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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 158 Original. 35

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY ET AL., PLAINTIFFS IN ERROR,

vs.

WIRT ADAMS, STATE REVENUE AGENT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

FILED APRIL 1, 1899.

(17,241.)

(17,341.)

SUPREME COURT OF THE UNITED STATES.

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WIRT ADAMS, STATE REVENUE AGENT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 6, 1899.

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1 Supreme Court of Mississippi, November Special Term, A. D. 1898.

Pleas and proceedings had and done at a special term of the supreme court of Mississippi, begun and held in the court-room, at the capitol, in the city of Jackson, on the third Monday, the 21st day, of November, in the year of our Lord one thousand eight hundred and ninety-eight.

Present: The Honorable Thomas H. Woods, chief justice, and the Honorable Albert H. Whitfield and the Honorable S. H. Terral, associate justices; E. W. Brown, clerk of said court, in person and by C. C. Campbell, his deputy; Thomas J. Wharton, marshall, and Thomas Grant, porter.

Proclamation being duly made, the court proceeded to business.

Be it remembered that heretofore, to wit, on the 25th day of October, 1898, the following order was made in vacation, to wit:

"Ordered that a special term of the supreme court of the State of Mississippi be begun and held on the third Monday, being the 21st day, of November, 1898, when the docket of the first district shall be taken up and the cases thereon called and disposed of until the fourth Monday in December, when the docket of the third district will be taken up and the cases thereon called and disposed of until the first Monday in February, 1899, when the docket of the second district shall be taken up and the cases thereon called and disposed of until the first Monday of March thereafter.

Ordered this the 25th day of October, 1898.

THOS. H. WOODS,
Judge of the Supreme Court.
A. H. WHITFIELD,
Associate Justice, Supreme Court."

Which order was published in the "Meridian Herald," a newspaper published in the city of Meridian, for the space of three weeks and more.

2 Pleas and proceedings had and done at a regular term of the circuit court in and for the 1st district of Hinds county, State of Mississippi, begun and held at the court-room, in the city of Jackson, on the 2nd Monday, being the 13th day, of July, 1896, before the Honorable Robert Powell, judge of the 7th judicial district of the State of Mississippi and presiding judge of said court.

Be it remembered that heretofore, to wit, on the 7th day of December, 1893, there was filed in the clerk's office of said court a certain declaration, which, with the exhibits and endorsements thereon, is in words and figures following, to wit:

THE STATE OF MISSISSIPPI,
Hinds County.

Circuit Court, First District.

WIRT ADAMS, State Revenue Agent, for the Use of THE STATE of Mississippi, Plaintiff,
vs.
THE YAZOO & MISSISSIPPI VALLEY RAILROAD CO. ET AL., Defendants.

Now comes the plaintiff, Wirt Adams, State revenue agent, who sues for the use of The State of Mississippi and of the counties of Coahoma, Bolivar, Washington, Sharkey, Issaquena, Warren, Claiborne, Jefferson, Franklin, Amite, Wilkinson, Tallahatchie, and Leflore, under and by virtue of chapter 126 of the Annotated Code of Mississippi, and complain- of the defendants The Yazoo & Mississippi Valley Railroad Company, a corporation created by and organized under the laws of the State of Mississippi, under an act entitled "An act incorporating the Yazoo & Mississippi Valley Railroad Company and declaring its powers," approved February 17, 1882, and The Illinois Central Railroad Company, a corporation created by and organized under the laws of the State of Illinois, and both having a part of their lines of railway, depots, and agents in said first district of Hinds county, in an action of debt on the statutes in such cases made and provided—

For that whereas heretofore, to wit, during the year 1892, the railroads and property of the Louisville, New Orleans & Texas Railway Company, a corporation authorized under the laws of the State of Mississippi under an act entitled "An act to amend an act entitled An act to authorize the Memphis & Vicksburg Railroad Company and the Mississippi Valley and Ship Island Railroad Company to effect a consolidation, approved March 3rd, 1882," approved March 15th, 1884, and created by a consolidation of the New Orleans, Baton Rouge, Vicksburg and Memphis Railroad Company, a Mississippi corporation created under an act entitled "An act to incorporate the New Orleans, Baton Rouge, Vicksburg and Memphis Short Line Railroad Company," approved March 9, 1882; the Memphis & Vicksburg Railroad Company, a Mississippi corporation created under an act entitled "An act to incorporate the Memphis and Vicksburg Railroad Company, approved August 8th, 1870; the Tennessee Southern Railroad Company, a Tennessee corporation, and the New Orleans and Mississippi Valley Railroad Company, a Louisiana corporation, under an act or deed of consolidation made and executed on or about August 12th, 1884, was duly assessfor taxation in said State of Mississippi under its laws by its Mississippi railroad commission, the said assessment being completed after objections heard on September 22nd, 1892, and was also by said commission duly classified for privilege taxation under said laws, the main line being by said commission classified as first class; the Riverside division, the Riverside division, special char-

ter, and the Helena branch, broad *guage*, as second class; the Tallahatchie branch and Bayou Sara division or branch as third class, and the Helena branch from Glendale to Eagle's Nest, purchased from the Financial Improvement Company, as narrow *guage* class, and the said assessment being as follows for the main line, to wit:

3	In the county of De Soto	$172,019
	In the county of Tunica	390,273
	In the county of Coahoma	417,217
	In the county of Bolivar	576,562
	In the county of Washington	428,558
	In the county of Sharkey	432,241
	In the county of Issaquena	90,518
	In the county of Warren	620,098
	In the county of Claiborne	267,533
	In the county of Jefferson	248,591
	In the county of Franklin	293,896
	In the county of Amite	218,136
	In the county of Wilkinson	150,312

For the Riverside division:

In the county of Coahoma	$260,301
In the county of Bolivar	448,335
In the county of Washington	8,511
In the county of Sharkey	23,672
In the county of Issaquena	46,382

For the Riverside division, special charter:

In the county of Bolivar	$93,483
In the county of Washington	452,391

The said Riverside division and Riverside division, special charter, constituting one continuous line or loop from Coahoma station, in Coahoma county, to Riverside station, in Sharkey county, while what is called the main line runs also from said Coahoma station by a different route, from five to twenty miles apart, to and through said Riverside station, the two lines connecting with and running into each other at said two stations.

For the Helena branch, broad *guage*:

In the county of Coahoma	$44,610

For the Helena branch, narrow *guage*:

In the county of Coahoma	30,000
Aggregating for the Helena branch	$74,610

For the Bayou Sara branch:

In the county of Wilkinson	$68,558

For the Tallahatchie branch:

In the county of Coahoma	$87,089
In the county of Tallahatchie	129,264
In the county of Leflore	33,571

And whereas the levy of State taxes for the said year 1892–1893 was five mills on the dollar's worth of taxable property;

And whereas the privilege taxes on railroads for said year under the *la* laws of said State were for first-class roads, $20.00; for second-class roads, $15.00; for third-class roads, $10.00, and for narrow-*guage* roads, $2.00 per mile;

And whereas the board of supervisors of said several counties did for *sd* said year duly levy county taxes on all taxable preperty within their respective limits as follows:

For the county of De Soto, six mills;
For the county of Tunica, seven and a half mills;
For the county of Coahoma, seven and a half mills;
For the county of Bolivar, seventeen and a half mills;
For the county of Washington, eight mills;
For the county of Sharkey, seven and a half mills;
For the county of Issaquena, seven and a half mills;
For the county of Warren, twelve and a half mills;
For the county of Claiborne, eight and a half mills;
For the county of Jefferson, seven and a half mills;
4 For the county of Franklin, nine mills;
For the county of Amite, twelve and a half mills;
For the county of Wilkinson, five and a half mills;
For the county of Tallahatchie, seven and a half mills;
For the county of Leflore, seven and a half mills;
on the dollar's worth of taxable property.

And whereas the mileage of said railroads in said respective counties was as follows:

For the main line and main track:

In the county of De Soto	12-870 miles.
In the county of Tunica	30-019 miles.
In the county of Coahoma	30-799 miles.
In the county of Bolivar	43-741 miles.
In the county of Washington	32-070 miles.
In the county of Sharkey	33-260 miles.
In the county of Issaquena	7-030 miles.
In the county of Warren	35-768 miles.
In the county of Claiborne	20-386 miles.
In the county of Jefferson	18-887 miles.
In the county of Franklin	22-691 miles.
In the county of Amite	16-562 miles.
In the county of Wilkinson	10-837 miles.

For the Riverside division, main track:

In the county of Coahoma	27-522 miles.
In the county of Bolivar	47-888 miles.

In the county of Washington..... ..... .0940 miles.
In the county of Sharkey..... .... 2-600 miles.
In the county of Issaquena..... .... 5-000 miles.

For the Riverside division, special charter, main track:

In the county of Bolivar..... ... 9-240 miles.
In the county of Washington..... . .. 47-888 miles.

For the Tallahatchie branch, main track:

In the county of Coahoma..... 14-109 miles.
In the county of Tallahatchie..... ... . 20-445 miles.
In the county of Leflore..... 5-026 miles.

For the Bayou Sara branch, main track:

In the county of Wilkinson..... 8-050 miles.

For the Helena branch, broad guage, main track:

In the county of Coahoma.... ..... 7-200 miles.

For the Helena branch, narrow guage, main track:

In the county of Coahoma..... .... 12 miles.

Whereby and by force of the statute in such cases made and provided and by said assessment and levy of taxes the said property and railroads of the said Louisville, New Orleans and Texas Railway Company became and was liable to and indebted to the State and said counties for taxes and privilege taxes as aforesaid;

And whereas, on or about July 21st, 1892, all the railroads and property of said Louisville, New Orleans and Texas Railway Company was purchased by the said Illinois Central Railroad Company;

And whereas, on or about October 25th, 1892, the said Illinois Central Railroad Company turned over, delivered to, and merged all said property and railroads of said Louisville, New Orleans and Texas Railway Company with the railroad system and property of the said Yazoo & Mississippi Valley Railroad Company, which it also then and there owned and controlled, and the said Louisville, New Orleans and Texas Railway Company then and there surrendered its franchise and then and there became extinct and ceased to exist as a corporation;

And whereas the said Yazoo & Mississippi Valley Railroad Company, under the direction and control of said Illinois Central Railroad Company, then and there, in said October, 1892, began and have since continued operating all said railroads and railroad system of said Louisville, New Orleans & Texas Railway Company in said State, and by virtue and reason thereof have become liable to pay a new privilege tax thereon from said October 1st, 1892;

And whereas said Illinois Central Railroad Company and said Yazoo & Mississippi Valley Railroad Company by taking said property and railroad of said Louisville, New Orleans & Texas Railway Company became liable for its debts and obligations and liabilities

and did in fact agree to and did assume and promise to pay all said debts, obligations, and liabilities of whatever kind or character.

Whereby and by force of which foregoing laws, acts, and agreements the said Yazoo & Mississippi and Illinois Central Railroad Companies have become and are indebted to the State of Mississippi and said several counties for privilege and current State and county taxes as follows:

In De Soto county:

For privilege taxes for fiscal year previous to October 1, 1892	$257.40
And for privilege taxes for fiscal year commencing Oct. 1, 1892	257.40
3rd. And for State tax of 5 mills	860.09
4th. And for county tax of 6 mills	1,032.10

In Tunica county:

5th. Privilege taxes for fiscal year previous to Oct. 1, 1892	600.38
6th. And for privilege taxes for fiscal year commencing Oct. 1, 1892	600.38
7th. And for State tax of 5 mills	1,951.36
8. And for county tax of 7½ mills	2,927.04

In Coahoma county:

9. For privilege taxes for fiscal year previous to Oct. 1, 1892	615.58
10. And for privilege taxes for fiscal year commencing Oct. 1, 1892	615.58
11. And for State tax of 5 mills	2,086.08
12. And for county tax of 7½ mills	3,129.12

In Bolivar county:

13. For privilege taxes for fiscal year previous to Oct. 1, 1892	874.82
14. And for privilege taxes for fiscal year commencing Oct. 1, 1892	874.82
15. And for State tax of 5 mills	2,882.81
16. And for county tax of 17½ mills	10,089.83

In Washington county:

17. For privilege taxes for fiscal year previous to Oct. 1, 1892	641.40
18. And for privilege taxes for fiscal year commencing Oct. 1, 1892	641.40
19. And for State tax of 5 mills	2,142.79
20. And for county tax of 8 mills	3,428.46

In Sharkey county:

21. For privilege taxes for fiscal year previous to Oct. 1, 1892	665.20

22. And for privilege taxes for fiscal year commencing Oct. 1, 1892	665.20
23. And for State taxes of 5 mills	2,161.20
24. And for county tax of 7½ mills	3,241.80
In Issaquena county:	
25. And for privilege taxes for fiscal year previous to Oct. 1, 1892	140.60
26. And for privilege taxes for fiscal year commencing Oct. 1, 1892	140.60
27. And for State tax of 5 mills	452.59
28. And for county tax of 7½ mills	678.88
In Warren county:	
29. And for privilege taxes for fiscal year previous to Oct. 1, 1892	715.36
30. And for privilege tax for fiscal year commencing Oct. 1, 1892	715.36
31. And for State tax of 5 mills	3,100.49
32. And for county tax of 12½ mills	7,751.22
In Claiborne county:	
33. And for privilege tax for fiscal year previous to Oct. 1, 1892	406.72
34. And for privilege tax for fiscal year commencing Oct. 1, 1892	406.72
35. And for State tax of 5 mills	1,377.66
36. And for county tax of 8½ mills	2,274.03
In Jefferson county:	
37. And for privilege tax for fiscal year previous to Oct. 1, 1892	377.74
38. And for privilege tax for fiscal year commencing Oct. 1, 1892	377.74
39. And for State tax of 5 mills	1,242.95
40. And for county tax of 7½ mills	1,864.42
6 In Franklin county:	
41. And for privilege taxes for fiscal year previous to Oct. 1, 1892	453.8
42. And for privilege tax for fiscal year commencing Oct. 1, 1892	453.82
43. And for State tax of 5 mills	1,469.48
44. And for county tax of 9 mills	2,646.06
In Amite county:	
45. And for privilege tax for fiscal year previous to Oct. 1, 1892	331.24
46. And for privilege tax for fiscal year commencing Oct. 1, 1892	331.24
47. And for State tax of 5 mills	1,090.18
48. And for county tax of 12½ mills	2,725.45

In Wilkinson county:

49.	And for privilege tax for fiscal year previous to Oct. 1, 1892	216.74
50.	And for privilege tax for fiscal year commencing Oct. 1, 1892	216.74
51.	And for State tax of 5 mills	751.56
52.	And for county tax of 5½ mills	826.71

For the Riverside division.

In Coahoma county:

53.	And for privilege tax for fiscal year previous to Oct. 1, 1892	412.83
54.	And for privilege tax for fiscal year commencing Oct. 1, 1892	412.83
55.	And for State tax of 5 mills	1,301.50
56.	And for county tax of 7½ mills	1,952.25

In Bolivar county:

57.	And for privilege tax for fiscal year previous to Oct. 1, 1892	718.32
58.	And for privilege tax for fiscal year commencing Oct. 1, 1892	718.32
59.	And for State tax of 5 mills	2,241.67
60.	And for county tax, 17½ mills	7,845.84

In Washington county:

61.	And for privilege tax for fiscal year previous to Oct. 1, 1892	14.13
62.	And for privilege tax for fiscal year commencing Oct. 1, 1892	14.13
63.	And for State tax of 5 mills	42.55
64.	And for county tax of 8 mills	68.08

In Sharkey county:

65.	And for privilege tax for fiscal year previous to Oct. 1, 1892	39.00
66.	And for privilege tax for fiscal year commencing Oct. 1, 1892	39.00
67.	And for State tax of 5 mills	118.36
68.	And for county tax of 7½ mills	177.54

In Issaquena county:

69.	And for privilege tax for fiscal year previous to Oct. 1, 1892	75.00
70.	And for privilege tax for fiscal year commencing Oct. 1, 1892	75.00
71.	And for State tax of 5 mills	231.91
72.	And for county tax of 7½ mills	397.86

For Riverside division, special charter.

In Bolivar county:

73.	And for privilege tax for fiscal year previous to Oct. 1, 1892	138.60
74.	And for privilege tax for fiscal year commencing Oct. 1, 1892	138.60
75.	And for State tax of 5 mills	467.41
76.	And for county tax of 17½ mills	1,635.93

In Washington county:

77.	And for privilege tax for fiscal year previous to Oct. 1, 1892	718.32
78.	And for privilege tax for fiscal year commencing Oct. 1, 1892	718.32
79.	And for State tax of 5 mills	2,261.95
80.	And for county tax of 8 mills	3,619.12

For Helena branch, broad guage.

In Coahoma county:

81.	And for privilege tax for fiscal year previous to Oct. 1, 1892	108.00
82.	And for privilege tax for fiscal year commencing Oct. 1, 1892	108.00
83.	And for State tax of 5 mills	223.05
84.	And for county tax of 7½ mills	334.55

7 For Helena branch, narrow guage.

In Coahoma county:

85.	And for privilege tax for fiscal year previous to Oct. 1, 1892	24.00
86.	And for privilege tax for fiscal year commencing Oct. 1, 1892	24.00
87.	And for State tax of 5 mills	150.00
88.	And for county tax of 7½ mills	225.00

For the Bayou Sara branch.

In Wilkinson county:

89.	And for privilege tax for fiscal year previous to Oct. 1, 1892	80.50
90.	And for privilege tax for fiscal year commencing Oct. 1, 1892	80.50
91.	And for State tax of 5 mills	342.79
92.	And for county tax of 5½ mills	377.06

For the Tallahatchie branch.

In Coahoma county:

93.	And for privilege tax for fiscal year previous to Oct. 1, 1892	141.09

94.	And for privilege tax for fiscal year commencing Oct. 1, 1892.....	141.09
95.	And for State tax of 5 mills.....	435.44
96.	And for county tax of 7½ mills.....	653.16
	In Tallahatchie county:	
—.	And for privilege tax for fiscal year previous to Oct. 1, 1892.....	204.45
98.	And for privilege tax for fiscal year commencing Oct. 1, 1892.....	204.45
99.	And for State tax of 5 mills.....	646.32
100.	And for county tax of 7½ mills.....	969.48
	In Leflore county:	
101.	And for privilege tax for fiscal year previous to Oct. 1, 1892.....	50.26
102.	And for privilege tax for fiscal year commencing Oct. 1, 1892.....	50.26
103.	And for State tax of 5 mills.....	167.85
104.	And for county tax of 7½ mills.....	251.77

The plaintiff herewith files copies of said deed of consolidation of said four railroad companies into the said Louisville, New Orleans and Texas Railway Company, of said merger of said Louisville, New Orleans & Texas Railway Company into said Yazoo & Mississippi Valley Railroad Company, as Exhibits "A" and "B" to this declaration, and asks that they be taken as parts thereof. He also refers to said charters of said New Orleans, Baton Rouge, Vicksburg & Memphis Short Line Railroad Company, in the Laws of Mississippi for 1882, pages 920–'32; of said Memphis & Vicksburg Railroad Company, in the Laws of Mississippi for 1870, pages 316–326 and page 327; of said Louisville, New Orleans & Texas Railway Company, in the Laws of Mississippi for 1884, page 936, and of said Yazoo & Mississippi Valley Railroad Company, in the Laws of Mississippi for 1882, pages 838–849, and asks that they be considered a part of this declaration, as Exhibits "C," "D," "E," and "F."

He also files copies of said assessment, classification, and levy of State, county, and privilege taxes, as Exhibit "G" to this declaration, and asks that it be taken as a part thereof, and adopts the same as just, fair, reasonable, and correct.

And the plaintiff in fact avers that all the railroads on which the taxes are herein sued for had the first rails laid more than three years before July 1st, 1890, and although the said defendants were and are indebted to said State of Mississippi and to said several counties in said several amounts above specified and set forth, aggregating a large sum of money, to wit, the sum of $109,365.90, and although the fiscal year in which said several sums were due has expired, and although plaintiff has given each of said defendants notice in writing, a copy of which is Exhibit "G," more than ten days before the commencement of this suit, and to pay the same, yet the said defendants have hitherto failed and refused, and still fail

and refuse, to pay the same or any part or parcel thereof, to plaintiff's damage, and hence he sues and makes parties to this suit the Honorables J. F. Sessions, of Lincoln county; Walter McLaurin, of Warren county, and J. H. Askew, of Oktibbeha county, constituting said Mississippi railroad commission, and W. H. Rollins, sheriff and tax collector of De Soto county; T. O. King, sheriff and tax collector of Tunica county; R. N. Harris, sheriff and tax collector of Coahoma county; G. P. Melchoir, sheriff and tax collector of Bolivar county; J. L. Griffin, sheriff and tax collector of Washington county; H. J. Wright, sheriff and tax collector of Sharkey county; A. N. Smith, sheriff and tax collector of Issaquena county; J. M. A. Brennan, sheriff and tax collector of Warren county; N. S. Walker, sheriff and tax collector of Claiborne county; L. W. Carradine, sheriff and tax collector of Jefferson county; R. S. Butler, sheriff and tax collector of Franklin county; D. M. Butler, sheriff and tax collector of Amite county; C. H. Neyland, sheriff and tax collector of Wilkinson county; C. H. Fonds, sheriff and tax collector of Tallahatchie county; J. L. Sullivan, ex-sheriff and tax collector, and W. C. George, present sheriff and tax collector, of Leflore county, as required by the statute in such cases made and provided, in section 4200 of the Annotated Code of Mississippi, and asks that they and said defendants be summoned, &c.

8

CRITZ & BECKETT,
Att'ys for Plaintiff.

EXHIBIT.

JACKSON, MISSISSIPPI, *November* 24, '93.

To the Yazoo & Mississippi Valley Railroad Company and the Illinois Central Railroad Company:

You are hereby respectfully notified that the railroads and property in this State belonging to the Louisville, New Orleans and Texas Railway Company were duly assessed for taxation for the year 1892–1893 by the Mississippi railroad commission, and duly classified for privilege taxation by said commission, and unless said taxes are paid within ten days I will, as State revenue agent, bring suit for same.

The said assessment and classification and levies of State, county, and privilege taxes for said year due and unpaid (to which is to be added a privilege tax of an equal amount for the fiscal year commencing October 1, 1892) are hereto attached and are as follows.

WIRT ADAMS,
State Revenue Agent.

I duly served the foregoing notice and attached papers on the Yazoo Valley & Mississippi Railroad Company and Illinois Central Railroad Company by delivering in person a true copy for each to

George R. Gordin, at union depot, in Jackson, Miss., he being then and there the agent for both said railroad companies.

Done this November 24th, 1893.

WIRT ADAMS,
State Revenue Agent.

9 EXHIBIT A.

Louisville, New Orleans & Texas Railway Co.

Articles of Association and Consolidation.

Articles of association and consolidation made and entered into this twelfth day of August, eighteen hundred and eighty-four, by and between the *Tennessee Southern Railroad Company*, a corporation created and existing under and by virtue of the laws of the State of Tennessee, of the first part; the *Memphis and Vicksburg Railroad Company*, a corporation created and existing under and by virtue of the laws of the State of Mississippi, of the second part; the *New Orleans, Baton Rouge, Vicksburg and Memphis Railroad Company*, a corporation created and existing under and by virtue of the laws of the State of Mississippi, of the third part, and *the New Orleans and Mississippi Valley Railroad Company*, a corporation created and existing under and by virtue of the laws of the State of Louisiana, of the fourth part.

Whereas, it is believed that a consolidation of the parties hereto into one corporation will be mutually advantageous, and it has been agreed, by and between the said parties, that they should be so consolidated with each other, in the manner and upon the terms and conditions hereinafter expressed,

Now, therefore, this agreement witnesseth: That under and by virtue of the statutes of the respective States of Tennessee, Mississippi and Louisiana, in such case made and provided, and in consideration of the mutual undertakings, covenants and agreements hereinafter contained, the said parties have mutually covenanted and agreed, and do hereby mutually covenant and agree to and with each other as follows, that is to say:—

Article I.

The said parties hereto do hereby consolidate with each
10 other into one consolidated corporation into which are merged and consolidated the several capital stocks, franchises, grants, immunities, privileges, properties, rights of way, and all property real, personal and mixed, of the several and respective parties hereto.

Article II.

The corporate name of the said consolidated company shall be the *Louisville, New Orleans and Texas Railway Company.*

Article III.

The officers of said consolidated company shall consist of a president, vice-president, secretary, treasurer, and nine directors, who shall be elected by the stockholders of the companies entering into this consolidation at the time the same is effected; and such officers shall be elected annually thereafter, upon such notice and terms as the board of directors may prescribe, but failure to hold any annual election shall in nowise impair or affect said corporation; in such event the officers elected at the last regular election shall hold office until their successors are elected and qualified, and a special election may be held for that purpose.

Article IV.

The capital stock of said consolidated corporation shall be ten million dollars, to be divided into one hundred thousand shares of one hundred dollars each; but the said corporation may at any time increase or diminish the amount of its capital stock according to law.

Article V.

Each stockholder of any of the divisional companies, parties hereto, shall be entitled to the same number of shares of the capital stock of the consolidated corporation which he holds of the capital stock of such divisional company, and shall be entitled to receive from said consolidated company certificates therefor upon the surrender of the certificates for stock in such divisional company held by him, and the remainder of the capital stock of such con-
11 solidated company shall be issued from time to time, and upon such terms and conditions as may be prescribed by the board of directors of said company.

Article VI.

That the company formed by consolidation as aforesaid, be, and the same is hereby authorized and empowered, in such manner and upon such conditions as permitted by law so to do, to issue its bonds and to secure the same by mortgage or deed in trust upon all its rights, ways, franchises, and property, real and personal, no matter where the same be situated, and whether the same be owned by said company at the time of its formation or thereafter acquired.

Article VII.

The domicile of such new corporation under the laws of the State of Louisiana, shall be in the parish of Orleans, and the general domicile of the consolidated company shall be at Memphis, in the State of Tennessee.

In witness whereof, the parties hereto have caused their corporate seals to be affixed, and attested by the secretaries of their respective

companies and their corporate names to be subscribed hereto by their respective presidents.

[SEAL.] THE TENNESSEE SOUTHERN RAILROAD COMPANY,
By R. T. WILSON, *President.*

Attest: HOLMES CUMMINS, *Secretary.*

[SEAL.] THE MEMPHIS AND VICKSBURG RAILROAD COMPANY,
By R. T. WILSON, *President.*

Attest: CHANNING BURNZ, *Secretary.*

[SEAL.] THE NEW ORLEANS, BATON ROUGE, VICKSBURG AND MEMPHIS RAILROAD COMPANY,
By R. T. WILSON, *President.*

Attest: CHARLES E. ARMSTRONG, *Secretary.*

[SEAL.] THE NEW ORLEANS AND MISSISSIPPI VALLEY RAILROAD COMPANY,
By R. T. WILSON, *President.*

Attest: C. H. BOSHER, *Secretary.*

12 EXHIBIT B.

Articles of Consolidation.

These articles of consolidation, made this 24th day of October, A. D. 1892, by and between the Louisville, New Orleans and Texas Railway Company, a corporation of the States of Tennessee, Mississippi and Louisiana, party of the first part, and the Yazoo and Mississippi Valley Railroad Company, a corporation of the State of Mississippi, party of the second part, witnesseth:

That under and by virtue of the charters of the respective parties hereto and of the laws of the respective States of Tennessee, Mississippi and Louisiana, in such case made and provided, the said parties of the first and second parts have mutually covenanted and agreed and do hereby mutually covenant and agree to and with each other, to unite, merge and consolidate their several capital stocks, corporate rights, franchises, immunities and privileges and properties of every kind, real, personal and mixed, upon the following terms and conditions, that is to say:

Article I. Such consolidation shall be effected by uniting or merging the stock, property and franchises of the party of the first part with and into the stock, property and franchises of the said The Yazoo and Mississippi Valley Railroad Company, without disturbing the corporate existence of the last-named company, or the

formation of any new, distinct, corporation, unless such result shall be necessary to give legal effect to this agreement; but whatever may be the legal consequence of the consolidation herein provided for, this agreement is to stand and be effective.

Article II. The corporate name of the said consolidated company shall be the Yazoo and Mississippi Valley Railroad Company.

13 Article III. The capital stock of the said consolidated company shall be fifteen million dollars, to be divided into one hundred and fifty thousand shares of one hundred dollars each; but the said corporation may at any time increase or diminish the amount of its capital stock according to law.

Article IV. Every holder of the stock of either of the said companies now outstanding shall be entitled to cast one vote for each share of stock held by him at all stockholders' meetings of the consolidated company, which vote may be cast either in person or by proxy, and shall have all the rights of a stockholder of the consolidated company, as fully as if new shares of the consolidated company had been issued and exchanged therefor; and in case the consolidated company shall determine to issue new shares, such shares shall be exchangeable at par for the now outstanding shares of each of the constituent companies; and the remainder of the capital stock of the consolidated company shall be issued from time to time, and upon such terms and conditions as may be prescribed by the board of directors of said company.

Article V. All and singular the rights, powers, privileges, immunities and franchises, and all the railroads, real and personal estate, easements, fixtures, equipments, choses in action and property and assets of every kind, nature or description, belonging to either of the parties hereto, shall be vested in, and become the property of, the said consolidated company, without any further act, deed, conveyance or assurance being required in the premises.

Article VI. The affairs of the consolidated company shall be managed by a board of directors, which shall consist of such a number of members, not less than five, as the company may determine from time to time, each of whom shall be a stock-

14 holder, and one of them a resident of the State of Mississippi, one of Tennessee and one of Louisiana. The members shall be divided into three equal classes as nearly as practicable. Successors to serve for the term of three years, shall be chosen for those who belong to the first class at the first annual meeting of the stockholders held after this consolidation shall have been effected; for those who belong to the second class, at the next annual meeting; and for those belonging to the third class at the next succeeding annual meeting of the stockholders. Each director successively chosen shall continue in office until his successor is elected. Vacancies in the board, caused otherwise than by expiration of the term for which the retiring director was chosen, may be filled by a vote of a majority of the directors remaining, such appointee to continue

in office until the next regular election of directors by the stockholders.

The first board of directors shall be composed of the following members, divided into three classes as follows:

First Class.—Stuyvesant Fish, Adolphe Schreiber, W. C. Craig, Charles A. Peabody, Jr.

Second Class.—John W. Auchincloss, Walther Luttgen, Edward H. Harriman, J. T. Harahan.

Third Class.—S. V. R. Cruger, R. P. Neeley, R. C. Shepherd, John C. Welling.

Article VII. The board of directors of said consolidated company shall choose one of their number president, whose term of office shall be one year, or until his successor shall be chosen and qualified. They may also appoint such other officers and agents as they may deem necessary from time to time, and prescribe their duties and compensation; and may provide, by the by-laws to be adopted, such rules and regulations relating to the affairs and business of said company as may be necessary or proper. The said board shall also have power to appoint an executive committee, of whom the president shall be one *ex officio*, who shall possess
15 and exercise all the powers and duties of the board of directors when the board is not in session. Until otherwise ordered, the corporate seal of the said consolidated company shall be that of the Yazoo and Mississippi Valley Railroad Company.

Article VIII. The said consolidated company shall be, and the same is hereby authorized and empowered, in such manner and upon such conditions as are permitted by law, to issue its bonds and to secure the same, as well as all bonds heretofore issued by either of the constituent companies, or that have been heretofore or may be hereafter issued by any other railroad company, by mortgage or deed of trust upon all or any of its railroads, rights, franchises and property, real or personal, wherever the same may be situated, and whether the same may be owned by said company at the time this consolidation is effected or may be thereafter acquired; and may also exercise any and every other corporate right or power now vested in, or which might have been heretofore lawfully exercised by, either of said constituent companies.

Article IX. Until otherwise ordered the domicile of the said corporation, under the laws of the State of Louisiana, shall be in the parish of Orleans; and, under the laws of the State of Mississippi, in the city of Jackson, in Hinds county; and the general domicile of the corporation shall be at Memphis, in the State of Tennessee.

Article X. The provisions of these articles shall be obligatory upon the successors and assigns of the respective parties hereto and shall become operative and of force from and after the 25th day of October, A. D. 1892.

In witness whereof, the parties hereto have caused their
16 corporate names to be hereto subscribed by their respective presidents, and their corporate seals to be affixed and at-

tested by their respective secretaries, on the day and year first above written.

LOUISVILLE, NEW ORLEANS AND TEXAS RAILWAY COMPANY,
[SEAL.] By RICHARD T. WILSON, *President.*

Attest: CHARLES H. BOSHER, *Secretary.*

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY,
[SEAL.] By STUYVESANT FISH, *President.*

Attest: ALEXANDER G. HACKSTAFF, *Secretary.*

As to the Louisville, New Orleans and Texas Railway Company:
Witness-:
S. TOWNSEND.
J. F. VAN NAME.
GEORGE H. TAYLOR.

As to the Yazoo and Mississippi Valley Railroad Company:
Witness-:
W. E. RUTTAN,
CHAS. H. WENMAN, AND
GEORGE H. TAYLOR.

17 STATE OF NEW YORK, } ss:
City and County of New York, }

Be it remembered that, on this twenty-fourth day of October, A. D. 1892, before me, George H. Taylor, a duly appointed notary public in and for the city and county of New York, State of New York, and commissioner for the State of Tennessee in and for the State of New York, residing in said city and county of New York, personally appeared Richard T. Wilson, president of the Louisville, New Orleans and Texas Railway Company, and Charles H. Bosher, secretary of the same company, to me personally known and known to me to be such officers of said company, who, being by me severally duly sworn, did depose and say: that the said Richard T. Wilson was the president and the said Charles H. Bosher was the secretary of the said company; that they knew the corporate seal of said company; that the seal affixed to the foregoing instrument was such corporate seal, and that it was so affixed thereto by order of the board of directors of said company; and that they, the said Richard T. Wilson and Charles H. Bosher, signed their names thereto by like order as president and secretary of said company respectively.

In witness whereof, I have hereunto set my hand and affixed my official seals this twenty-fourth day of October, A. D. 1892.

GEORGE H. TAYLOR,
[SEAL.] [SEAL.] *Commissioner for Tennessee in New York and Notary Public, N. Y. County.*

18 STATE OF NEW YORK, } ss:
City and County of New York, }

Be it remembered that, on this twenty-fourth day of October, A. D. 1892, before me, George H. Taylor, a duly appointed notary public in and for the city and county of New York, State of New York, and commissioner for the State of Mississippi in and for the State of New York, residing in said city and county of New York, personally appeared Richard T. Wilson, president of the Louisville, New Orleans and Texas Railway Company, and Charles H. Bosher, secretary of the same company, to me personally known and known to me to be such officers of said company, who being by me severally duly sworn, did depose and say: That the said Richard T. Wilson was the president and the said Charles H. Bosher was the secretary of the said company; that they knew the corporate seal of said company; that the seal affixed to the foregoing instrument was such corporate seal, and that it was so affixed thereto by order of the board of directors of said company; and that they, the said Richard T. Wilson and Charles H. Bosher, signed their names thereto by like order as president and secretary of said company respectively.

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GEORGE H. TAYLOR,
[SEAL.] [SEAL.] *Commissioner for Mississippi in New York and Notary Public, N. Y. County.*

19 STATE OF NEW YORK, } ss:
City and County of New York, }

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In witness whereof, I have hereunto set my hand and affixed my official seals this twenty-fourth day of October, A. D. 1892.

GEORGE H. TAYLOR,
[SEAL.] [SEAL.] *Commissioner for Louisiana in New York and Notary Public, N. Y. County.*

20 STATE OF NEW YORK, } ss:
City and County of New York, }

Be it remembered that, on the twenty-fourth day of October, A. D. 1892, before me, George H. Taylor, a duly appointed notary public in and for the city and county of New York, State of New York, and commissioner for the State of Tennessee, in and for the State of New York, residing in said city and county of New York, personally appeared Stuyvesant Fish, president of the Yazoo and Mississippi Valley Railroad Company, and Alexander G. Hackstaff, secretary of the same company, to me personally known and known to me to be such officers of said company, who, being by me severally duly sworn, did depose and say: That he, the said Stuyvesant Fish, was the president, and that he, the said Alexander G. Hackstaff, was the secretary of the said company; that they knew the corporate seal of said company; that the seal affixed to the foregoing instrument was such corporate seal, and that it was so affixed thereto by order of the board of directors of said company; and that they, the said Stuyvesant Fish and Alexander G. Hackstaff, signed their names thereto by the like order as president and secretary of said company respectively.

In witness whereof, I have hereunto set my hand and affixed my official seals this twenty-fourth day of October, A. D. 1892.

GEORGE H. TAYLOR,
[SEAL.] [SEAL.] *Commissioner for Tennessee in New York and Notary Public, N. Y. County.*

21 STATE OF NEW YORK, } ss:
City and County of New York, }

Be it remembered that, on the twenty-fourth day of October, A. D. 1892, before me, George H. Taylor, a duly appointed notary public in and for the city and county of New York, State of New York, and commissioner for the State of Mississippi in and for the State of New York, residing in said city and county of New York, personally appeared Stuyvesant Fish, president of the Yazoo and Mississippi Valley Railroad Company, and Alexander G. Hackstaff, secretary of the same company, to me personally known and known to me to be such officers of said company, who, being by me severally duly sworn, did depose and say: That he, the said Stuyvesant Fish, was the president, and that he, the said Alexander G. Hackstaff, was the secretary of the said company; that they knew the corporate seal of said company; that the seal affixed to the foregoing instrument was such corporate seal, and that it was so affixed thereto by order of the board of directors of said company; and that they, the said Stuyvesant Fish and Alexander G. Hackstaff, signed their names thereto by the like order as president and secretary of said company, respectively.

In witness whereof, I have hereunto set my hand and affixed my official seals this twenty-fourth day of October, A. D. 1892.

GEORGE H. TAYLOR,
[SEAL.] [SEAL.] *Commissioner for Mississippi in New York and Notary Public, N. Y. County.*

22 STATE OF NEW YORK, } ss:
City and County of New York, }

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In witness whereof, I have hereunto set my hand and affixed my official seals this twenty-fourth day of October, A. D. 1892.

GEORGE H. TAYLOR,
[SEAL.] *Commissioner for Louisiana in New York and*
[SEAL.] *Notary Public, N. Y. County.*

23 EXHIBIT C.

Charter of the New Orleans, Baton Rouge, Vicksburg & Memphis Railroad Co.

An act to incorporate the New Orleans, Baton Rouge, Vicksburg and Memphis Short Line Railroad Company.

SECTION 1. Be it enacted by the legislature of the State of Mississippi, That A. R. Shaw, P. Willoughby, L. G. Chapman, F. H. Brown, N. B. Norwood, F. O. Brown, T. A. Moore, and B. F. Morris, and their associates, successors and assigns, be and they are hereby made and constituted a body corporate and politic, by the name of the New Orleans, Baton Rouge, Vicksburg and Memphis Railroad Company, and by that name may sue and be sued, plead and be impleaded, in any court in this State, and have a common seal, the same to break, alter or renew at pleasure; and the said company is hereby authorized and empowered to locate and construct a single or double standard gauge railroad or way, from the city of Vicksburg, in the county of Warren, on or by that route which said company may determine to be the most practicable or desirable, toward the city of Memphis in the State of Tennessee, and to such a point on the line dividing the State of Mississippi and the State of Tennessee, as the company may determine upon, to connect at said point with any railroad or way running out of or from the city of Memphis, and also from said city of Vicksburg by or on any route which said company may determine to be the most desirable, toward the city of New Orleans, in the State of Louisiana, and to such a point on the line dividing the State of Mississippi from the State of Louisiana, as the company may determine upon, and to connect at said point with a railroad leading out of or from the city of New Orleans to said point on said dividing line; also to run a branch from any point on said road to the city of Natchez, in the county of Adams, and to take, transport and carry persons or property upon said railroad or way, and to receive, for the safe keeping and store, merchandise and all other property in its yards and warehouses, and to receive for such safe keeping, passage and transportation such tolls and charges as may, from time to time, be established by the directors of said company, and to construct,

Incorporators.

Name of company.

Route of roads.

24

Branch to Natchez.

Tolls, charges, etc.

establish, or purchase, in this State, and thereafter to own, maintain, use and lease suitable wharves, piers, warehouses, yards, depots, harbors, stations, and all other works and appurtenances, connected with and incidental to said railroad, and to run and manage the same as the directors of said company shall deem most expedient to the welfare of the company.

SEC. 2. Be it further enacted, That the said company be, and is hereby authorized and empowered, to enter upon, take and hold any land or premises whatever, whether by purchase, grant, donation, devise or otherwise, that may be necessary and proper for the construction and working of said road, not exceeding fifty feet in width on each side of the line of its railroad, unless a greater width be required for excavation or embankment; and also any lands or premises that may be necessary and proper for turnouts, side tracks, standing places for cars, depots, station-houses, work and machine shops, and any other structures required in the construction, security and working of said railroad; and said company shall have the right to cut and remove trees and other material that might, by falling, encumber its road-bed, though standing more than fifty feet from the lines of said road; and in case the owners of such lands or premises cannot agree with said company as to the value of the premises taken or to be taken for the use, of said road, the value thereof shall be determined by the appraisal of three disinterested commissioners, who may be appointed on the application of either party to the chancery court of the county in which the land or premises to be taken lie; and the said commissioners shall appraise, in their assessment of damages, such premises at what would have been the value thereof, had not the road been built; and upon the return into court of such appraisement, and upon the payment into the same of the estimated value of the premises taken, for use and benefit of the owners thereof, said premises shall be deemed to be taken by said company, which shall acquire full title to the same for the purposes aforesaid; either party feeling aggrieved at such an appraisement may, within thirty days after the same has been returned into court, file an appeal therefrom, and demand a jury of twelve men to estimate the damages sustained; but such appeal shall not interfere with the right of said company to enter upon

Right of way.

How lands may be condemned.

Jury to estimate damages.

the premises taken, or to do any act necessary and proper in the construction of its road; and the party appealing shall give bond, with sufficient security for the payment of costs that may arise from said appeal; and in case the party appealing does not obtain a verdict, increasing or diminishing, as the case may be, the award of the commissioners, such party shall pay the whole cost incurred by the appellee, as well as his own, and the payment into court, for the use of the owner of the premises taken, of a sum equal to that finally awarded, shall be held to vest in said company the title of said land, and the right to use and occupy the same for the construction, maintenance and operation of said road; and in case any of the lands to be taken as aforesaid, shall be held by any infant, *femme covert*, *non compos* or insane person or persons residing without the State, or person subjected to any legal disability, the court may appoint a guardian for such party, to appear in proper person, who shall give bond, with sufficient security, for the faithful and proper execution of his trust, and who may represent in court the person disqualified or residing without the State as aforesaid, when the proceedings shall be had in reference to the appraisement of the premises to be taken for
26 the use of said company, and with the same effect as has already been described, and the title of the company to the lands taken by this act shall not be affected or impaired by reason of any failure of any guardian to faithfully discharge his trust; and in case any party shall have a right or claim to any land for a term of years, or any interest therein in possession, reversion or remainder, or as mortgagee, trustee or *cestu- que trust*, the value of any such estate, less than a fee-simple, and of all interest therein, shall be estimated and determined in the manner hereinbefore set forth; and in case it shall be necessary to enter upon any lands unoccupied, and of which there is no apparent owner or claimant, it may proceed to take and use same for the purpose of the railroad, and may institute proceedings in the manner described, for the purpose of ascertaining the value and acquiring the title to the same; but the court shall determine the kind of notice to be served on such owner or owners, and may, in its discretion, appoint an agent or guardian, to represent such owner or owners in case of his or her incapacity or non-appearance; but in

Payment vests title.

Title shall not be impaired.

Court may appoint agent or guardian.

case no claimant shall appear within six years from the time of the opening said road across any land, all claims to damages against said company shall be barred; and when any land to be taken for the purposes aforesaid shall belong to any infant, *non compos*, or insane person, having a resident general guardian, such guardian may agree with said company upon the amount of damages to be paid for taking such lands, or release to said company his claim or right to damages in the premises.

When claims barred.

Capital stock.

SEC. 3. Be it further enacted, That the capital stock of said company shall be five million, two hundred and fifty thousand dollars, represented by fifty-two thousand shares, of the value of one hundred dollars each, with the right to increase said capital stock, as the extension of the main line or the purchase or construction of branches may require; provided, the consent of the stockholders holding the larger amount in value of stock be first obtained at a meeting of stockholders, to be held after thirty days' notice, to be given in pursuance of law; which shares shall be deemed personal property, and to be transferred in such manner as the by-laws of said company shall direct.

Payment of stock.

27 SEC. 4. Be it further enacted, That the time and manner for the payment of stock shall be such as may be determined by the board of directors; provided, however, that no call shall be made for more than ten per cent. on each share at any time and that a period of thirty days shall elapse before another call can be made; and in case any stockholder shall refuse or neglect to make payment pursuant to the requisition of the board of directors, the stock of such stockholder, or so much thereof as may be necessary, may be sold by the board of directors of said company at public auction, after the lapse of sixty days from the time when the payment became due; and all surplus money, the proceeds of such sale, after deducting the payments due and the interest thereon, and the necessary expenses of the sale, shall be paid over to such negligent stockholder.

Subscription to stock.

SEC. 5. Be it further enacted, That any county through which said railroad will pass, incorporated city or town, interested therein, or any township along the line of said road or contiguous thereto, may subscribe to the capital stock of said company in any sum, the interest upon

which, at seven per cent. per annum, shall not exceed two per cent. upon the assessed value of real estate within their limits.

Questions to be submitted to voters.

SEC. 6. Be it further enacted, That no subscription shall be made to the capital stock of said company until the question has been submitted to the legal voters of such county or counties, city or cities, incorporated town or towns, or townships, in which the subscription is proposed to be made; and the president and board of supervisors for the county, and the mayor of any incorporated city or town, *is* hereby required, upon the petition of fifteen legal voters and tax-payers of such county, city or town, and in which petition the amount proposed to be subscribed shall be stated, to post up notices in at least five public places, in such county, city or town, and to publish the same in the newspapers published in such place, not less than twenty days before holding such election, notifying the legal voters of such county, city, or town to meet at the usual places for holding elections in such county, city or town, for the purpose of voting "for" or "against" such subscription; and the officers aforesaid shall
28 appoint judges and returning officers for such elections, which shall in all respects be conducted as other elections are in such county, city or town, and the return thereof made in the same manner; and the result shall be entered upon the minutes of the board of supervisors in the case of a county, and of a city or town, in the respective minutes of said city or town.

How election conducted.

If two-thirds favor.

SEC. 7. Be it further enacted, That if it shall appear that two-thirds of all qualified votes cast at such election of county, city or town have voted "For subscription," it shall be the duty of such president of the board of supervisors, of such county, or the chief of such incorporated city or town, to subscribe to the capital stock of said railroad company, and in the name of such county, city or town, the amount so voted to be subscribed, and to receive from said company the proper certificates therefor; he shall also execute to said company in the name of such county, city or town, bonds, bearing interest at seven per cent. per annum, which bonds shall be payable to bearer, and run for a term of not more than twenty years, and the interest on the same shall be payable annually, and such bonds shall be signed by such president, mayor or other executive officer, and be attested by the clerk of the

Bonds to be issued.

board of supervisors, or of the city or town, as the case may be, in whose name the bonds are issued, and a true record shall be kept of all such bonds so issued; said bonds shall be delivered to the president or secretary of said company, for the use of said company.

Township subscription.

SEC. 8. Be it further enacted, That if any county shall refuse to subscribe to said company, — any township, along or near said railroad, shall petition as aforesaid, the president of the board of supervisors, for an election, the president shall order an election as herein provided for counties, and if two-thirds of the voters at such election of said township, shall vote "For subscription," the result thereof shall be entered upon the minutes of the board of supervisors for said county. The president of the board of supervisors of such county shall execute to said company, in the name of said township, to be particularly designated by the number of the township in the United States surveys, or by some name
29 given thereto, bonds bearing interest at seven per cent. per annum, which shall be in all respects of the same character as the bonds described in section seven, and shall be signed by the president, and attested by the clerk of the board of supervisors, and a record kept of the issuance of said clerk, and shall be delivered to the president or secretary of said company.

Duty of tax assessors.

SEC. 9. Be it further enacted, That it shall be the duty of the assessor of taxes in such county, city, town, or township, annually, after the execution and delivery of such bonds as aforesaid to compute and assess upon the taxable property of such county, city, town, or township, a sum sufficient to pay the interest and cost of collection and disbursement upon all bonds so issued by the respective counties, cities, towns, or townships, which tax shall be entered on the assessors' books, made out for the collector as other taxes are, in a column designated, "Interest on railroad bonds," and shall be collected in the manner as other taxes are; and when collected, shall be paid to the treasurer of the county, and paid out in redemption of the coupons, for which said taxes were assessed respectively and collected; and such counties, cities, towns, or townships, shall have the power to provide by judicious taxation for the redemption of their respective bonds herein provided for.

Vote of stock.

SEC. 10. Be it further enacted, That at all elections for officers, and in all questions voted on by the stockholders of said company, the president of the board of supervisors of said county, the mayor of any city or town, and the supervisors of any township, which shall have subscribed to said stock shall represent and cast the vote which said stock is entitled to cast, unless said county, city, town, or township shall appoint some other person to perform said duty.

Liability of stockholders.

SEC. 11. Be it further enacted, That no stockholders, whether corporate or natural persons, shall be liable under his or their subscriptions of stock of said company for more than the amount of their respective subscription of stock, and according to the call of directors, under the conditions hereinbefore provided.

Books of subscription.

SEC. 12. Be it further enacted, That the persons named in the first section of this act, and such other persons as may associate themselves with them, or a majority of them, shall open books to receive subscriptions to the capital stock of said company, at such times and places as they or a majority of them may appoint, and shall give such notice of the time and places of opening said books as they may deem reasonable, and shall receive subscriptions under such regulations as they may adopt for the purposes.

Board of directors.

SEC. 13. Be it further enacted, That the corporate power of this company shall be vested in a board of directors, composed of the seven incorporate members, and shall hold their offices until the first day of ——, 188–, or until their successors are elected and qualified.

Election by ballot.

SEC. 14. Be it further enacted, That the next board of directors shall be elected at the general election of officers which shall be held on the first Monday in April, 188–, and annually on said day thereafter. All elections shall be by ballot, and each stockholder shall be entitled to vote in person or by proxy, one vote for each share of stock held by such person, corporate or natural, for ten days previous to the elections; and in all elections or deliberations, each person shall be entitled to one vote, in person or by proxy, for each and every share of stock held by him as aforesaid.

If directors not elected on day appointed.

SEC. 15. Be it further enacted, That in case it shall so happen that an election of directors shall not be made on the day herein appointed, said company shall not, for that cause, be deemed dis-

solved, but said election shall be held on any day which may be appointed by the directors of said company; and the directors and officers shall continue in office until their successors are elected and duly qualified.

By-laws.

SEC. 16. Be it further enacted, That the directors shall have full power to make and prescribe such by-laws, rules and regulations, not contrary to this charter, nor of the State of Mississippi, or the United States, as they shall deem needful and proper, touching the disposition of stock, property, estate, and effects of said company, the transfer of shares, the duties and conduct of officers and servants, and all matters whatsoever, which may appertain to the concerns of said company; and said company is also hereby empowered to take and hold, whether by purchase, grant, donation, devise, or otherwise, such real estate and other property as may be necessary and convenient in accomplishing the objects for which this incorporation is granted, and by their agents, surveyors, engineers, and servants, enter upon such route or places to be designated by the surveyor thereof, made and adopted by the directors of said company.

Grants and donations.

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Single or double track.

SEC. 17. Be it further enacted, That said company is hereby authorized to construct, erect, make, build or purchase and thereafter to own, maintain, use and lease, a single or double railroad or way, of suitable width or dimensions, to be determined by the directors of said company, on the line or course by them designated, and shall have power to regulate the time and manner in which goods or passengers shall be transported, taken and carried on the same, and shall have power to erect and maintain, toll-houses and all other buildings for the accommodation of their concerns, as they may deem suitable for their interests.

Transportation.

Crossing streams or highways.

SEC. 18. Be it further enacted, That whenever it shall be necessary for the construction of their single or double railroad, or way, to cross any streams of water or any road or highway, it shall be lawful for said company to construct said railroad across or upon the same; but said company shall restore said stream, road or highway, thus intersected or crossed to its former state, or in such a state as not to impair its usefulness; and in all cases, when any road or public highway is so located, that said railroad cannot be judiciously laid out or constructed across or upon the same

without interfering therewith, the county supervisors may authorize in such cases, the company by their engineer, to cause such road or roads to be changed or altered in such a manner that said railroad may be made on the ground for that purpose; provided, that said company shall put such road thus altered, in as good repair as at the time of changing or altering the same.

Damages and obstructions.

SEC. 19. Be it further enacted, That if any person shall wilfully do or cause to be done, any act or acts whatever, whereby any building, construction or work of said company, or any engine, machine, or structure or other matter or thing appertaining to the same, shall be stopped, obstructed, impaired, weakened, injured or destroyed, the person or persons so offending shall be deemed guilty of a misdemeanor, and shall forfeit and pay to said company double the amount of damages sustained by means of such offense or injury, to be recovered in the name of the company, with costs of suit by action for debt.

Roads to be altered.

SEC. 20. Be it further enacted, That said company is hereby authorized and empowered, from time to time, to borrow money or purchase property on its own credit, for the purpose of constructing and maintaining said railroad, and as evidence of the indebtedness of the company for such loans or for the purchase of property, may issue its corporate bonds or promissory notes, bearing interest at such a rate per annum and payable at such times and places as the directors of said company may fix and designate, and to secure the payment of such bonds or notes and interest, may mortgage its railroad, its corporate franchises, its real and personal property, or any part or portion thereof, and it may, by its president or other officers or agents, duly authorized by the directors, sell, negotiate or dispose of said bonds or promissory notes, or of its stock, or any of its personal or real property, at such times and places and at such rates and for such prices, either within or without the State, as the board of directors may deem best for the interest of the company, and if such capital stock, bonds or notes are disposed of or sold at a discount, such sale or disposition shall be in all respects binding upon the company; and such stocks, bonds or notes, shall be valid for the par value thereof, as if the same had been sold at par value.

May borrow money.

Mortgage property.

If so'd at discount.

Lands for stock.

SEC. 21. Be it further enacted, That said company may receive and take in payment, as cash for stock, upon the subscription therefor, any lands, the same to be conveyed to it in fee-simple, which shall be valued and appraised by the directors of the company, and such valuation thereof shall be returned in writing to the president of said company who shall cause the same to be entered upon the proper books of the company and to the credit of the subscription of the grantors, and certificates of stock shall be issued therefor to the subscribers thereof.

Sale of bonds.

33 SEC. 22. Be it further enacted, That no bonds issued and delivered to said company by any county, city, town, or township, shall be sold or negotiated, without the concurrence of two-thirds of the directors of said company, entered of record so as to preserve the evidence thereof.

Exempt from jury and militia duty.

SEC. 23. Be it further enacted, That the officers, agents and servants of said company, be and they are hereby exempt from jury duty and militia duty, while in the actual service of the company, except in case of insurrection or invasion.

Domicile, service of process.

SEC. 24. Be it further enacted, That the domicile of said company shall be fixed in the city of Vicksburg, and the business of said company shall be done and transacted and the records kept at the domicile of said company; and service of process, wherein said company is interested, shall be upon the president of said company or the secretary thereof; and the rights, power and authority granted in this act of incorporation shall be perpetual, except that the same may be altered or amended as necessity may require.

Connections, consolidations.

SEC. 25. Be it further enacted, That the company shall have power and authority to purchase and hold any connecting railroad, and operate the same or to consolidate the company with any other company, under the name of one or both; but when such purchase is made or consolidation is effected, the said company shall be entitled to all the benefits, rights, franchises, lands and property of every description, belonging to said road or roads so sold or consolidated.

How dissolved.

SEC. 26. Be it further enacted, That this corporation may be dissolved at a general meeting convened for that purpose, with the assent of a majority of the stock represented at such meeting, and in case of dissolution, the liquidation

shall be conducted by three commissioners, elected by ballot at such meeting.

SEC. 27. Be it further enacted, That this act shall take effect and be in force from and after its passage.

Approved, March 9, 1882.

34 EXHIBIT D.

Charter of the Memphis and Vicksburg Railroad Company.

An act to incorporate the Memphis and Vicksburg Railroad Company.

Names of the incorporators of the Memphis and Vicksburg railroad.

SECTION 1. *Be it enacted by the legislature of the State of Mississippi*, That M. S. Alcorn, A. S. Dowd, John Jones, B. Harrington, J. L. Alcorn, P. C. Legg, D. M. Childress, and James A. Peace, all of the county of Coahoma; Peter B. Starke, and Charles Clark, of the county of Bolivar; R. G. Simms, and C. W. Clark, of Washington county; J. M. Manning, and J. F. Jaques, of Tunica county; T. W. Stringer, of Warren county; H. N. Ballard, J. W. Vance, of the county of De Soto; together with those who may hereafter become stockholders, in the manner hereinafter provided, their successors and assigns, and the assigns of such assigns, be, and they are hereby created a body corporate, by the name and style of the Memphis and Vicksburg Railroad Company, and as such, shall have perpetual succession; and by that name and style shall be, and are hereby made capable in law to have, purchase, receive, and enjoy real and personal estate, and retain to them, their successors, and assigns, all such lands, tenements and hereditaments, as shall be requisite for the accommodation and convenience in the transaction of their business, and such as may be in good faith

35 conveyed to them, by way of security, or in satisfaction of debts, or by donation or purchase, and the same to sell, grant, rent or otherwise dispose of; to sue and be sued, to plead and be impleaded, to answer and be answered unto, defend and be defended, in any court of law or equity, and to make, have, and use a common seal, and the same to alter, break or renew at pleasure.

Powers conferred and responsibilities imposed on company.

SEC. 2. Be it further enacted, That the said corporation shall be, and are hereby vested with the rights and exclusive authority to construct a railroad, with a double or single track, from the city

Right to construct railroad.

Line of the route of the road.

of Vicksburg, in the county of Warren; to the northern boundary of the State, in the county of De Soto, in the direction of the city of Memphis, in the State of Tennessee; passing through the county of Issaquena, on the most eligible ground east or west of Sunflower river; through the county of Washington, east or west of Deer creek; through the county of Bolivar, east or west of Bogue Pholia; through the county of Coahoma, in the direction of Swan lake, in said county, on or near the east bank of the same; thence crossing the Yazoo pass at the most eligible place, in the direction of Moon lake, along or around the bank of said lake, to a point proper for divergence in the direction of Beaver Dam lake, in Tunica county; thence, by way of said lake, or in the vicinity thereof, through Tunica county, in the direction of Memphis, by way, or in the vicinity of Horn lake, in the county of De Soto, toward the Mississippi boundary, in the direction, as aforesaid, of Memphis, Tennessee.

Capital stock.

SEC. 3. Be it further enacted, That the capital stock of said company shall be five millions of dollars, and shall be augmented to eight millions of dollars, after the grading of the road shall have been completed, divided into shares of one hundred dollars each; and the shares of the capital stock of said company shall be deemed personal property, transferable by assignment agreeable to the by-laws of said company.

Persons named above to act as commissioners, to authorize the opening of books for stock.

SEC. 4. Be it further enacted, That the above-named persons, or a majority of those who may consent to act as such, shall be commissioners, who may authorize such person or persons as they may select, to open books for subscription to the capital stock of said corporation, at such times and places as they may deem expedient. And the books shall be kept open until at least one million dollars are subscribed. Provided, that any subscription at any time or place, other than those advertised, may be received, by said commissioners, or any one of them, or by the person appointed to receive subscriptions, and the same shall be valid against the party subscribing, as if received at the time and place advertised. As soon as the stock shall be subscribed, or fifty thousand dollars of the same, such one of the persons so acting as commissioner, who may be appointed for this purpose, shall, by giving at least thirty days' notice of the time and place of meeting, in at least three public news-

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May call a meeting of stockholders.

papers: one published at Vicksburg, one at Memphis, and another as near as practicable, on the line of said road, for a meeting to elect directors, at the time and place appointed; and nine directors shall be chosen, by ballot, by such stockholders as shall attend for that purpose, either in person or by proxy. Each share of the capital stock shall entitle the holder to one vote. The persons named in the first section of this act as commissioners, or any three appointed by a majority of such as shall act as commissioners, as hereinbefore provided, shall be inspectors of such election first held, and shall certify under their hands and seals what persons are elected. A new election of directors shall be held annually, at such time and place as the stockholders, at their preceding meeting, shall appoint; but if no election shall be made on the day appointed, such election shall be held at any other time appointed by the by-laws of the corporation, and the directors chosen at any election shall continue in office until their successors are elected and qualified; and, as soon after their election as may be convenient, they, or a majority of them, shall hold a meeting and elect one of their number president; and if a vacancy shall occur in said board by death, resignation, or otherwise, said vacancy may be filled by the remaining directors, or a majority of them; four or more of said directors, with the president, shall form a board, and be competent to transact all the business of the corporation, and, in the event of the absence of the president, from any cause whatever, the directors, if five are present, shall elect one of their number president *pro tempore*.

Number of directors to be chosen.

Commissioners to be inspectors of elections.

Election of directors to be held annually.

How vacancies may be filled.

37 SEC. 5. Be it further enacted, That upon every subscription for stock there shall be paid at the time of subscribing, to the person or persons authorized by the commissioners, or a majority of those who may act, to open said books, the sum of fifty cents on each share subscribed, and the residue thereof shall be paid in such instalments, and at such time as may be required by the president and directors of said company, to the treasurer thereof. Provided, that no more than five per cent. on the capital stock subscribed, shall be paid or called for, until, in the opinion of the president and directors, or the president and a majority of the directors, a sufficient amount of the capital stock shall be subscribed, with other resources, means and credits of the company, to

Fifty cents of each share of stock paid at the time of subscribing.

How future payments of stock shall be demanded.

construct said road. No payment other than the first shall be demanded until at least thirty days' notice of such demand shall have been given by the president and directors, in three public newspapers: one published at Vicksburg, one at Memphis, and another as near as practicable, on the line of said road. And said person or persons appointed by said commissioners, as aforesaid, to receive such first instalment, and who shall receive the same, shall forthwith, after such election of the president and directors of the company, pay over to the directors or the treasurer of said company, all moneys received by them, and on failure thereof, the president and directors may recover the amount from him or them, by motion, on ten days' notice, in the circuit court of the county wherein he or they, or his or their executors or administrators, may reside; and the clerk of said court shall endorse on the execution which shall issue on such judgment, that no security shall be taken; and the sheriff or other officer executing said execution, shall govern himself accordingly.

How the president and directors may recover the same when commissioners fail to pay it over.

Penalty for failure to pay stock when called on.

SEC. 6. Be it further enacted, That should any stockholder fail or neglect to pay any instalment or parts of said subscription demanded, as aforesaid, for thirty days after the same shall be due and payable, the said president and directors, upon giving twenty days' notice thereof, in some newspaper published in any or either of the places aforesaid, may, and they are hereby authorized to sell at public auction, so many shares of such delinquent stockholder or stockholders' stock, as shall be necessary to pay such instalment, and the expenses of advertising and sale, and transfer the shares so sold to the purchasers; and the residue of the money arising from such sale, after paying such instalment, and the expenses, if any, shall be paid to such delinquent stockholders, on demand. In the event the proceeds of the sale of all the stock held by such delinquent stockholder shall not pay the instalment or instalments then due, and the expense of said sale, then the president and directors may recover the residue of such unpaid instalment or instalments, and all costs of such delinquent stockholder, his or her executors or administrators, on ten days' notice, before any justice of the peace, where the amount due does not exceed one hundred and fifty dollars, or before the circuit court, where the amount exceeds one hundred and fifty

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Where the sale of stock does not pay the amount due, etc.

dollars, in the county of which he, she or they are inhabitants; and any purchaser of stock under such sale shall be subject to the same rules and regulations as the original subscriber.

Powers vested in president and board of directors.

SEC. 7. Be it further enacted, That the president and directors of said company shall be, and they are hereby vested with all the rights, privileges and powers requisite and necessary for the construction, repair, and maintenance of a railroad, to be located as aforesaid, with double or single track, as a majority of them shall determine, and to make and construct all works whatsoever, which may be necessary and expedient in order to the proper completion of said road and its appendages; to erect depots for the accommodation of passengers, storage of property of any description, water stations, machine shops, car-houses, and such other buildings as may be thought necessary for the protection and repairs of their property, or that which may be entrusted to their care; they shall have power to appoint a treasurer, clerks, engineers, surveyors, and such other officers as may be necessary to conduct the business of the company, and require bonds for the faithful performance of their duty; they shall have power to make contracts with any person or persons, in behalf of the company, for making or repairing the said railroad, or any part thereof, and performing all the work respecting the same, which they may deem necessary or proper; to require of the shareholders, from time to time, instalments upon their stock, until one hundred dollars a share shall have been paid; to call general meetings of the stockholders whenever the interest of the stockholders may seem to require it, and to adopt rules and by-laws for the government of said company as they may think right and proper, not inconsistent with the laws and constitution of this State, or of the United States.

Power to appoint all subordinate officers.

To make all contracts.

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To call general meetings of stockholders and make all necessary rules and regulations.

To cause examination and surveys to be made.

SEC. 8. Be it further enacted, That said corporation be, and they are hereby authorized to cause such examination and surveys to be made on the ground before indicated, as shall be necessary to determine the most eligible route on which to construct said road, and it shall be lawful for said corporation, by its members, officers, or agents, to enter upon and take possession of all such lands, timbers, stone, gravel, earth, or other materials as may be necessary for the construction or repair

May agree with the owners of land, etc., for use of road.

of said railroad, and the requisite erections; and the president and directors of said company may agree with the owner of said land, timber, earth, gravel, stone, or other material, or any other article whatever, which may be wanted in the construction or repair of said road, or any of its works, for the purpose or occupation of the same;

How cases of disagreement shall be settled.

and in case of disagreement with the owner, as to the price of the land required for said road, or any of the materials for the same, or if the owners are under any disability in law, to contract, or are out of the county where such lands or materials are, application may be made to any justice of the peace of such county, who shall thereupon issue his warrant, under his hand and seal, to the sheriff of such county, requiring him to summon a jury of twelve disinterested freeholders of the county, to appear at or near the land or materials, or property to be valued, on a day named in said warrant, not less than five nor more than ten days after issuing the same; and if any one of the persons summoned do not attend, the said sheriff shall immediately summon as many as may be necessary to furnish a panel of twelve jurors, who shall act as a jury of inquest of damages, having an oath or affirmation administered to each, by said sheriff or justice of the peace, justly and impartially to value the damages which the owner or owners will sustain by the use or occupation of the land, materials, or property required by the said company; and the jury, in estimating the damages, if for the ground occupied by said road, shall take into the estimate the benefit resulting to such owner or owners, by reason of said road passing through or upon said land, toward the extinguishment of such claim for damages; and the jury shall reduce their inquisition to writing, and shall sign and seal the same; and such valuation, when paid or tendered to the owner or owners of such property, his, or her, or their legal representatives, if found in the county, or thereafter paid on demand of any person legally authorized to receive the same, shall entitle said company to the land, the estate and interest thus valued, as fully as if it had been conveyed by the owner or owners of the same, for such term of time as said company shall occupy the same as a railroad; and the inquest of the jury, after payment, or tender of the valuation, shall be admitted to record in the office of the chancery clerk of the proper county, and be a bar

Duty of jury in estimating damages.

Rights of company after tender of payment.

to all action for taking or using such property; and that said sheriff and jurors be entitled to receive from such company such fees as are allowed for like services. Provided, that either party may, within ten days, appeal from the decision of said jury to the circuit court of the proper county in which the lands are situated, and said court shall proceed thereon, as in case of appeals from board of supervisors in this State, in relation to county or State roads. Provided, further, that said appeal, after the tender, as before provided, of the damages of the jury of inquest, shall in no-wise hinder or delay said company from using the land, or other property thus valued, nor shall any order be made, nor shall any injunction be granted by any judge or court to prevent the use thereof, or delay said work.

Right of appeal.

Appeal not to hinder the road from using the same.

SEC. 9. Be it further enacted, That the president and directors be, and they are hereby authorized to adopt and establish such a tariff of charges for the transportation of persons and property as they may think proper, and the same to alter and change at pleasure. Provided, that said railroad company shall not charge more than twenty-five per centum higher rates for transporting local freight than is charged for transporting through freights, and not more than three cents per mile for transporting passengers.

President and board of directors to fix a tariff of charges.

SEC. 10. Be it further enacted, That the president and directors, or any number of stockholders, owning one-half of the whole amount of stock, may call a general meeting of the stockholders, by giving at least thirty days' notice thereof, in any newspaper published in Memphis, Vicksburg, and at a point as near as practicable, on the line of said road, specifying the objects of the meeting; and a majority of the stockholders being represented, they may make such order relative to the affairs of the company as they may think proper.

How a general meeting of stockholders may be called.

SEC. 11. Be it further enacted, That so soon as a section of twenty miles of said road shall be completed, and as often thereafter as any other section of like length shall be completed, the said president and directors shall transport persons and property of any description that shall be deposited at any of their depots, and which they shall be required to transport to any other depot along the line of said road, and as nearly as practicable in the same order of time in which the same was delivered to their care, and may require all their

May transport persons and property after the completion of 20 miles of road.

charges for passage, transportation and other services to be paid in advance.

Powers conferred on the commissioners and president and board of directors.

SEC. 12. Be it further enacted, That the commissioners appointed by the first section of this act, or a majority of such of them as may choose to act as such, or the president and directors of said company, may adopt such portions of sections 3, 4, 5, and 6, of an act passed by the legislature of the State of Mississippi, in February, 1850, entitled "An act to incorporate the New Orleans and Jackson Railroad Company, and for other purposes," as relates to subscriptions for capital stock in said company, to be paid in labor, with such restrictions and modifications as said commissioners, or said president and directors, may deem proper. Provided, however, that no person be permitted to subscribe for stock payable wholly in labor, but at least twenty-five per cent. of such subscription shall be payable in money, as hereinbefore provided.

No person to be permitted to subscribe for stock payable wholly in labor.

Commissioners may take subscriptions of land anywhere in the State.

42 SEC. 13. Be it further enacted, That it shall and may be lawful for said commissioners to receive subscriptions as aforesaid, in land, to the capital stock of said company, anywhere in the State; said lands shall be estimated at their cash value, by three disinterested persons, to be appointed by the president and directors of the company, for the purpose, and the said lands shall be taken by the company at the said valuation, and be conveyed to said company with covenants of title, to be approved by the president and directors; and the party making the subscription in land shall pay all the costs of valuation and conveyance, and for the subscription of said land shall be entitled to receive certificates of stock, as in other cases. Provided, however, that nothing in this act shall be construed to prevent the president and directors from receiving donation of free gifts of lands to the company.

Authority to the board of supervisors to make subscriptions to capital stock.

SEC. 14. Be it further enacted, That the board of supervisors of the counties through which the said railroad is to be built, are hereby authorized and empowered to make such subscriptions to the capital stock of said company as a majority of said board may deem proper, in such sum or sums, and payable in such amounts and at such times as said board of supervisors may approve; and said board are further authorized to issue bonds on the faith of their respective counties, in such sums as may be deemed best, and payable at such

times, bearing not more than six per centum interest, as said board may determine, and may sell lands to pay the stock subscribed, or may transfer them on such terms as may be agreed on with said company, in payment of the stock subscribed. And said board are hereby further authorized and empowered to levy a special railroad tax on the real estate of their respective counties, to pay the interest accruing on said bonds, and to pay the bonds at maturity. Provided, that no subscription of capital stock to said company by the board of supervisors shall be valid and binding unless the question of subscription shall be first submitted to the qualified voters of said counties, giving thirty days' notice of an election to be held for that purpose alone, and the amount of stock proposed to be subscribed, and unless the constitutional majority of two-thirds of those voting shall vote in favor thereof.

Board may levy special tax on real estate.

How the question of stock shall be determined.

43

SEC. 15. Be it further enacted, That said company shall have the right to mortgage any of the franchises or property of the company to secure the payment of any loan of money, or any evidence of debt, due by said company, for the survey, construction or equipment of said road, or any debt contracted to carry out the purposes of this act.

Right of company to mortgage franchises and property.

SEC. 16. Be it further enacted, That said company shall have the right and power to consolidate the stock, property, and franchises of the road with any other road or roads, in or out of this State, at any time that the president and directors of the road may deem proper, and upon such terms as may be consistent with the powers conferred upon said company.

Company may consolidate with any other company.

SEC. 17. Be it further enacted, That said company may adopt such gauge for said road as shall conform to the gauge of any other road with which they may wish to connect or consolidate.

May adopt such gauge as to conform to any other road.

SEC. 18. Be it further enacted, That the said company be, and the same is hereby authorized to build a branch or branches, of said railroad, from the main track of the same, to such points on the Mississippi river on the west, or the Yazoo, Tallahatchie, or Cold Water on the east, as they may deem proper in response to the wants of the county.

Authority to build branches to road.

SEC. 19. Be it further enacted, That said company shall have the right to clear a roadway for

Distance of roadway from center to center.

one hundred feet from the center of the track, on each side thereof.

Laws repealed.

SEC. 20. Be it further enacted, That all acts and parts of acts inconsistent with the provisions of this act, be, and the same are hereby repealed.

SEC. 21. Be it further enacted, That this act take effect and be in force from and after its passage.

Approved August 8th, 1870.

44 *Amendments.*

An act supplemental to the acts of incorporation of certain railroad companies.

SECTION 1. Be it enacted by the legislature of the State of Mississippi, That the provisions of the twenty-first section of an act entitled "An act to incorporate the Mobile and Northwestern railroad," be, and they are hereby made to apply to the following railroad companies: The Memphis and Vicksburg railroad; the Vicksburg, Yazoo Valley and Grenada railroad; the Canton and Vicksburg railroad; the Natchez and Jackson railroad; the Meridian and Red River railroad; the Ship Island, Mississippi City, and Paducah railroad; the Elyton and Aberdeen railroad; the Grenada, Louisville and Meridian railroad; the Greenville and Rolling Fork railroad; and the charters of said companies are hereby amended so as to confer upon said companies all the rights, privileges, immunities and franchises granted by the act of incorporation of the said Mobile and Northwestern, embraced in the twenty-first section thereof.

SEC. 2. Be it further enacted, That this act take effect and be in force from and after its passage.

Approved August 8th, 1870.

Following is the twenty-first section of the Mobile and Northwestern Railroad Company, referred to above, chapter 113:

Exempt from tax for a limited time for the construction of road.

SECTION 21. Be it further enacted, That in consideration of the construction of the railroads provided for herein, and of the great benefit which the State will receive in the development of its agricultural resources by means of said railroads as works of internal improvement, and also

45 of the increased value which will thereby be added to the property of the State, thus

enabling the State to greatly increase its revenue without additional and burdensome taxation on the people, the State hereby agrees with said company (and which agreement is irrepealable), that all taxes to which said company shall be subject for the period of thirty years, are hereby appropriated and set apart, and shall be applied to the payment of the debts and liabilities which the said company may have incurred in the construction of said road, or for money borrowed by said company upon lands or otherwise, to be used in constructing said road, or paying debts incurred by said company in constructing the same; and it shall be the duty of the tax collector in every county, in each and every year, to give to said company a receipt in full for the amount of said taxes upon receiving from said company an affidavit made by the president or cashier of said company that the amount of said taxes have actually and in good faith been paid and applied by said company during the year, in payment of the debts incurred, or money borrowed as aforesaid, and which receipt shall be in full of all taxes, county, State, and municipal, to which said company shall be subject. Provided, however, that whenever the profits of said company shall enable it to declare and pay to the stockholders an annual dividend of eight per cent. on its capital stock over and above the payment of its debts and liabilities, then the appropriation of the taxes aforesaid shall cease, and said taxes shall be paid by said company to the tax collector, to be by him paid over as required by law.

Duty of tax collectors.

When tax shall be paid.

46 EXHIBIT E.

An act to authorize the Memphis and Vicksburg Railroad Company and the Mississippi Valley and the Ship Island Railroad Company to effect a consolidation.

SECTION I. *Be it enacted by the legislature of the State of Mississippi, That* the Memphis and Vicksburg Railroad Company, and the Mississippi Valley and Ship Island Railroad Company be, and they are hereby authorized and empowered to consolidate with each other, or with each other and any other railroad company or companies, whether such company or companies have been incorporated under the laws of this State or of any other State, so that all of the companies so consolidating shall be merged into and become one company; and the company so formed by such consolidation shall be deemed and held to be a corporation created by the laws of the State, and shall have, enjoy and possess all the rights, ways, priv-

ileges franchise, property, grants, and immunities, which are now possessed by the companies which may enter into such consolidation, as fully as though the same were conferred specifically in this act, and to that end the charters of said consolidating companies shall be taken and held to be a part of this act.

SEC. II. *Be it further enacted, That* the company created by the consolidation of such companies as aforesaid, shall be known and designated by such name as the stockholders of the companies so consolidating may fix and adopt, and by that name shall contract and be contracted with, sue and be sued, plead and be im-
47 pleaded, and it shall be authorized to adopt a common seal and to alter and change the same at pleasure, and shall have perpetual succession.

SEC. III. *Be it further enacted, That* the officers of said consolidated company shall consist of a president, vice-president, secretary and treasurer, and nine directors, who shall be elected by the stockholders of the companies entering into such consolidation, at the time the same is effected; and such officers shall be elected annually thereafter, upon such notice and terms as the board of directors may prescribe; but the failure to hold any annual election shall in no-wise impair or affect said corporation. In such event the officers elected at the last regular election shall hold until their successors are elected and qualified, and a special election may be held for that purpose.

SEC. IV. *Be it further enacted, That* the stockholders of the companies so consolidated shall at the time the consolidation is effected, prescribe the terms, mode and manner upon and by which the stock of the companies shall be taken up, and the stock of the consolidated companies shall be issued, and the consolidated company shall be liable for all the debts which may be legally chargeable against any of the consolidated companies.

SEC. V. *Be it further enacted, That* the provisions of the twenty-first section of an act entitled "An act to incorporate the Mobile and North Western railroad, approved July 20th, 1870," is hereby made to apply to the said consolidated company, and for that purpose the said section is hereby declared to be a part of this act, and this section shall be construed as though the said twenty-first section was specially and fully set out herein. But this section shall not be in force for a longer time than twenty-five years from the approval of this act.

SEC. VI. *Be it further enacted, That* the company formed by consolidation as aforesaid, be, and the same is hereby authorized and empowered to issue its bonds for such amounts, and payable
48 at such times and places, as a majority of its stockholders may agree upon, and to secure the same by mortgage or deed in trust upon all its rights, ways, franchises and property, real and personal, no matter where the same be situated, and whether the same be owned by said company at the time of its formation or thereafter acquired.

SEC. VII. *Be it further enacted, That* the capital stock of the company so formed by consolidation, shall be such an amount as the

stockholders of the consolidated companies may agree upon and fix, and thereafter the amount of its capital stock may be increased at the pleasure of its stockholders.

SEC. VIII. *Be it further enacted, That* section nine of an act entitled "An act to incorporate the Memphis and Vicksburg Railroad Company," approved August 8th, 1870, be, and the same is hereby repealed.

SEC. IX. *Be it further enacted, That* the maximum rates to be charged by said company for the transportation of freight and passengers shall not exceed four cents per mile for each passenger; sixty-five cents per one hundred pounds for first and second class freight for one hundred miles or less; forty-five cents per one hundred pounds for third and fourth class freight for one hundred miles or less; thirty-two cents per one hundred pounds for fifth and sixth class freights for one hundred miles or less; *Provided* that for carrying such articles as coal, iron, lumber, cattle, horses, mules, hogs, sheep, and machinery, the company may make special rates with shippers per car-load; but for similar articles, and from the same place, and for the same distance, others shall have the advantage of the same rates; *and provided, further,* that the company shall not be required to charge less than twenty-five cents for each passenger, package or parcel.

SEC. X. *Be it further enacted, That* this act shall not be in any manner binding or obligatory upon the said Memphis and Vicksburg Railroad Company, and the Mississippi Valley and Ship Island Railroad Company, unless they shall fail to signify their rejection
49 of it by a resolution of their boards of directors, and file a copy thereof in the office of secretary of state within thirty days after its passage, but if they should so fail to signify their rejection of the same, then this act shall be held to be in force from and after its passage.

SEC. XI. *Be it further enacted, That* no mortgage executed by said company shall protect its property against the collection of claims for damages done by its engines and cars to the persons or property of citizens and residents of the State of Mississippi.

Approved March 3d, 1882.

OFFICE OF SECRETARY OF STATE,
JACKSON, MISSISSIPPI.

I, Henry C. Myers, secretary of state, do certify the act hereto attached, entitled "An act to authorize the Memphis and Vicksburg Railroad Company and the Mississippi Valley and Ship Island Railroad Company to effect a consolidation," is a true and correct copy of the original now on file in this office.

[SEAL.] Given under my hand and the great seal of the State — Mississippi hereunto affixed, this 3d day of March, 1882.

HENRY C. MYERS.
Secretary of State.

50 An act to amend an act entitled "An act to authorize the Memphis and Vicksburg Railroad Company and the Mississippi Valley and Ship Island Railroad Company to effect a consolidation," approved March 3d, 1882.

SECTION 1. *Be it enacted by the legislature of the State of Mississippi, That* the act entitled "An act to authorize the Memphis and Vicksburg Railroad Company and the Mississippi Valley and Ship Island Railroad Company to effect a consolidation," approved March 3d, 1882, be, and the same is hereby, so amended as to authorize and empower the Memphis and Vicksburg Railroad Company and any other railroad company or companies, incorporated under the laws of this State, to consolidate in the manner and upon the terms and conditions and with the rights, privileges and immunities in said act mentioned, with each other, and any other railroad company or companies, incorporated or organized under the laws of any other State or States, and that such consolidation may be so effected whether the Mississippi Valley and Ship Island Railroad Company becomes a party to such consolidation or not.

SEC. 2. That this act take effect and be in force from and after its passage.

Approved March 15, 1884.

(*Vide* General Laws of Tennessee and Louisiana authorizing consolidation.)

51 CHAPTER DXLI.

An act incorporating the Yazoo and Mississippi Valley Railroad Company and declaring its powers.

Work of great public importance.

Whereas, the construction of railroads to, in, through and along the Mississippi River basin, and the Yazoo and Sunflower River basins, penetrating these and other alluvial lands in this State, west of the Chicago, St. Louis and New Orleans railroad, and connecting them by railroads and branches with other railroads west, east, north and south, is deemed and hereby declared to be a work of great public importance and in strict accordance with the true policy and interest of this State, should be encouraged by legislative sanction and liberality; and,

Physical difficulties.

Whereas, the physical difficulties of constructing and maintaining railroads to, across, along or within either the Mississippi, Sunflower, Deer Creek or Yazoo bottoms or basins, or the other alluvial lands herein referred to, are such that no private company has so far been able to establish a railroad and branches developing said basins and alluvial lands, and connecting them with the railroad system of the country:

Induce investment of capital.

Now, therefore, in order to induce the investmentment of capital in the construction, maintenance and operation of such a railroad and branches, and thus develop the resources and wealth of this State:

SECTION 1. *Be it enacted by the legislature of the State of Mississippi*, That R. C. Shepherd, F. Barksdale, J. Z. George, Wm. R. Pillow, F. A. Montgomery, G. W. Faison, John Willis, R. P. Neely, W. H. H. Green, John W. Shields, W. H. Osborn, J. C. Clarke, W. K. Ackerman, L. V. F. Randolph, A. R. Van Nest, F. Sturges, Jno. Elliott, W. W. Gebhard, James Fentress, W. H. Bayard, R. N. Miller, W. P. Harris, R. H. Thompson, James Trotter, L. E. Simonds, H. Q. Bridges and H. S. Foote, together with those who may hereafter become stockholders, their successors and assigns, and the assigns of such assigns forever, be and they are hereby created a body corporate, under the name and style of the Yazoo and Mississippi Valley Railroad Company, and as such shall have perpetual succession; and said corporation, its successors and assigns, are hereby forever authorized and

Incorporators.

52

Style of company.

made capable in law to have, hold, purchase, receive and enjoy real and personal estate in this and other State or States, whether acquired by way of security or in satisfaction of debt, or by donation, purchase, devise or otherwise, and to hold, use and enjoy all of such real estate in fee-simple or otherwise, and the same or any part thereof to sell, rent, lease, mortgage or otherwise dispose of or encumber; to sue and be sued, plead and be impleaded; to use a common seal, and the same to alter, break or renew at pleasure.

Powers and privileges.

SEC. 2. *Be it further enacted*, That the said corporation shall also have, and it is hereby authorized and invested with the right and power to build and construct, and thereafter to use, operate, own and enjoy a railroad or railroads, with one or more tracks, into, along and across that part of the State of Mississippi lying between the Mississippi river and the Chicago, St. Louis and New Orleans railroad, on such line or lines as shall be deemed best by the board of directors of the company hereby chartered; one of said lines or a branch therefrom to reach the Mississippi river at or near a point opposite Arkansas City if practicable, so as to connect such point on the east bank of the Mississippi river with some point or points on the line of the Chicago, St. Louis and New Orleans railroad; one of said lines of railroad, or a branch therefrom, to be extended to or pass through Yazoo City, Mississippi; and said company shall have the right and power, and are hereby authorized to build one or more branches or lines of railroads between the Mississippi river and Deer creek, and between Deer creek and the Sunflower river, and between the Sunflower and Yazoo rivers, in the direction of or to the north line of this State, and extend the same, or any one thereof, in the direction of or to the south boundary line of this State, as shall from time to time, in the judgment of said company, be deemed proper; and shall also be authorized to construct and operate such spurs or laterals from or along such main line or branches not exceeding one hundred miles in length, as may from time to time be necessary or proper to fully develop said country lying west of the Chicago, St. Louis and New Orleans railroad, and east of the Mississippi river, in this State; and the said company, as soon as and whenever, from time to time, they have located said line or lines of railroad or

53

One or more tracks.

Where roads may be built.

Spurs or laterals.

branches, spurs or laterals thereto, or any of them, shall file in the office of the secretary of state a statement showing the general line thereof as far as the same has up to that time been located.

Shall file statement.

SEC. 3. *Be it further enacted*, That the capital stock of said company shall be five millions of dollars, but the same may be, from time to time, increased to a sum or sums not exceeding the amounts actually expended by said company in constructions, completions, equipments and additions to said railroads and property; and said company may issue any part of said stock as preferred stock, and fix the relative rights of common and preferred stock as to dividends and income, and they may issue said stock or any part thereof as fully paid and not liable to calls; and also such bonds and obligations as they may from time to time determine; said capital stock shall be in shares of one hundred dollars each, and each share thereof shall entitle the holder to one vote, under such regulations as the company may in its by-laws provide; said stock shall be deemed personal property, transferable by assignment agreeably to the by-laws of said company, and may be owned and voted by any person, association or corporation of this or any other State or country, in person or by proxy, with the same power as such stockholder (though an alien or foreigner), to bring and maintain suits, or do other acts, in his right as such stockholder, as if a resident and citizen of this State.

Capital stock.

54

Preferred and common stock.

In shares of $100.

Rights of stock.

SEC. 4. *Be it further enacted*, That the affairs of said company shall be managed by a board of directors and such officers and agents under them as the interests of the company may, from time to time require; such board of directors shall consist of such a number of members as the company may determine, from time to time, but not less than five; one of whom shall be a resident of the State of Mississippi; and said board shall have power to appoint an executive committee with full power to act in their stead and place, at all times when said board of directors is not in session; the persons named in the first section of this act, may of their number organize a board of directors who may open books of subscription to the capital stock of said company, and when five hundred thousand dollars of stock has been subscribed, shall call a meeting of the stockholders or subscribers thereto, for the election of a board of directors; the term of office of director of said

Directors and other officers.

Executive committee.

Books of subscription.

Director for three years.

company shall be three years, and until
55 his successor is elected and qualified, but in the first election of directors by the stockholders or subscribers to the capital stock as above provided, part of said directors shall be elected for one year, part for two years and part for three years, as may be determined at said meeting; and in each subsequent year a number of directors shall be elected by the stockholders equal to the number of directors, whose term of office expires in such year; and said board of directors may, of their number, elect a president and fix his term of office and compensation; and may provide for the election of or appointment and removal of such other officers and agents as, and when they please, and may create and abolish such offices, fix the duration and compensation thereof, from time to time, as may seem best, and may adopt, modify or alter by-laws for said company at their will, not inconsistent with the laws of this State, and do all other acts proper or necessary to be done in the management of the affairs of said company.

How directors elected.

President.

By-laws.

SEC. 5. *Be it further enacted*, That said company may, from time to time, mortgage or convey in trust any or all of its property, real, personal and mixed, of any and every description whatsoever, then owned or thereafter to be acquired, and also all or any of its rights, powers, privileges, liabilities, immunities and franchises whether then owned, possessed and enjoyed or thereafter to be acquired, including its rights to be a corporation; and under such deed or deeds of trust or mortgage secure, execute and dispose of the mortgage bonds of said company, to such amounts and maturing at such times and bearing such interest as it may deem best; said company may also execute a mortgage or mortgages and trusts as aforesaid, to secure bonds or obligations of other railroad companies, or may endorse the bonds of any other railroad company or companies; or in any other manner guarantee such
56 bonds and secure the same by a mortgage or mortgages on its own property and franchises, then owned or thereafter to be acquired, as fully as it could do if the bonds were issued by it as aforesaid; said company may consolidate with any other railroad company in or out of the State of Mississippi upon such terms as the consolidating companies may agree upon; and it may lease its railroads and all its property and

May mortgage property.

Endorse bonds of other companies.

Consolidate with other companies.

franchises, rights, powers, privileges and immunities then owned or thereafter to be acquired, or lease other railroads in or out of this State, for a term of years or in perpetuity, and upon any such consolidation, the consolidated company shall have and enjoy all the property, rights, privileges, powers, liberties and immunities and franchises herein granted; but such consolidation shall not have the effect of exempting from taxation the railroad or property owned by such other consolidating company prior to its consolidation with the company hereby chartered; nor of exempting from taxation any property which the consolidated company may, after such consolidation acquire under the provisions of the charter of such other consolidating company; and in case of a lease, the *lease* shall, so far as the terms of the lease may allow, enjoy and possess all the property, rights, powers, privileges, liberties, immunities and franchises which the lessor had as to the leased premises; the said company is also authorized to do an express business over its own and other lines of railroad and steamboats or other conveyances in and out of this State; and to acquire or put up, use and operate a line or lines of telegraph in this and other State or States, and to acquire, hold and enjoy all such property as may be proper, necessary or convenient in doing the said express or telegraph business; *Provided*, that by such consolidation the maximum in section six applies only to roads hereafter built.

Rights of consolidated company.

As to exemption from taxation.

In case of a lease.

Express and telegraph business.

Maximum in sec. 6.

57 SEC. 6. *Be it further enacted*, That said company shall have and possess the power of fixing from time to time, by its board of directors, the rates at which it will do express and telegraph business, and shall transport other express companies as may apply for transportation over its line at a just and reasonable rate of compensation, and also the rates at which said company will transport persons or property over its railroads and branches; *Provided*, said last-mentioned rates shall not exceed four cents per mile for each passenger, nor exceed the following rates on freights: Sixty-five cents per hundred pounds for transporting first or second class freights one hundred miles or less; forty-five cents per hundred pounds for transporting third or fourth class freights one hundred miles or less; thirty-two cents per hundred pounds for transporting fifth or sixth class freights one hundred miles or less:

Rates for express and telegraph business.

Rates for passengers and freights.

(reference being had herein to the classification of freights now recognized and observed on the existing railroad line between New Orleans and Jackson, Mississippi). But in no case shall the railroad company be limited to a less charge than twenty-five cents for the transportation of any passenger, or parcel, package or article, however short the distance. The rates so established from time to time by the said board of directors for transporting persons or property as a railroad company, not exceeding the maximum rates for railroad business, as above set out, may be charged and collected by said company; *Provided, further,* that as to lumber, coal, iron, salt, machinery, fertilizers, bricks, lime, agricultural implements, steam-engines and boilers, and other freights transported in car-loads, rates may be made by special agreements between the shippers and the company, for such sums as they may agree upon; but in all such cases the same rates shall
58 be given to any shipper of an equal quantity, at the same time, under similar circumstances of similar freight between the same points. Nothing herein contained shall prevent the railroad company from making such reduction of rates below the maximum herein fixed as it may elect to do, for the purpose of fostering, aiding and developing the resources of the country, penetrated by its railroads and branches.

No package less than 25 cents.

Special rates for lumber, coal, iron, etc.

Same rates to all shippers.

Rates below maximum.

SEC. 7. *Be it further enacted,* That the right of way is hereby granted said company to pass in and through the State of Mississippi, with said railroads, branches, spurs and laterals aforesaid, and to enter upon and use all lands, rocks, timber, earth, sand, gravel, water or other materials, which may be found on the routes selected, and which may belong to the State of Mississippi, and be convenient or necessary for the use of said railroads; and wherever said railroads or the branches, spurs or laterals aforesaid are located, over any lands belonging to this State, the title in fee-simple, to one hundred feet on each side of the center of said railroad track or tracks shall vest in said company, its successors and assigns; and said company is hereby authorized to cause such examinations and surveys to be made as shall be deemed necessary to determine the most eligible route or routes upon which to locate its line or lines, branches, spurs or laterals, and to enter upon and appropriate all such lands and materials as may be private property, which may be conve-

Right of way and materials granted.

100 feet on each side of track.

nient or necessary for said road, together with one hundred feet on each side of the center of such road, laterals, branches, or spurs; and in case the company fails to agree with the owners of such lands or materials upon the price to be paid for the fee-simple title thereto, or in case the owner is under any disability in law to contract, or is absent from the county where such lands or materials are situate, or is unknown, the company may proceed to condemn such lands or materials as provided in section eight of the act, approved March 10, 1852, entitled "An act to incorporate the Mississippi Central Railroad Company," with all the rights and powers as therein provided; and upon such condemnation being had, the title in fee-simple to such lands or materials, shall vest in the said company, its successors and assigns. Said company is also authorized to construct, maintain and operate its said railroads, branches, spurs and laterals under, over or across any and all streams and bodies of water in this State, whether navigable or not, which lie along or across the lines selected for said railroads, branches, laterals or spurs; and to erect, use and maintain ferries and bridges over the same: *Provided*, that wherever a navigable stream or body of water is crossed by a bridge of said company, there shall be maintained a draw in such bridge sufficient to allow the passage of boats and water crafts plying such waters, which draw shall be so operated as to cause no unreasonable delay to the passage of such water craft; and the said company is also authorized and empowered, so far as this State can or may give such power and authority, to build, construct, maintain and operate of itself or with others, in or out of this State, a ferry across or a tunnel under, or a bridge over the Mississippi river at any point within this State, where its railroads, branches, laterals or spurs may reach said river, and to acquire and hold all such lands and materials as are or may be necessary or convenient for landings, wharves, inclines or approaches thereto; and it may establish such transfer landings, wharves, approaches and inclines as are or may be necessary or convenient in transferring by boat or other water craft, all or any freights, passengers, cars or rolling stock, loaded or unloaded, upon and across said Mississippi river or any other river or body of water within this State, and may own, use, operate and control of itself or others, all such steamboats,

In case of disagreement with owner.

How lands may be condemned.

Vest title.

May build road across streams.

Draw-bridges.

Ferries and tunnels.

Transfer landings, wharves, etc.

Steamboats, ferries, etc.

ferries or other water craft as are or may be convenient or necessary in crossing such water or plying therein, so as to develop trade over its said lines of railroad.

SEC. 8. *Be it further enacted*, That in order to encourage the investment of capital in the works which said company is hereby authorized to construct and maintain, and to make certain in advance of such investment, and as an inducement and consideration therefor, the taxes and burdens which this State will and will not impose thereon, it is hereby declared that said company, its stock, its railroads and appurtenances, and all its property in this State, necessary or incident to the full exercise of all the powers herein granted—not to include compresses and oil mills—shall be exempt from taxation for a term of twenty years from the completion of said railroad to the Mississippi river, but not to extend beyond 25 years from the date of the approval of this act; and when the period of exemption herein prescribed shall have expired, the property of said railroad may be taxed at the same rate as other property in this State. All of said taxes to which the property of said company may be subject in this State, whether for county or State, shall be collected by the treasurer of this State and paid into the State treasury, to be dealt with as the legislature may direct; but said company shall be exempt from taxation by cities and towns.

Exempt from tax for 20 years.

Oil mills and compresses excepted.

When exemption expires.

Taxes to be paid State treasurer.

Cities and towns not to tax.

SEC. 9. *Be it further enacted*, That said company shall have power, and is hereby authorized to insure persons and property, or either, transported or to be transported over or on any part of its lines of railroad, and all other property coming, or about to come into the possession or control of said company for purposes of transportation, or incident thereto, or for storage in any of its depots, or storage-houses, or wharves, and to charge and collect reasonable compensation for such insurance or storage, but no charge for storage shall be made on freights transported by them to their several railroad depots, until the consignee has had a reasonable time in which to remove the same. And it is authorized to erect or acquire, maintain and use such depots, storage-houses, wharves, sheds, or other buildings or depositories in or out of this State, as shall be necessary or convenient in the exercise of the powers granted in this charter;

May insure passengers or freights.

61

Charges for storage.

Depots, etc.

and said company shall have power to construct and operate compresses and oil mills.

Compresses and oil mills.

May build roads through towns.

SEC. 10. *Be it further enacted*, That this company, be and it is hereby granted the right to run its railroads, branches, laterals or spurs into the corporate limits of any incorporated town or city, reached by the line or lines of said railroad, as they may hereafter be located, under the powers herein granted, and to build and operate such railroad tracks, across or along any streets of such incorporated municipality; *Provided*, that such part of said railroad as shall be located in, across, under or upon any such street, shall be so constructed and operated as shall not unreasonably hinder its use as a street.

Meetings and offices.

SEC. 11. *Be it further enacted*, That the board of directors, stockholders, executive committee and officers and agents of said company, may hold their meetings and transact the business of said company, in or out of this State, and may establish such offices as they may from time to time deem best, in or out of this State. And any and all acts done by said company, its officers or agents, out of this State, shall be of the same force and effect as if done within this State.

Claims for damages.

62 SEC. 12. *Be it further enacted*, That no mortgage executed by said company shall protect its property against the collection of claims for damages done by its engines and cars to the persons or property of citizens and residents of the State of Mississippi.

If 20 miles not built in three years.

SEC. 13. *Be it further enacted*, That unless said company shall construct and have in operation twenty miles of railroad within three years from the passage of this act, the legislature shall have the right to declare this charter forfeited.

SEC. 14. *Be it further enacted*, That all acts in conflict with this act, or any part thereof, be and the same are hereby repealed, and that this act take effect and be in force from and after its passage, the public welfare requiring it.

Approved, February 17, 1882.

63 *Plea of Illinois Central Railroad.*

In the Circuit Court, to the January Term, 1894.

STATE OF MISSISSIPPI,
Hinds County, First District.

WIRT ADAMS, State Revenue Agent, Use, etc.,
vs.
THE YAZOO & MISSISSIPPI VALLEY RAILROAD CO. ET AL. } # 2788.

Now comes the defendant The Illinois Central Railroad Company, by its attorneys, Mayes & Harris, and for a separate plea as to the declaration herein filed against it says—

That it is not true, as in said declaration is falsely alleged, that this defendant, on or about the 21st day of July, 1892, or at any other time, purchased all the railroads and property of the said Louisville, New Orleans & Texas Railway Company or any part thereof; nor is it true, as in said declaration is falsely alleged, that this defendant, on or about October 25th, 1892, or at any other time, turned over, delivered to, and merged all said property and railroads or any part thereof of said Louisville, New Orleans & Texas Railway Company into the railroad system and property of the said Yazoo & Mississippi Valley Railroad Company; nor is it true, as in said declaration is falsely alleged, that in said October, 1892, or at any time, the said Yazoo & Mississippi Valley Railroad Company began and have since continued operating all said railroads and railroad system of the said Louisville, New Orleans & Texas Railway Company or any part thereof under the direction and control of this defendant; nor is it true, as in said declaration is falsely alleged, that this defendant did at any time or in any way become liable for or undertake to pay or assume the liabilities, debts, and obligations of the said Louisville, New Orleans & Texas Railway Company or any of them; and of this the said defendant puts itself upon the country. Wherefore, etc.

MAYES & HARRIS,
Att'ys for Illinois Central R. R. Co.

Endorsed: Filed Dec. 27, 1893. F. B. Neal, clerk, by W. H. Harris, D. C.

Plea of the Yazoo & Mississippi Valley R. R. Company.

STATE OF MISSISSIPPI,
Hinds County, First District.

In the Circuit Court, at the January Term, 1894.

WIRT ADAMS, State Revenue Agent, Use, etc.,
vs.
THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY *et al.* # 2788.

And now comes the defendant The Yazoo & Mississippi Valley Railroad Company, by its attorneys, Mayes & Harris, and for its separate plea to the said declaration herein filed against it says:

1. That the said Louisville, New Orleans & Texas Railway Company was authorized by and organized under an act of the legislature of the State of Mississippi entitled "An act to authorize the Memphis & Vicksburg Railroad Company and the Mississippi Valley and Ship Island Railroad Company to effect a consolidation," approved March 3rd, 1882, as amended by the said act of March 15th, 1884.

2. That on or about the 24th day of October, 1892, the said Louisville, New Orleans & Texas Railway Company was consolidated with and merged in the said defendant, The Yazoo & Mississippi Valley Railroad Company, by the act and deed of the said two companies, as authorized by their respective charters.

3. That during the said year- 1892, 1893, 1894, and 1895, and in due and proper time, the said Yazoo & Mississippi Valley Railroad Company delivered to the tax collector of each and every of said named counties an affidavit made by the president of said
64 company or by the cashier thereof that the amount of said taxes had actually and in good faith been paid and ap-lied by said company (or by the said Louisville, New Orleans & Texas Railway Company) during the said years 1892, 1893, 1894, and 1895 in payment of the debts incurred by the said Louisville, New Orleans & Texas Railway Company in the construction of its said railroad, or money borrowed by said last-named company upon lands or otherwise, to be used in constructing said road, or paying debts incurred by said last named company in constructing the same, whereupon the said several tax collecters did each and every one give *ton* defendant a receipt in full for the amount of said taxes, respectively, and that in the said years 1892, 1893, 1894, and 1895, respectively, the profits of said Louisville, New Orleans & Texas Railway Company had never enabled it to declare and pay to its stockholders an annual dividend of eight per cent. on its capital stock over and above the payment of its debts and liabilities, nor had the profits of this defendant enabled it to declare and pay such dividend.

4. That it is not true, as in said declaration is falsely alleged, that

on or about July 21st, 1892, or at any other time, all the railroads and property of said Louisville, New Orleans & Texas Railway Company was purchased by the Illinois Central Railroad Company or any part thereof; nor is it true, as in said declaration is falsely alleged, that on or *abot* about the 25th day of October, 1892, or at any other time, the said Illinois Central Railroad Company turned over, delivered to, and merged all said property and railroads of said Louisville, New Orleans & Texas Railway Company or any part thereof into the railroad system and property of the said Yazoo & Mississippi Valley Railroad Company; nor is it true, as in said declaration is falsely alleged, that the said Illinois Central Railroad Company then and there owned and controlled the said railroad system and property of said Yazoo & Mississippi Valley Railroad Company to any other extent and degree than that it held and operated the same under a lease for a term of years; nor is it true, as in said declaration is falsely alleged, that in said October, 1892, or at any time, the said Yazoo & Mississippi Valley Railroad Company began and has since continued operating all said railroads and railroad system of said Louisville, New Orleans & Texas Railway Company or any part thereof under the direction and control of the said Illinois Central Railroad Company; nor is it true, as in said declaration is falsely alleged, that the said Illinois Central Railroad Company did at any time or in any way become liable for or undertake to pay or assume the liabilities, debts, or obligations of the said Louisville, New Orleans & Texas Railway Company or any of them.

All of which said defendant is ready to verify. Wherefore it prays judgment, etc.

MAYES & HARRIS,
Att'ys for the Y. & M. V. R. R. Co.

Endorsed: Filed Dec. 27, 1893. F. B. Neal, clerk, by W. H. Harris, D. C.

Demurrer to Plea of Yazoo & Mississippi Valley R. R. Company.

THE STATE OF MISSISSIPPI, *Hinds County.*

Circuit Court.

WIRT ADAMS, State Revenue Agent, Use, &c.,
vs.
YAZOO & MISSISSIPPI VALLEY R. R. CO. ET AL. } 2788.

Now comes the plaintiff, by his attorneys, and demurs to the plea of the defendant The Yazoo & Mississippi Valley Railroad Company, and says the same is insufficient in law, and assigns the following causes of demurrer:

1st. Said plea is no defense.

2nd. It does not allege that all taxes to which said Louisville,

New Orleans & Texas Railway Company were subject for
65 said year 1892 had in fact been applied by said defendant to the payment of the debts and liabilities which said company had incurred in the construction of said road, or of money borrowed by said company upon lands of otherwise to be used in constructing said road, or in paying ddebts incurred by said company in constructing the same.

3rd. It does not allege that the domicil of said Louisville, New Orleans & Texas Railway Company or any domicil of said company was fixed at the city of Vicksburg, or that the business of said company or any part of its line was done and transacted and records kept at said Vicksburg, or that said company had any president or secretary at said Vicksburg on whom process could be served.

4th. It does not allege that said defendant or said Louisville, New Orleans & Texas Railway Company filed any written statement with its sched- with said railroad commission in 1892 claiming said exemption, or citing the law under which claim of exemption is made, and in the absence of such written statement said assessment cannot be collaterally attacked.

5th. Said plea is no defense to the claim for taxes on that part of said Louisville, New Orleans & Texas railroad called the Riverside division or Bolivar loop.

6th. It is no defense to the claim for taxes on what is in said declaration called the Riverside division, special charter.

7th. It is no defense to the claim for taxes on what is therein called the Helena, broad guage.

8th. It is no defense to the claim for taxes on what is therein called the Helena branch, narrow guage.

9th. It is no defense to the claim for taxes on what is therein called the Bayou Sara branch.

—. It is no defense to the claim for taxes on what is therein called the Tallahatchie branch.

11th. Said plea is no defense to the county taxes.

CRITZ & BECKETT,
Att'ys for Plaintiff.

Order Overruling Demurrer.

July Term, 1894.

JULY 26, 1894.

WIRT ADAMS, State Revenue Agent, Use, &c.,
vs.
THE YAZOO & MISSISSIPPI VALLEY R. R. CO. ET AL. } 2788.

This day coming on to be heard this cause on the demurrer of the plaintiff herein to the plea interposed by the Yazoo & Mississippi Valley Railroad Company, and the court, being satisfied in the premises, doth order and adjudge that the said demurrer be, and the same is hereby, overruled, and the said plea be, and the same is hereby, sustained, and leave is hereby granted to the said plaintiff to reply to the said plea.

66 *Replications.*

THE STATE OF MISSISSIPPI,
Hinds County.

Circuit Court, 1st District.

WIRT ADAMS, State Revenue Agent, Use, &c.,
vs.
YAZOO & MISSISSIPPI VALLEY R. R. CO. ET AL. } 2788.

Now comes the plaintiff, and, for replications to the plea of the defendant The Yazoo & Mississippi Valley Railroad Company, says *precludi non*, &c., because he says:

1st. He denies the allegation in said plea contained that the said Louisville, New Orleans & Texas Railway property was not purchased by the said Illinois Central Railroad Company, but alleges that it was so purchased as in the declaration alleged; and of this he puts himself upon the country, and the defendant doth the like.

2nd. And for a second replication he says he denies that the profits of the said Louisville, New Orleans & Texas Railway Company was not sufficient to enable it to declare and pay an annual dividend of eight per cent. upon its proper capital stock over and above the payment of its due debts and liabilities, which said company had incurred in the construction of said railroad, and money borrowed by said company upon lands or otherwise to be used in the construction of the same or in paying debts incurred by said company in constructing the same; and of this he puts himself upon the country.

3. And for a further replication he says he denies that all taxes for which said Louisville, New Orleans & Texas Railway Company was liable for the year 1892–'3 were actually and in good faith applied by said company during the year in payment of the debts and liabilities which said company had incurred in the construction of said railroad or money borrowed by said company upon lands or otherwise to be used in constructing the same or paying debts incurred by said company in constructing the same; and of this he puts himself upon the country.

4. And for a further replication plaintiff says the said Louisville, New Orleans & Texas Railway Company did not and has not fixed its domicil in the city of Vicksburg, and did not transact and has not done and transacted its business there, and did not keep and has not kept its records there, as required in section 24 of the act entitled "An act to incorporate the New Orleans, Baton Rouge, Vicksburg and Memphis Short Line Railroad Company," approved March —, 1882, whereby and by reason whereof its charter became forfeited and it became liable to taxation under the laws and constitution of this State; and this he is ready to verify, &c.

5. And for a further replication the plaintiff says that by the consolidation of said Louisville, New Orleans & Texas Railway Company and said Yazoo & Mississippi Valley Railroad Company a

new corporation was formed after the adoption of the present constitution of this State, and that by reason thereof all the property of said consolidated company became and was liable to taxation; and this he is ready to verify.

6. And for a further replication the plaintiff says that the right to consolidate conferred in the charters of the Louisville, New Orleans & Texas Railway Company and the Yazoo & Mississippi Valley Railroad Company were grants of corporate franchise, and that no organization or consolidation took place thereunder till after the adoption of the present constitution of this State, and said consolidation was made under *an* and is governed by the charter of the Yazoo & Mississippi Valley Railroad Company, which is now shown to the court here, and which does not exempt the consolidated company from taxation, and that thereby and by reason thereof said consolidated company became and was liable to taxation; and this he is ready to verify, &c. Said charter of the
67 Yazoo & Mississippi Valley Railroad Company, in the Acts of 1882, pages 838–849, entitled "An act incorporating the Yazoo & Mississippi Valley Railroad Company and declaring its powers," approved Feb'y 17, 1882, is herewith filed and made part of this replication.

7. And for a further replication the plaintiff says that no schedule of the gross amount of receipts or of net profits for the year preceding the year 1891 or 1892 or the fiscal year 1891–'92 from passengers and freights, or of the proportion thereof earned within and from this State by the property of said Louisville, New Orleans & Texas Railway Company, was ever filed with said railroad commission, nor was any statement whatever filed of any of said property claimed to be exempt from taxation, nor was any law cited under which any such claim was made as was required by the Code of 1892, section 3875, and plaintiff avers that in consequence thereof any pretended exemption was waived for that assessment and the fiscal year 1892–1893, and said State railroad assessor- properly assessed said property under section 3877 of said Code; and this he is ready to verify, &c.

8. And for a further replication the plaintiff says that the decision of said State railroad assessors finding said property liable to taxation and assessing the same, as alleged in said declaration, has never been vacated, reversed, or annulled, but still stands in full force and effect, and that everything required of said assessors of clerks under said Code of 1892, sections 3877 to 3883, inclusive, was duly done, performed, and complied with, thereby making said assessment a public record, and the plaintiff pleads said record as an estoppel to defendant's claim of exemption; and this he is ready to verify, &c.

9. And for a further replication the plaintiff says that the said Louisville, New Orleans & Texas Railway Company, at and soon after building said railroad in 1886, issue- interest-bearing bonds secured by mortgage on its said property to the following amounts, viz: $13,805,000.00, bearing interest at the rate of 4 % per annum; $8,731,000.00, bearing interest at the rate of 5 % per annum,

$8,347,000.00, bearing interest at the rate of 6 % per annum, aggregating $30,883,000.00, and sold and disposed of the same to non-residents of this State, and then divided the proceeds, except what was required to construct said road, among the officers and stockholders of said company, also non-residents of this State, so that none of the same or proceeds thereof are taxable in this State, when in fact it did not take or require more than about $4,000,000.00 to construct said road as contemplated by its charter, and so the plaintiff avers that said Louisville, New Orleans & Texas Railway Company so mixed and mingled its liabilities for money used in constructing said road and for money to divide out among its officers and stockholders as aforesaid that it became and was and is impossible to appropriate the taxes to the liabilities contemplated in said charter, or to tell what rate of interest the construction debt bears, or to make a true affidavit as in said charter is required, whereby and by reason whereof said pretended exemption was waived, and plaintiff further avers that by such illegal execution and issuance of bonds said company forfeited its charter; and this he is ready to verify, &c.

10. And for a further replication the plaintiff says that said Louisville, New Orleans & Texas Railway Company, previous to January 1st, 1891, issued and disposed of to its incorporators and others to make them stockholders 48,242 shares of stock of the par value of $100.00 each for little or no consideration and much less than the face value of the shares, and that said company was not authorized by its charter or the charters of said consolidated roads to issue gratuitous or paid-up stock without its full consideration, and the plaintiff avers that the profits of said company was sufficient to enable it to pay an annual dividend of 8 % upon the full amount paid or agreed to be paid for its capital stock over and above its current due liabilities for proper debts incurred in and about constructing said road as contemplated by its charter, and said property thereby became liable to taxation; and the plaintiff further avers that by said illegal issue and disposition of its
68 stock it has become impracticable to determine accurately when the profits of said company will enable it to pay an annual dividend of 8 % upon its proper capital stock as aforesaid, and said company thereby waived any claim to exemption from taxation, and also forfeited its charter; and this he is ready to verify.

11. And for a further replication the plaintiff says that previous to said assessment the said Illinois Central Railroad Company had paid off, by novation, with its own bonds, all the debts and liabilities which said Louisville, New Orleans & Texas Railway Company had incurred in the construction of its said road, and money borrowed by said company upon lands or otherwise to be used in constructing the same or paying debts incurred in constructing the same and its profits enabled it to pay a dividend of 8 % on its proper stock, and that thereby said appropriation of taxes ceased and said property became liable to taxation; and this he is ready to verify.

12. And for a further replication the plaintiff says that on or about March 1st, 1888, the entire stock of the original Yazoo & Mississippi Valley Railroad Company was 5,005 shares, of the par value of $100.00 each, of which the said Illinois Central Railroad Company had acquired and then owned 4,993 shares, and 8 other shares were then owned by its officers and stockholders; that said Yazoo & Mississippi Valley Railroad Company so owned and controlled did then and there lease all its property, franchises, rights, privileges, and immunities to said Illinois Central Railroad Company for the period from said March 31st, 1888, to June 1st, 1952, and the plaintiff further avers that about July 1st, 1892, and previous thereto the entire stock of the Mississippi Valley Company, a corporation chartered and organized under the laws of this State under an act entitled "An act to incorporate the Mississippi Valley Company of McComb city, Miss.," approved April 2nd, 1872, and an act supplemental to an act which passed the Senate March 7th, 1872, and passed the House of Representatives March 25th, 1872, entitled "An act to incorporate the Mississippi Valley Company, not yet approved," approved April 2nd, 1872, amounted to 6,000 shares, of the par value of $100.00 each, of which the said Illinois Central Railroad Company had acquired and then owned 5,910 shares in its own name, and had acquired and given to or placed in the name of nine of its directors, officers, and stockholders ten shares each, in order to enable them to act as directors and officers of said Mississippi Valley Company under its charter now shown to the court here and a copy thereof filed as a part of this replication as Exhibit "A" thereto, a copy of said lease of the Yazoo & Mississippi Valley Railroad Company being also shown to the court here and filed as Exhibit "B" to this replication; and the plaintiff further avers that at and during said time the entire stock of said Louisville, New Orleans & Texas Railway Company amounted to 48,242 shares, of the par value of $100.00 each, of which said Mississippi Valley Company so owned and controlled, acquired subsequent to November 1st, 1890, and then owned 37,539 shares, and the officers and stockholders of said Illinois Central Railroad Company had so acquired and then owned a large portion of the balance of said shares, and the plaintiff avers that subsequent to said November 1st, 1890, the said original Yazoo & Mississippi Valley Railroad Company and Louisville, New Orleans & Texas Railway Company, owned and controlled as aforesaid, were consolidated as aforesaid by the vote of the stocks of said Yazoo & Mississippi Valley Railroad Company and Louisville, New Orleans & Texas Railway Company, owned and controlled as aforesaid, and that said consolidation was not authorized under the charters of said companies and the laws of this State, but that said consolidated Yazoo & Mississippi Valley Railroad Company holds the railroad and property of said Louisville, New Orleans & Texas Railway Company *ultra vires* and liable to taxation; and this he is ready to verify, &c.

13th. And for a further replication the plaintiff says that on or about March 31st, 1888, the entire stock of the original Yazoo &

Mississippi Valley Railroad Company was 5,005 shares, of the par value of $100.00 per share, of which the said Illinois Central Railroad Company had acquired and then owned 4,993 shares, and 8 other shares were then and there owned by its officers and
69 stockholders; that said Yazoo & Mississippi Valley Railroad Company so owned and controlled, did then and there lease all its property, franchises, rights, powers, privileges, and immunities to said Illinois Central Railroad Company for the period from said March 31st, 1888, to June 1st, 1952, a copy of which lease is now shown to the court here and filed as Exhibit "B" to plaintiff's 12th replication; and the plaintiff further avers that about July 1st, 1892, and previous thereto the entire stock of the Mississippi Valley Company, a corporation chartered and organized under the laws of this State, a copy of whose charter is now shown to the, court here and filed as Exhibit "A" to plaintiff's 12th replication amounted to 6,000 shares of the par value of $100.00 each, of which the said Illinois Central Railroad Company had acquired and then owned 5,910 shares in its own name, and had acquired and given to or placed in the name of nine of its directors, officers, and stockholders ten shares each in order to enable them to act as directors and officers of said Mississippi Valley Company under its charter. The plaintiff further avers that at and during said time the entire stock of said Louisville, New Orleans & Texas Railway Company amounted to 48,242 shares of the par value of $100.00 each, of which the said Mississippi Valley Company, so owned and controlled, acquired, subsequent to April 2nd, 1892, and then owned 37,539 shares, and the officers and stockholders of said Illinois Central Railroad Company had so acquired and then owned a large part of the balance of said shares, and the plaintiff avers that subsequent to said April 2nd, 1892, the said original Yazoo & Mississippi Valley Railroad Company and Louisville, New Orleans & Texas Railway Company, owned and controlled as aforesaid, were consolidated as aforesaid by the vote of the stocks of said Yazoo & Mississippi Valley Railroad Company and Louisville, New Orleans & Texas Railway Compan*ies*, owned and controlled as aforesaid, and that said *said* railroads of said Louisville, New Orleans & Texas Railway Company, one the one side, and said Illinois Central Railroad Company, with said original Yazoo & Mississippi Valley railroad as a branch thereof, on the other side, were then and there competing and parallel lines, and said consolidation was not authorized under the charter of any of said railroad companies and the laws of this State, and said property of said Louisville, New Orleans & Texas Railway Company is held by said Yazoo & Mississippi Valley Railroad Company *dehors* its charter and liable to taxation; and this *it* is ready to verify, &c.

14. And for a further replication to said plea, except as to the main line and Tallahatchie branch, the plaintiff says that all the railroads and property, the taxes on which are sued for in the declaration, except what is therein denominated the "main line" and "Tallahatchie branch," were acquired by said Louisville, New Orleans & Texas Railway Company by purchase or under other

charters and is liable to taxation, and is not protected by the charter of said Louisville, New Orleans & Texas Railway Company by the defendant pleaded; and this he is ready to verify, &c.

CRITZ & BECKETT,
Attorneys for Plaintiff.

THE STATE OF MISSISSIPPI, }
Hinds County. }

Before me, clerk of the circuit court in and for the 1st district of said county, this day personally appeared the plaintiff, Wirt Adams, who, being duly sworn, deposes and says that he is advised and believes that he has just ground — the several matters proposed to be traversed by him in the foregoing replications, and that to the best of his knowledge, information, and belief the several matters sought to be pleaded by him by way of confession and avoidance in the other foregoing replications are respectively true in substance and in fact.

WIRT ADAMS.

Sworn to and subscribed before me this Sept. 19th, 1894.

F. B. NEAL, *Clerk*,
By W. J. BROWN, JR., *D. C.*

Endorsed: Leave is given to file the foregoing fourteen replications. J. B. Chrisman, judge 7th circuit court district. Filed Oct. 27, 1894. F. B. Neal, clerk, by W. J. Brown, Jr., D. C.

70 S. B. No. 186.

An act to incorporate the Mississippi Valley Company.

SECTION 1. Be it enacted by the legislature of the State of Mississippi, That J. B. Fant, Thomas J. Malone, A. J. McConico, A. M. West, G. Burgland, R. P. Weiley and H. L. Duncan, and their associates, successors and assigns be and they are hereby incorporated under the name and style of the "Mississippi Valley Company" and by that name, style and title shall have perpetual succession, and all the privileges, franchises and immunities by law incident to a corporation, may sue and be sued plead and be impleaded, complain and defend in all courts of law and equity, and may purchase receive hold and enjoy, to them their successors and assigns, all such lands tenements leasehold estates and hereditaments, goods and chattels, securities, and estates, real, personal and mixed of what kind and quality soever, and may sell and convey the same at pleasure, and shall also be authorized to erect residences, depots, engine-houses, tracks, shops and other improvements necessary for the purposes of the said corporation as hereafter defined by the second section of this act; and the same may from time to time sell, convey, mortgage and submortgage, encumber, charge, pledge, grant, lease, sublease, aline and dispose of, and also make and have a common seal, and the same to alter and renew at pleasure, and ordain, establish and put in execution such by-laws or ordinances

rules and regulations, as may be necessary or convenient for the government of the said corporation, not being contrary to the constitution and laws of this State, and generally may do all and singular the matters and things which to them shall appertain to do for the well being of the said corporation and the management and ordering of the affairs and business of the same.

SECTION 2. Be it further enacted, That the corporation hereby created shall have power to contract with any person or per-
71 sons firms, corporations or any other parties whomsoever, formed or existing, or that may hereafter exist in any way; that said parties or any of them may have authority to do to build, construct, maintain or manage any work or works, public or private, which may tend or be designed to improve, increase, facilitate or develop trade, travel or the transportation and conveyance of freight, live stock and passengers and any other traffic by land or water from or to any part of the United States or the territories thereof, and the said company shall also have power and authority to supply or furnish all needful material, labor, implements, instruments and fixtured of any and every kind whatsoever, on such terms and conditions as may be agreed upon by and between the parties respectively, and also to purchase, erect, construct, maintain or conduct in its own name, and for its own benefit or otherwise, any such works, public or private, as they may by law be authorized to do, (including also herein lines for telegraphic communication) and to aid co-operate, and unite with any other company, person, or firm in so doing.

SECTION 3. Be it enacted further, That the company hereby created shall also have the power to make purchases and sales, for investments in the bonds, stocks and securities of the companies, and to make advances of money and of credit to other companies, and to aid in like manner contractors and manufacturers, and to receive and hold on deposit, or as collateral or otherwise, any estate or property real or personal including the notes, stocks, obligations and accounts of individuals and companies and the same to purchase, collect, adjust and settle, and also to pledge, sell and dispose thereof on such terms as may be agreed between them and the parties contracting with them and also to endorse and guarantee the payment of the obligations of other corporations, firms and individuals, and to assume, become responsible for, execute and carry out any contracts, leases or subleases made by any company, to or with any other company or companies, individuals or firms whatsoever, provided that nothing herein contained shall be
72 construed as to give the said corporation any banking privileges or franchises, or the privileges of making issuing or putting in circulation any notes, bills or other paper of any other bank to circulate — money, provided, that nothing herein contained shall be construed as preventing this company from availing themselves of the provisions of the act of Congress for a national system of banking.

SECTION 4. Be it enacted further, That the company hereby created shall also have power to enter upon and occupy the lands of indi-

viduals or companies (on making payment therefor or giving security according to law) for the purpose of erecting, constructing, maintaining or managing any public work such as is provided for or mentioned in the second section of this act, and to construct and erect such works thereon and also buildings, improvements, structures, roads or fixtures as may be necessary or convenient for the purpose of said company, under the powers herein granted, and to purchase, make, use and maintain any works or improvements connecting, or intended to be connected with the work of the said company, and to merge, consolidate or unite with the said company the improvements, property and franchises of any other company or companies on such terms and conditions, as the said company may agree upon, and to fix and regulate the tolls or charges to be charged or demanded for any freight property or passengers travelling over or passing over any improvement erected, managed or owned by the said company on any merchandise or property transported over any road whatsoever by said company, and to make from time to time dividends from the profits made by said company. Any railroad or the several railroads managed by said company shall be taxable as provided in their charter or other laws of the State and in proportion to their length within this State, respectively, and the property of said "Mississippi Valley Company" that is within the limits of the State, and all its income derived from its business within this State, shall forever be subject to taxation, the same as that of individuals, but its property beyond the limits of this
73 State, and all its income derived from its business beyond the limits thereof shall not be subject to taxation nor shall it at any time be subject to a privilege tax, or any other tax, except as is stipulated in the constitution of the State or as provided in the acts of Congress.

SECTION 5. Be it further enacted, That the capital stock of said company shall consist of one thousand shares of the value of fifty dollars each, being fifty thousand dollars and with the privilege of increasing the same by a vote of the holders of a majority of the stock present at any annual meeting or special meeting to such an amount as they may from time to time deem needful, and the corporators or any three of them named in the first section of this act, shall have power to open books for subscription at such times and places as they may deem expedient and when not less than five hundred shares shall have been subscribed and twenty per centum thereon shall have been paid in.

The shareholders may elect not less than three nor more than nine directors to serve until the next annual election or until their successors shall be duly elected and qualified, and the directors so elected may and the- are hereby authorized and empowered to have and to exercise in the name and in behalf of this company all the rights and privileges which are intended to be hereby given subject only to such liabilities as other shareholders are subject to which liabilities are no more than for the payment to the company of the sums due or to become due on the shares held by them, over and

above this no stockholder shall be individually liable and should the capital stock at any time be increased, the stockholders at the time of such increase shall be entitled to a *pro rata* share of such increase, upon the payment of the installment thereon duly called for and whenever all increase of capital stock is made, a certificate thereof ful-y executed under the corporate seal of the company and signed by the president and secretary, shall be filed with the secretary of state before the same shall be deemed valid.

SECTION 6. Be it further enacted, That the principal
74 office of the said company shall be in Water Valley until otherwise ordered and hereinafter provided, but the directors under such rules and regulations as they may prescribe, may establish branches or agencies in other parts of the State or elsewhere, all of the directors of said company shall be citizens of the United States and reside therein.

SECTION 7. Be it further enacted, That the directors shall be elected annually by the stockholders on the first Tuesday of June of each year, and said directors shall elect from their number at the first meeting of the board after their election a president, and shall also have power to elect from their number or otherwise a vice-president, a treasurer and secretary, and such other officers, clerks, and agents as the business of the company may require, all elections for directors shall be by ballot and every stockholder shall be entitled to one vote for each share of stock held by him either in person or by proxy, but no person shall be eligible as director who is not a stockholder to the amount of ten shares. At the annual or special meeting a quorum shall consist of stockholders in person or by proxy owning at least one-half the capital stock.

SECTION 8. Be it further enacted, That ten days' notice shall be given by publication in two newspapers published in the State of Mississippi of the time and place of the annual election, which election shall be conducted by three stockholders, one of which shall act as judge, and the other two as inspectors.

SECTION 9. Be it further enacted, That the board of directors shall make all by-laws necessary for conducting the business of the company, which by-laws shall at all times be accessible to persons transacting business with them. The said directors shall have power by a vote of a majority of their number at any meeting of the board to change the name of the said corporation, and the location of its principal office, or either, but no such name thus adopted shall be deemed valid until a truly certified certificate of its adoption shall be filed with the secretary of state as above pro-
75 vided in case of an increase of stock. The said company shall have, hold and enjoy all the rights, powers, privileges and immunities hereby granted, and such other powers and privileges as belong to corporations by the laws of this State. The directors shall have power to require payment of the amount remaining unpaid on the stock of said company, at such times and in such proportions as they shall think proper, the said assessment to be made as the by-laws of said company shall direct.

SECTION 10. Be it further enacted, That this act take effect and be in force from and after its passage.

Passed the house of representatives March 25, 1872.

JOHN R. LYNCH,
Speaker of the House of Representatives.

Passed the senate March 7th, 1872.

JAS. BENNETT,
President of the Senate.

Approved April 2nd, 1872.

R. C. POWERS, *Governor.*

STATE OF MISSISSIPPI,
Office of Secretary of State.

JACKSON, MISS., *June 28th*, 1894.

I, George M. Govan, secretary of state, do certify that the act hereto attached entitled "An act supplemental to and amendatory of an act which passed the senate March 7th, 1872, and passed the house of representatives March 25, 1872, entitled "An act to incorporate the Mississippi Valley Company," not yet approved, approved April 2nd, 1872, is a true and correct copy of the original now in file in this office.

Given under my hand and the great seal of the State of Mississippi this 28th day of June, 1894.

GEO. M. GOVAN,
Secretary of State.

76 EXHIBIT TO REPLICATIONS.

This indenture, made the 31st day of March, A. D. 1888, by and between the Yazoo & Mississippi Valley Railroad Company, a corporation created under the laws of the State of Mississippi, herein designated as party of the first part, and the Illinois Central Railroad Company, a corporation created under the laws of the State of Illinois, hereinafter designated as the party of the second part—witnesseth:

1. That for the considerations hereinafter mentioned, the said The Yazoo & Mississippi Valley Railroad Company, party of the first part aforesaid, being thereunto duly authorized by law and also by the action of its executive committee and its stockholders, doth hereby demise and lease to the Illinois Central Railroad Company, party of the second part aforesaid, the railroad and the telegraph line of the party of the first part which are now built and in operation, consisting of its railroad extending from its junction with the Chicago, St. Louis and New Orleans railroad at or near Jackson, in the county of Hinds and State of Mississippi, thence through Yazoo City to Parsons, in the State of Mississippi, and also the railroad extending from Tchula junction through Lexington to Durant, Mississippi, in all one hundred and forty miles of railroad, more or less (it being all the railroads which the party of the first part has now in operation) including the road-bed, superstructure and rights

of way of the railroads aforesaid, and the side tracks, spurs, bridges, station-houses, and station grounds, engine-house and grounds, warehouses and grounds, turn-tables, water tanks, fences and all other buildings or structures, fixtures, tools or appurtenances of, in or to the said railroads belonging, which are now owned by the party of the first part.

Including also the engines and cars and other rolling stock of every description now owned by the party of the first part, and all and singular the easements, servitudes, hereditaments and appurtenances of said railroads and the right and franchise to use, operate and enjoy said divisions or parts of the railroad system which the party of the first part is by its charter authorized to build or acquire, being all that it has up to this time built or acquired and put in operation. Including also the franchise and right, as authorized and granted by its said charter, to fix, demand and collect toll or charges for transporting passengers and freight, mail or express matter thereon, as fully as the party of the first part could under its charter do. Including also the exemption from taxation of the leased premises aforesaid under the provisions of said charter. Together with all the telegraph lines, poles, wires, batteries and all its fixtures and appurtenances which are now owned and operated by the party of the first part along said railroads or elsewhere. (But this lease does not include or encumber any part or division of the railroad or telegraph line, or their appurtenances, which the party of the first part may hereafter build or acquire; or any of its lands which are now owned except those which are appurtenant to the leased premises and used as rights of way or station grounds, or which are situated within one hundred feet from the centre of the main or side tracks of the railroads so leased as aforesaid; or any of its charter rights, privileges, powers, exemptions or franchises, except such as are necessary to the full enjoyment, use, control or dominion of the leased premises aforesaid by said lessee during the term of this lease.) To have and to hold the leased premises aforesaid, with the appurtenances, unto the party of the second part aforesaid, and its successors, from the date of this indenture until and to the first day of June, A. D. nineteen hundred and fifty-two (1952).

2. And the party of the first part covenants that it will at any and at all times during the continuance of this lease, upon the reasonable request of the party of the second part, do all acts, and sign, seal, acknowledge and deliver all such further or other papers, deeds, transfers or agreements which are or may be necessary to assure and make certain unto said party of the second part the leased premises aforesaid and the possession, use and enjoyment of every part thereof for and during the full term of this indenture.

77 3. And the party of the second part hereby covenants and agrees, that it will, during the term that this indenture may continue in force, operate said leased railroads and telegraph lines in compliance with the charter of the party of the first part, and will indemnify and hold harmless the said party of the first part from all and every of the liabilities or penalties which may arise

from or be founded on its acts or omissions as such lessee in the use of the leased premises in anywise whatsoever; and at the termination of this lease will surrender and restore the possession and control of the leased premises to the party of the first part in as good condition as the same now are, and that as to anything included in this lease, which from any cause cannot be returned in as good condition as it now is, it will replace the same by one as good as the one which it receives under this lease.

4. The party of the second part furtehr covenants and agrees that it will pay to the party of the first part the net earnings of said leased premises, semi-annually, to wit, on the first days of June and December in each year, and that said net earnings shall amount to at least one hundred thousand dollars per annum during the continuance of this lease, and that in case said net earnings do not amount to said last mentioned sum it will pay such an amount in addition to such year's net income as shall, together such net income, amount to the sum of one hundred thousand dollars for that year.

5. It is covenanted and agreed by both parties hereto that this lease may be terminated upon six months' written notice by either party to the other of its desire to end the same: and at the time so fixed in said notice, if the same be six months or more from the time of the service thereof on the other party, this lease shall be as fully determined and ended as if said date was herein declared to be the end of the term of this lease.

6. The covenants and agreements hereinbefore set out are not only in behalf of and by the respective parties hereto, but also in behalf of and binding on their successors, respectively, whether the same be so expressed in each covenant or not.

In witness whereof, the Yazoo and Mississippi Valley Railroad Company and the Illinois Central Railroad Company have hereunto set their respective names and common seals, this the day and date first above written.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY,

[SEAL.] By STUYVESANT FISH, *President.*

Attest: JOHN ANTHON, *Secretary.*

ILLINOIS CENTRAL RAILROAD COMPANY,

[SEAL.] By STUYVESANT FISH, *President.*

Attest: A. G. HACKSTAFF, *Secretary.*

STATE OF NEW YORK, *City and County of New York,* } *ss:*

Be it remembered that on this 10th day of April, A. D. 1888, before me, William H. Clarkson, a commissioner of the State of Mississippi in and for the State of New York, residing in said city of New York, and notary public for New York county, personally appeared the foregoing named Stuyvesant Fish, president of the

Yazoo & Mississippi Valley Railroad Company, and John Anthon, secretary thereof, who acknowledged that they signed, sealed, and delivered the foregoing instrument, on the day and year therein named, as their voluntary act and deed and the voluntary act and deed of said company.

And the said Stuyvesant Fish and John Anthon, being duly sworn, deposed and said that they were the above-described officers of said company; that the seal affixed to the foregoing instrument, purporting to be the corporate seal of said company, was such corporate seal; that it was affixed thereto by order of the executive committee and the stockholders of said company, and that they signed their names thereto by the same authority as the president and secretary of said company respectively.

78 And on the same day before me also personally appeared the said Stuyvesant Fish, as the president, and A. G. Hackstaff, secretary, of the Illinois Central Railroad Company, who acknowledged that they signed, sealed, and delivered the foregoing instrument as their voluntary act and deed as such officers of said company and the voluntary act and deed of said company.

And the said Stuyvesant Fish and A. G. Hackstaff being by me first duly sworn, they did depose and say that the said Stuyvesant Fish was the president of the Illinois Central Railroad Company; that he, the said A. G. Hackstaff, was the secretary of the same company; that the seal affixed to the foregoing instrument was the corporate seal of said company; that it was affixed thereto by order of the board of directors of said company, and that they signed their names thereto by the like order as the president and secretary of said company, respectively.

Witness my hand and official seals.

[Commissioner's Seal.]

[NOTARY'S SEAL.] WILLIAM H. CLARKSON,
Commissioner for the State of Mississippi in New York and Notary Public for New York County, N. Y.

Declaration in No. 2916.

THE STATE OF MISSISSIPPI, }
Hinds County. }

Circuit Court, First District.

WIRT ADAMS, State Revenue Agent, for the Use of The State of Mississippi, Plaintiff,
vs.
THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY *et al.*, Defendants. } No. 2916.

And now comes the plaintiff, Wirt Adams, State revenue agent, who sues for the use of The State of Mississippi and of the counties therein of De Soto, Tunica, Coahoma, Bolivar, Washington, Sharkey, Issaquena, Warren, Claiborne, Jefferson, Franklin, Amite, Wilkin-

son, Tallahatchie, and Leflore, and of the towns of Tunica, in Tunica county; Lula, Coahoma, and Clarksdale, in Coahoma county; Shelby, Cleveland, and Shaw, in Bolivar county; Leland and Hollandale, in Washington county; Rolling Fork, in Sharkey county; Vicksburg, in Warren county; Port Gibson and Russum, in Claiborne county; Harriston, in Jefferson county; Harrisburg, Roxie, and Knoxville, in Franklin county; Gloster, in Amite county; Centerville, in Wilkinson county; Jonestown, in Coahoma county; Friars Point, in Coahoma county, and Rosedale and Gunnison, in Bolivar county, under and by virtue of the statutes in such cases made and provided, and complains of the defendants, The Yazoo & Mississippi Valley Railroad Company, a corporation chartered by and organized under the laws of the State of Mississippi, and the Illinois Central Railroad Company, a foreign corporation chartered by and organized under the laws of the State of Illinois, and both having a part of their lines of railway, depots, and agents in said first distr-t of Hinds county, in an action of debt on the statutes in such cases made and provided—

For that whereas, in October of the year 1892, the railroads and property of the Louisville, New Orleans & Texas Railway Company, a corporation organized under the laws of the State of Mississippi, became the property of the said defendants, The Yazoo & Mississippi Valley and Illinois Central Railroad Companies, and has ever since been owned by them, and was duly assessed for taxation in and for each of the years 1893 and 1894, in said State of Mississippi, under and in accordance with its laws, by its Mississippi railroad commission as State railroad assessors, after objections heard and considered, and was also duly classified for privilege taxation by said railroad commission under said laws for each of said years, the main line being classified as first class, and the Riverside division and Helena and Tallahatchie branches as third class, and the said assessment rolls were duly sent to the clerks of the boards of supervisors of said several counties and by them filed as required by law, and the said assessments were as follows:

79

For the main line for 1893:

In De Soto county	$164,883.00
In Tunica county	376,719.00
In Coahoma county	392,803.00
In Bolivar county	562,038.00
In Washington county	416,038.00
In Sharkey county	420,711.00
In Issaquena county	82,274.00
In Warren county	594,821.00
In Claiborne county	256,601.00
In Jefferson county	251,227.00
In Franklin county	271,776.00
In Amite county	209,809.00
In Wilkinson county	144,330.00

For the year 1894:

In De Soto county	164,427.00
In Tunica county	376,639.00
In Coahoma county	392,081.00
In Bolivar county	562,788.00
In Washington county	416,836.00
In Sharkey county	420,471.00
In Issaquena county	82,274.00
In Warren county	580,821.00
In Claiborne county	257,016.00
In Jefferson county	251,267.00
In Franklin county	270,966.00
In Amite county	209,203.00
In Wilkinson	144,110.00

For the Riverside division for 1893:

In Coahoma county	263,109.00
In Bolivar county	449,934.00
In Washington county	19,590.00
In Issaquena county	50,587.00
In Sharkey county	23,824.00

For the year 1894:

In Coahoma county	262,120.00
In Bolivar county	450,069.00
In Washington county	19,590.00
In Issaquena county	50,497.00
In Sharkey county	23,824.00

For the Helena branch for 1893:

In Coahoma county	95,134.00

For the year 1894:

In Coahoma county, east	73,154.00
West of main line	51,745.00
Total	$124,899.00

For the Tallahatchie branch for 1893:

In Coahoma county	$88,039.00
In Tallahatchie county	129,843.00
In Leflore county	33,730.00

For the year 1894:

In Coahoma county	88,124.00
In Tallahatchie county	129,933.00
In Leflore county	33,691.00

For said town of Tunica:

For 1893, $8,490.00; for 1894, $8,240.00.

For said Lula:

For 1893, $14,460.00; for 1894, $14,460.00.

For said town of Coahoma:

For 1893, $15,130.00; for 1894, $14,830.00.

For Clarksdale:

For 1893, $16,180.00; for 1894, $15,680.00.

For Shelby:

For 1893, $14,380.00; for 1894, $14,330.00.

For Cleveland:

For 1893, $21,300.00; for 1894, $20,950.00.

For Shaw:

For 1893, $7,470.00; for 1894, $7,420.00.

For Leland:

For 1893, $29,500.00; for 1894, $29,500.00.

For Hollandale:

For 1893, $9,060.00; for 1894, $8,830.00.

For Rolling Fork:

For 1893, $13,970.00; for 1894, $13,870.00.

For Vicksburg:

For 1893, $163,881.00; for 1894, $141,881.00.

For Port Gibson:

For 1893, $16,924.00; for 1894, $17,909.00.

For Russum:

For 1893, $9,169 00; for 1894, $9,129.00.

For Harriston:

For 1893, $9,747.00; for 1894, $9,692.00.

For Hamburg:

For 1893, $14,573.00; for 1894, $14,533.00.

For Roxie:

For 1893, $15,079.00; for 1894, $15,079.00.

For Knoxville:

For 1893, $10,937.00; for 1894, $10,897.00.

For Gloster:

For 1893, $15,241.00; for 1894, $15,241.00.

For Jonestown:

For 1893, $3,488.00; for 1894, $3,488.00.

For Friars Point:

For 1893, $10.175.00; for 1894, $10,175.00.

For Rosedale:

For 1893, $6,450.00; for 1894, $6,435.00.

For Gunnison:

For 1893, $10,281.00; for 1894, $10,291.00.

For said Centerville:

For 1893, $10,402.00; for 1894, $10,362.00.

And whereas the levy of State taxes for said year 1893 was five mills, and for said year 1894 six mills on the dollar's worth of taxable property;

81 And whereas the privilege taxes for said years 1893c and 1894 were $20.00 per mile for first-class and $10.00 per mile for third-class railroads for each year;

And whereas the boards of supervisors of said several counties did for the year 1893 duly levy county taxes on said railroad and branches and all other taxable property within their respective limits as follows:

De Soto county	5½ mills.
Tunica county	14 mills.
Coahoma county	8 mills.
Bolivar county	17½ mills.
Washington county	5½ mills.
Sharkey county	7 mills.
Issaquena county	6 mills.
Warren county	12½ mills.
Claiborne county	9 mills.
Jefferson county	7½ mills.
Franklin county	12 mills.
Amite county	7½ mills.
Wilkinson county	6¾ mills.
Tallahatchie county	10 mills.
Leflore county	7½ mills.

And for the year 1894:

De Soto county	5 mills.
Tunica county	7⅔ mills.
Coahoma county	10 mills.
Bolivar county	17½ mills.
Washington county	7 mills.
Sharkey county	7½ mills.
Issaquena county	5 mills.
Warren county	11½ mills.
Claiborne county	8 mills.
Jefferson county	7½ mills.
Franklin county	10½ mills.
Amite county	5 mills.
Wilkinson county	6½ mills.
Tallahatchie county	8 mills.
Leflore county	7½ mills.

And whereas the town taxes duly levied also on the dollar's worth of taxable property for each of said years 1893 and 1894 by the respective municipal authorities *was* as follows:

In Tunica:

For 1893, 3 mills; for 1894, 5 mills.

In Lula:

For 1893, — mills; for 1894, — mills.

In Clarksdale:

For 1893, 12 mills; for 1894, — mills.

In Shelby:

For 1893, — mills; for 1894, — mills.

In Cleveland:

For 1893, — mills; for 1894, — mills.

In Shaw:

For 1893, — mills; for 1894, — mills.

In Leland:

For 1893, 7 mills; for 1894, 7 mills.

In Hollandale:

For 1893, 6 mills; for 1894, 6¼ mills.

In Rolling Fork:

For 1893, — mills; for 1894, — mills.

In Vicksburg:

For 1893, 20 mills; for 1894, 20 mills.

In Port Gibson:

For 1893, 8 mills; for 1894, 8¼ mills.

82 In Russum:

For 1893, — mills; for 1894, — mills.

In Harriston:

For 1893, — mills; for 1894, — mills.

In Harrisburg:

For 1893, — mills; for 1894, — mills.

In Roxie:

For 1893, — mills; for 1894, — mills.

In Knoxville:

For 1893, — mills; for 1894, — mills.

In Gloster:

For 1893, 10 mills; for 1894, 10½ mills.

In Centerville:

For 1893, — mills; for 1894, — mills.

In Jonestown:
For 1893, — mills; for 1894, — mills.

In Friars Point:
For 1893, 3 mills; for 1894, 3 mills.

In Rosedale:
For 1893, — mills; for 1894, — mills.

In Gunnison:
For 1893, — mills; for 1894, — mills.

In Coahoma:
For 1893, — mills; for 1894, — mills.

And whereas the mileage of said railroads in said respective counties was as follows:

For the main line and main track:

In Do Soto county	12.863 miles.
In Tunica county	30.020 miles.
In Coahoma county	30,234 miles.
In Bolivar county	44.322 miles.
In Washington county	32.173 miles.
In Sharkey county	33.527 miles.
In Issaquena county	6.645 miles.
In Warren county	35.768 miles.
In Claiborne county	20.373 miles.
In Jefferson county	19.851 miles.
In Franklin county	21.752 miles.
In Amite county	16.577 miles.
In Wilkinson county	10.826 miles.

For the Riverside division, main track:

In Coahoma county	27.713 miles.
In Bolivar county	47.891 miles.
In Washington county	2.175 miles.
In Issaquena county	5.460 miles.
In Sharkey county	2.615 miles.

For the Helena branch, main track:

In Coahoma county	20.242 miles.

For the Tallahatchie branch, main track:

In Coahoma county	14.109 miles.
In Tallahatchie county	20.445 miles.
In Leflore county	5.045 miles.

And whereas the said Illinois Central Railroad Company and the said Yazoo & Mississippi Valley Railroad Company, when they procured said property of said Louisville, New Orleans & Texas Railway Company, which then and there abandoned its charter and the same became extinct, became liable for all its debts, liabili-

ties, and taxes, and did in fact in writing agree to and did assume and promise to pay all debts, liabilities, and taxes of whatever kind to which said property was then or should thereafter become subject or liable.

83 Whereby and by force of the statutes in such cases made and provided and of said agreement and assumption the said Yazoo & Missis-ippi Valley and Illinois Central Railroad Companies have become and are now indebted to said State of Mississippi and to said several counties and towns for current privileges, State and county and municipal taxes for said fiscal years 1893–'4 and 1894–'5, as follows:

On main line.

In De Soto county for 1893–'4:

Privilege tax	$257.26
State tax	824.16
County tax	906.85

For 1894–'5:

Privilege tax	257.26
State tax	986.56
County tax	822.13

In Tunica county for 1893–'4:

Privilege tax	600.64
State tax	1,883.59
County tax	5,274.06

For 1894–'5:

Privilege tax	600.64
State tax	2,259.83
County tax	2,874.79

In Coahoma county for 1893–'4:

Privilege tax	604.68
State tax	1,964.01
County tax	3,142.42

For 1894–'5:

Privilege tax	604.68
State tax	2,352.48
County tax	3,920.81

In Bolivar county for 1893–'4:

Privilege tax	886.44
State tax	2,810.19
County tax	9,835.66

For 1894–'5:

Privilege tax	886.44
State tax	3,376.72
County tax	9,848.79

In Washington county for 1893–'4:

Privilege tax	643.46
State tax	2,084.18
County tax	2,292.59

For 1894–'5:

Privilege tax	643.46
State tax	2,501.01
County tax	" 917.85

In Sharkey county for 1893–'4:

Privilege tax	670.54
State tax	2,103.55
County tax	2,944.97

For 1894–'5:

Privilege tax	670.54
State tax	2,522.82
County tax	3,153.59

84 In Issaquena county for 1893–'4:

Privilege tax	132.90
State tax	411.37
County tax	493.64

For 1894–'5:

Privilege tax	132.90
State tax	493.64
County tax	411.37

In Warren county for 1893–'4:

Privilege tax	715.36
State tax	2,974.10
County tax	5,779.74

For 1894–'5:

Privilege tax	715.36
State tax	3,484.92
County tax	6,679.44

In Claiborne county for 1893–'4:

Privilege tax	407.46
State tax	1,283.00
County tax	2,275.96

For 1894–'5:

Privilege tax	407.46
State tax	1,542.09
County tax	2,056.12

In Jefferson county for 1893–'4:

Privilege tax	396.74
State tax	1,256.13
County tax	1,884.20

For 1894–'5:

Privilege tax	396.74
State tax	1,507.60
County tax	1,884.50

In Franklin county for 1893–'4:

Privilege tax	435.04
State tax	1,256.13
County tax	3,261.31

For 1894–'5:

Privilege tax	435.04
State tax	1,625.79
County tax	2,845.14

In Amite county for 1893–'4:

Privilege tax	331.54
State tax	1,049.04
County tax	1,573.56

For 1894–'5:

Privilege tax	331.54
State tax	1,255.21
County tax	1,046.01

In Wilkinson county for 1893–'4:

Privilege tax	216.52
State tax	721.65
County tax	974.22

For 1894–'5:

Privilege tax	216.52
State tax	864.66
County tax	936.71

85 For the Helena branch.

In Coahoma county for 1893–'4:

Privilege tax	202.42
State tax	475.67
County tax	762.07

For 1894–'5:

Privilege tax	202.42
State tax	749.39
County tax	1,248.99

For the Tallahatchie branch.

In Coahoma county for 1893–'4:

Privilege tax	141.09
State tax	440.19
County tax	704.31

For 1894–'5:

Privilege tax	141.09
State tax	528.74
County tax	881.24

In Tallahatchie county for 1893–'4:

Privilege tax	204.45
State tax	649.21
County tax	1,298.43

For 1894–'5:

Privilege tax	204.45
State tax	779.59
County tax	1,019.46

In Leflore county for 1893–'4:

Privilege tax	50.45
State tax	168.67
County tax	252.97

For 1894–'5:

Privilege tax	50.45
State tax	202.15
County tax	252.68

For the Riverside division.

In Coahoma county for 1893–'4:

Privilege tax	277.13
State tax	1,315.54
County tax	2,104.87

For 1894–'5:

Privilege tax	277.13
State tax	1,572.72
County tax	2,621.20

In Bolivar county for 1893–'4:

Privilege tax	478.91
State tax	2,248.67
County tax	7,873.84

For 1894–'5:

Privilege tax	478.91
State tax	2,700.41
County tax	7,876.20

In Washington county for 1893–'4:

Privilege tax	21.75
State tax	97.95
County tax	106.73

For 1894–'5:

Privilege tax	21.75
State tax	117.54
County tax	134.13

86 In Issaquena county for 1893–'4:

Privilege tax	54.60
State tax	252.94
County tax	303.52

For 1894–'5:

Privilege tax	54.60
State tax	302.98
County tax	252.47

In Sharkey county for 1893–'4:

Privilege tax	26.15
State tax	119.12
County tax	166.76

For 1894–'5:

Privilege tax	26.15
State tax	142.94
County tax	166.76

And municipal taxes as follows:

Tunica for 1893, $25.56; for 1894, $47.75.

Lula:

For 1893, $—; for 1894, $—.

Coahoma:

For 1893, $—; for 1894, $—.

Clarksdale:

For 1893, $—; for 1894, $—.

Shelby:

For 1893, $—; for 1894, $—.

Cleveland:

For 1893, $—; for 1894, $—.

Shaw:

For 1893, $—; for 1894, $—.

Leland:

For 1893, $206.50; for 1894, $206.50.

Hollandale:

For 1893, $72.36; for 1894, $54.87.

Rolling Fork:

For 1893, $—; for 1894, $—.

Vicksburg:

For 1893, $3,277.62; for 1894, $2,997.62.

Port Gibson:

For 1893, $135.39; for 1894, $149.38.

Russum:
For 1893, $—; for 1894, $—.
Harriston:
For 1893, $—; for 1894, $—.
Hamburg:
For 1893, $—; for 1894, $—.
Roxie:
For 1893, $—; for 1894, $—.
Knoxville:
For 1893, $—; for 1894, $—.
Gloster:
For 1893, $152.41; for 1894, $158.23.
Centerville:
For 1893, $—; for 1894, $—.
Jonestown:
For 1893, $—; for 1894, $—.
Friars Point:
For 1893, $30.50; for 1894, $30.50.
Rosedale:
For 1893, $—; for 1894, $—.
Gunnison:
For 1893, $—; for 1894, $—.

87 Plaintiff files copies of said assessment-rolls for the years 1893 and 1894 as Exhibits "A" and "B," and asks that they be taken as part of this declaration.

And the plaintiff, use, &c., in fact avers that all the railroads on which the taxes are herein sued for had the first rails laid more than three years before January 1st, 1890, and although the said defendants were and are indebted to said State of Mississippi and to said several counties and towns in said several amounts above specified and set forth, aggregating a large sum of money, to wit, the sum of $—, and although said several amounts have long been due and have been duly demanded and are delinquent, yet the said defendants, the said Yazoo & Mississippi Valley and Illinois Central Railroad Companies, have both and each hitherto failed and refused and both and each still fail and refuse to pay the same or any part or parcel thereof, to plaintiff's damage $250,000.00, and hence he sues for the uses aforesaid, &c., and, as required by the statute in such cases made and provided, makes parties to this suit the Honorables J. F. Sessions, of Lincoln county; Walter McLaurin, of Warren county; J. H. Askew, of Oktibbeha county, constituting said railroad commission and State railroad assessors, and W. H. Rollins, T. O. King, R. N. Harris, G. P. Melchoir, J. L. Griffin, H. J. Wright, A. N. Smith, J. M. A. Brennan, N. S. Walker, L. W. Carra-

dine, R. S. Butler, D. M. Butler, C. H. Neyland, C. H. Fonda, and J. L. Sullivan, sheriffs and tax collectors of said De Soto, Tunica, Coahoma, Bolivar, Washington, Sharkey, Issaquena, Warren, Claiborne, Jefferson, Franklin, Amite, Wilkinson, Tallahatchie, and Leflore counties respectively, under section 4200 of the Annotated Code, and asks that they and the said railroad, defendants, be summoned, &c.

CRITZ & BECKETT,
Attorneys for Plaintiff.

Endorsed: Declaration and exhibits filed and summons issued to Hinds, Lincoln, Warren, Oktibbeha, De Soto, Tunica, Coahoma, Bolivar, Washington, Sharkey, Issaquena, Claiborne, Jefferson, Franklin, Amite, Wilkinson, Tallahatchie, and Leflore counties, December 18, 1894. F. B. Neal, clerk, by W. J. Brown, Jr., D. C.

88 *Demurrers to 1st, 2nd, 3rd, 9th, 10th, & 14th Replications and Eight Others.*

STATE OF MISSISSIPPI,
County of Hinds, First District.

In the Circuit Court, at the January Term, 1895.

WIRT ADAMS, State Revenue Agent, Use, &c.,
vs.
THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY ET AL. } 2788.

1. Now comes the defendant The Yazoo & Mississippi Valley Railroad Company, and for answer to the said first replication to the plea of said company, as to that part of said replication which denies the allegation alleged to be contained in said plea that the said Louisville, New Orleans & Texas Railway Company was not purchased by said Illinois Central Railroad Company, the defendant demurs thereto, because such denial is a pretended traverse of matter not alleged in said plea. Wherefore it prays judgment whether — as to such denial.

MAYES & HARRIS,
Att'ys for Defendant.

2. Now comes the defendant The Yazoo & Mississippi Valley Railroad Company, and for answer to the said second replication to the plea of said company the said defendant demurs thereto, because it says the said replication is not sufficient in law, because the debts and liabilities to be taken into consideration are not limited to debts for construction, and also because this court will not investigate the propriety of issuance of stock. Wherefore it prays judgment, &c.

MAYES & HARRIS,
Att'ys for Def't.

3. Now comes the defendant The Yazoo & Mississippi Valley Railroad Company, and for answer to the said third replication to

the plea of said defendant the said defendant demurs thereto, because it says the said replication is not sufficient in law, and also because the question thereby sought to be raised cannot be raised in a collateral manner or in any manner by this plaintiff. Wherefore it prays judgment, &c.

MAYES & HARRIS,
Att'ys for Def't.

9. Now comes the defendant The Yazoo & Mississippi Valley Railroad Company, and for answer to the ninth replication to said plea of this defendant says that it demurs thereto, and for cause of demurrer says that *that* the said replication is not sufficient in law; also that the questions thereby sought to be raised cannot be raised in this collateral manner or raised in any manner by this plaintiff. Wherefore it prays judgment whether, &c.

MAYES & HARRIS,
Att'ys for Def't.

10. Now comes the defendant The Yazoo & Mississippi Valley Railroad Company, and for answer to the fourth, fifth, sixth, seventh, eighth, eleventh, twelfth, and thirteenth replications to said plea of this defendant says that it demurs to the same, because the same are respectively insufficient in law. Wherefore it prays judgment whether, &c.

MAYES & HARRIS,
Att'ys for Def't.

14. Now comes the defendant The Yazoo & Mississippi Valley Railroad Company, and for answer to the fourteenth replication to said plea of this defendant says that it demurs thereto, because the same is not sufficient in law, and also because the said replication is too broad in its application. Wherefore the defendant prays judgment whether, &c.

MAYES & HARRIS,
Att'ys for Def't.

89 *Agreement as to Exhibits.*

THE STATE OF MISSISSIPPI,
Hinds County.

Circuit Court, 1st District.

WIRT ADAMS, State Revenue Agent, &c.,
vs.
THE YAZOO & MISSISSIPPI VALLEY RAILROAD CO. ET AL. } 2788.

It is hereby agreed that on the argument of the demurrers to the replications in this cause the deed of consolidation of the Yazoo & Mississippi Valley Railroad Company and the Louisville, New Orleans & Texas Railway Company, the charters of the Memphis & Vicksburg Railroad Company, New Orleans, Baton Rouge, Vicksburg and Memphis Railroad Company, Louisville, New Orleans &

Texas Railway Company, and Yazoo & Mississippi Valley Railroad Company shall be considered as set out in the replications and filed with them as part of them, and said deed and charters may all be used and referred to by the court and counsel without actual filing.

CRITZ & BECKETT,
Att'ys for Plaintiff.
MAYES & HARRIS,
Att'ys for Def't.

Pleas in No. 2916.

STATE OF MISSISSIPPI,
County of Hinds, First District.

In the Circuit Court, to the January Term, A. D. 1895.

WIRT ADAMS, State Revenue Agent, Use, &c.,
vs.
THE YAZOO & MISSISSIPPI VALLEY RAILROAD CO. ET AL. } 2916.

Now comes the defendants The Yazoo & Mississippi Valley Railroad Company and The Illinois Central Railroad Company and for a plea to the declaration herein filed against it says:

1. That it is not true, as in said declaration is alleged, that in October of the year 1892, or at any other time, the railroads and property of the Louisville, New Orleans & Texas Railway Company became the property of the said defendants, The Yazoo & Mississippi Valley and Illinois Central Railroad Companies, and have ever since been owned by them; nor is it true that the said two companies became liable for all the debts, liabilities, and taxes of said Louisville, New Orleans & Texas Railway Company, or did in fact agree in writing to pay all debts, liabilities, and taxes of whatsoever kind to which the said property was then or should thereafter become subject or liable.

2. That the said Louisville, New Orleans & Texas Railway Company was authorized by and organized under an act of the legislature of the State of Mississippi entitled "An act to authorize the Memphis & Vicksburg Railroad Company and the Mississippi Valley and Ship Island Railroad Company to effect a consolidation," approved March 3rd, 1882, and a certain other act of said legislature, entitled "An act to amend an act entitled An act to authorize the Memphis and Vicksburg Railroad Company and the Mississippi Valley & Ship Island Railroad Company to effect a consolidation, approved March 3rd, 1882," approved March 15th, 1884.

3rd. That on or about the 24th of October, 1892, the said Louisville, New Orleans & Texas Railway Company was consolidated with and merged in this defendant by the act and deed of the two said companies as authorized by their respective charters.

4th. That during the said years 1893 and 1894 and in due and proper time this defendant delivered to the tax collector of each and every of said named counties an affidavit, made by the president of said company or its cashier, that the amount of said taxes had actu-

ally and in good faith been paid and applied by said com-
90 pany, this defendant, during the said years, respectively, in payment of the debts incurred by the said Louisville, New Orleans & Texas Railway Company in the construction of its said railroad or money borrowed by said last-named company upon lands or otherwise to be used in constructing said road or paying debts incurred by said last-named company in constructing the same; whereupon the said several tax collectors did, each and every one, give to defendant a receipt in full for the amount of said taxes respectively, and that in the said years 1893 and 1894, respectively, the profits of defendant on the lines of railway that were of the said Louisville, New Orleans & Texas Railway Company have not enabled it to declare and pay to its stockholders of and on account of said last-named company an annual dividend of eight per cent. on its capital stock over and above the payment of the debts and liabilities of said Louisville, New Orleans & Texas Railway Company, nor have the profits of this defendant enabled it to declare and pay said dividend.

All of which this defendant is ready to verify. Wherefore it prays judgment, &c.

MAYES & HARRIS,
Att'ys for Def'ts.

STATE OF MISSISSIPPI, }
Hinds County. }

In the Circuit Court, to the January Term, 1895, First District.

WIRT ADAMS, State Rev. Agent, for the Use, etc., }
vs. }
YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY ET AL. }

Now comes the defendants, The Yazoo & Mississippi Valley Railroad Company and The Illinois Central Railroad Company, and for a plea to the declaration herein filed say that it is not true, as in said declaration is alleged, that in October of the year 1892 the railroads and property of the Louisville, New Orleans & Texas Railway Company became the property of the said defendants, The Yazoo & Mississippi Valley and The Illinois Central Railroad Companies, and has ever since been owned by them, and that the said railroads and property have at any time become the property of the said two companies, nor is it true that the said Illinois Central Railroad Company and the said Yazoo & Mississippi Valley Railroad Company became liable for all debts, liabilities, and taxes, or did in fact, in writing, agree to assume and promise to pay all the debts, liabilities, and taxes to which the said property was then or should thereafter become subject or liable, or that said Yazoo & Mississippi Valley and Illinois Central Railroad Companies have become or now are indebted to said State of Mississippi and to the said several counties and towns or any of them for current privilege, State, county, and municipal taxes for said fiscal years 1893–1894, 1894–1895, as stated

in said declaration, or any of them; and of this the said defendant puts *itself* upon the country.

MAYES & HARRIS,
Att'ys for Def'ts.

Endorsed: Filed January 24, 1895. F. B. Neal, clerk.

Order on Demurrer.

January Term, 1895.

JANUARY 26, 1895.

WIRT ADAMS, State Revenue Ag't, &c.,
vs.
YAZOO & MISSISSIPPI VALLEY R. R. CO. ET AL. } 2788.

This day came on to be heard the above-entitled cause on the demurrers of the defendant The Yazoo & Mississippi Valley Railroad Company to the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, and 14 replications interposed to the plea of said defendant, and the court being satisfied, it is ordered and adjudged that the said demurrers to the fourth, fifth, sixth, seventh, eighth, twelfth, and thirteenth replications be and the same are respectively sustained, and that the demurrers to the said first, second, third, ninth, tenth, eleventh, and fourteenth replications be and the
91 same are respectively overruled; to which judgment and consideration of the court the plaintiff and the defendant respectively excepted, and it is considered by the court *the* the said defendant do rejoin to said first, second, third, ninth, tenth, eleventh, and fourteenth replications.

Motion to Consolidate.

WIRT ADAMS, State Revenue Agent, Use, &c.,
vs.
THE YAZOO & MISSISSIPPI VALLEY R. R. CO. ET AL. } 2788.

WIRT ADAMS, State Revenue Agent, Use, &c.,
vs.
THE YAZOO & MISSISSIPPI VALLEY R. R. CO. ET AL. } 2916.

In these two causes come the defendant railroad companies and move that the same be consolidated into one cause, to proceed under the same name and number of the first cause and the pleadings therein, and also the declaration in the second cause.

MAYES & HARRIS, *For Motion.*

CRITZ & BECKETT, *Contra.*

Endorsed: Filed and entered January 26, 1895. F. B. Neal, clerk.

Order of Consolidation.

January Term, 1895.

JANUARY 26, 1895.

WIRT ADAMS, State Revenue Agent, Use, &c.,
vs.
THE YAZOO & MISSISSIPPI VALLEY R. R. CO. ET AL. } 2788 & 2916.

In these causes, by consent of parties given in open court, it is considered and adjudged that the same be, and they are hereby, consolidated into one cause, to be prosecuted under the name and number of the cause numbered 2788; also that the pleadings heretofore filed and acted upon as of the first cause shall be applicable to the cause as consolidated, and that the declaration in the second cause, but not the pleas, shall be applicable to the cause as consolidated. No exceptions taken nor errors committed heretofore in the progress of cause numbered 2788 or that numbered 2916 are waived hereby.

Motion to Strike Out Part of 9th and 10th Replications.

WIRT ADAMS, State Revenue Agent, Use, &c.,
vs.
YAZOO & MISSISSIPPI VALLEY R. R. CO. ET AL. } 2788.

In this the consolidated cause above entitled comes the defendant The Yazoo & Mississippi Valley Railroad Company and moves the court as follows:

1st. To strike out from the 9th replication the words "and plaintiff further avers that by said illegal execution and issuance of bonds said company forfeited its charter."

2nd. To strike out from the 10th replication the words "and also forfeited its charter."

MAYES & HARRIS,
Att'ys for Def't.

CRITZ & BECKETT, *Contra.*

Endorsed: Filed and entered January 26, 1896. F. B. Neal, clerk.

Order on Motion.

January Term, 1895.

JANUARY 26TH, 1895.

WIRT ADAMS, State Revenue Agent, Use, &c.,
vs.
THE YAZOO & MISSISSIPPI VALLEY R. R. CO. ET AL. } 2788.

92 This day came on to be heard the above entitled cause on the motion of the Yazoo & Mississippi Valley Railroad Com-

pany to strike out from the 9th and 10th replications certain words, to wit, from the 9th replication the words "and plaintiff further avers that by such illegal execution and issuance of bonds said company forfeited its charter," and from the 10th replication the words "and also forfeited its charter;" and the court being satisfied in the premises, it is considered and adjudged that said words be, and the same are hereby, stricken from said replications, respectively; to which action of the court the plaintiff excepted.

Rejoinder of Yazoo & Mississippi Valley R. R. Co.

STATE OF MISSISSIPPI,
County of Hinds, First District.

In the Circuit Court, at the January Term, A. D. 1895.

WIRT ADAMS, State Revenue Agent, Use, &c.,
vs.
THE YAZOO & MISSISSIPPI VALLEY R. R. CO. ET AL. } 2788.

And the said defendants, The Yazoo & Mississippi Valley Railroad Company and The Illinois Central Railroad Company, for rejoinder to the 9th replication of the plaintiff to *its* plea, says that it is not true, as in said replication is falsely averred, that the said Louisville, New Orleans & Texas Railway Company so mixed and mingled its liabilities for money used in constructing said road and for money to divide out among its officers and stockholders, as in said replication alleged, that it became or was or is impossible to appropriate the said taxes to the liabilities contemplated in said charter or to make a true affidavit as therein required; and of this the said defendant- puts *itself* upon the country. Wherefore, &c.

MAYES & HARRIS,
Att'ys for Def't.

Rejoinder to 10th Replication.

And the said defendants, The Yazoo & Mississippi Valley Railroad Company and The Illinois Central Railroad Company, for a rejoinder to the 10th replication of the plaintiff to *its* plea, says that it is not true, as in said replication is falsely averred, that the profits of said Louisville, New Orleans & Texas Railway Company were sufficient to enable it to pay the annual dividend of 8% upon the full amount paid or agreed to be paid for its capital stock over and above its current due liabilities for proper debts incurred in and about constructing said road as contemplated by its charter; and *it* further deni*es* that by improper issue of stock, as in said replication is falsely alleged, it has become impracticable to determine accurately when the profits of said company will enable it to pay an annual dividend of 8% upon its proper capital stock; and of this the defendant- puts *itself* upon the country. Wherefore, &c.

MAYES & HARRIS,
Att'ys for Def't.

Rejoinder to 11th Replication.

And the said defendants, The Yazoo & Mississippi Valley Railroad Company and The Illinois Central Railroad Company, comes and for a rejoinder to the eleventh replication to the defendants' said plea, says that it is not true, as in said replication is falsely alleged, that previous to said assessment the said Illinois Central Railroad Company had paid off, by novation, with its own bonds, all the debts and liabilities which said Louisville, New Orleans & Texas Railway Company had incurred in the construction of its road and money borrowed by said company upon its lands or otherwise to be used in constructing the same or paying debts incurred in constructing the same and that its profits enabled it to pay a dividend of 8% on its proper stock; and of this the said defendant- puts *itself* upon the country. Wherefore, &c.

MAYES & HARRIS,
Att'ys for Def't.

93 *Rejoinder to 14th Replication.*

And the said defendants, The Yazoo & Mississippi Valley Railroad Company and The Illinois Central Railroad Company, comes and for a rejoinder to the fourteenth replication of the plaintiff to the said plea of *this* defendant- says that it is not true, as in said replication is falsely alleged, that the Riverside division of said defendants' railway, as described in said declaration, was acquired by said Louisville, New Orleans & Texas Railway Company by purchase or under other charters and is liable to taxation; and, further, defendant- avers that as to the other parts of said railway described in said replication the taxes assessed thereon were fully paid in lawful currency of the United States before the bringing of this suit; and this the defendant- *is* ready to verify. Wherefore, &c.

MAYES & HARRIS,
Atyt'ys for Def't.

Endorsed: Filed January 6, 1895. F. B. Neal, clerk, by W. J. Brown, Jr., D. C.

Motion to Strike Out Rejoinder to 9th Replication.

THE STATE OF MISSISSIPPI, }
Hinds County. }

Circuit Court, First District.

WIRT ADAMS, State Revenue Agent, Use, &c.,
vs.
YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY. } 2788.

And now comes the plaintiff and moves the court to strike out the rejoinder of the defendant- to the ninth replication of plaintiff, because:

1st. It is in substance merely a second demurrer where a former demurrer has been overruled and attempting to relitigate the same question.

2nd. It tenders an issue of law and not fact.

3rd. It is no defense to said 9th replication.

CRITZ & BECKETT,
Attorneys for Plaintiff.

Endorsed: Filed January 26, 1895. F. B. Neal, clerk, by W. J. Brown, Jr., D. C.

Issue on Rejoinder to 14th Replication.

THE STATE OF MISSISSIPPI, *Hinds County.*

Circuit Court, First District.

WIRT ADAMS, State Revenue Agent, Use, &c.,
vs.
THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY *et al.* } 2788.

And now comes the plaintiff and for a surrejoinder to defendants' rejoinder to plaintiff's 14th replication takes issue in short by consent without this, that any part of said Riverside division was or is exempt, even if said part was built or acquired under the charter of said Louisville, New Orleans & Texas Railway Company, and plaintiff denies that as to the other parts of said railway described in said replication the taxes thereon assessed or any part thereof were fully paid in lawful currency of the United States before the bringing of this action; and of this he puts himself upon the country.

CRITS & BECKETT,
Att'ys for Plaintiff.

Endorsed: Filed January 26, 1895. F. B. Neal, clerk, by W. J. Brown, Jr., D. C.

94 *Demurrer to Surrejoinder.*

THE STATE OF MISSISSIPPI, *Hinds County, First District.*

In the Circuit Court, at the January Term, 1895.

WIRT ADAMS, State Revenue Agent, Use, &c.,
vs.
THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY *et al.* } 2788.

Comes the defendant The Yazoo & Mississippi Valley Railroad Company and for answer to so much of the plaintiff's surrejoinder to the defendant's rejoinder to the fourteenth replication as applie

to the said Riverside division demurs to the same, and for cause of demurrer shows that the said surrejoinder traverses matter not alleged, and also that the said surrejoinder fails to show or set forth in any way the facts which prevent the exemption in the charter of the Louisville, New Orleans & Texas Railway Company from applying to said division of said railway.

Wherefore defendant prays judgment, &c.

MAYES & HARRIS,
Att'ys for Def't.

Endorsed: Filed January 26, 1895. F. B. Neal, clerk, by W. J. Brown, Jr., D. C.

Demurrer to Surrejoinder Overruled.

January Term, 1895.

WIRT ADAMS, State Revenue Agent, Use, &c.,
vs.
YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY ET AL. } 2788.

JANUARY 28, 1895.

This day came on to be heard the demurrer of the defendant The Yazoo & Mississippi Valley Railroad Company to the surrejoinder to the rejoinder to the fourteenth replication, and the court, being satisfied in the premises, doth consider and adjudge that the said demurrer be, and the same is hereby, overruled; to which action said defendant excepted.

Rejoinder to 9th Replication.

STATE OF MISSISSIPPI,
Hinds County, First District.

In the Circuit Court, to the January Term, 1895.

WIRT ADAMS, State Revenue Agent, Use, &c.,
vs.
YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY ET AL. } 2788.

And now comes defendants The Yazoo & Mississippi Valley Railroad Company and The Illinois Central Railroad Company and for a rejoinder to the ninth replication of the plaintiff to the defendants' plea says: That it is not true, as in said replication is falsely alleged, that the said Louisville, New Orleans & Texas Railway Company had soon after building said railroad, in 1886, issued interest-bearing bonds secured by mortgage on its said property to the amount stated in said replication, to wit, to the amount of $12,805,000, bearing interest at the rate of four per cent. per annum; $8,731,000, bearing interest at the rate of five per cent. per annum; $9,347,000, bearing interest at the rate of six per cent. per annum, aggregating $30,833,000, or that it sold and disposed of the same to non-residents of this State for cash, and then mixed and confused

the entire proceeds of said bonds into one common fund, or that in consequence thereof it was or is impossible to identify the proceeds of any set of said bonds or of any part thereof, or that from
95 this common mixed fund it paid all of its construction expenses and the divided the proceeds, except what was required to construct said road, among the officers and stockholders of said company, also non-residents of this State, or that none of said bonds or the proceeds thereof are taxable in this State, or that in fact it did not take or require more than about $4,000,000 to construct said road, as contemplated by its charter.

And it denies, further, that the said Louisville, New Orleans & Texas Railroad Company so mixed and mingled its liabilities for money used in constructing said road and for money to divide out amongst its officers and stockholders, as falsely alleged, as aforesaid, or that it became or was or is impossible to appropriate the taxes to the liabilities contemplated in said charter, or to tell what rate of interest the construction debt bears, or to make a true affidavit as in said charter required, or that thereby or by reason thereof said pretended exemption was waived; and of this the said defendant puts itself upon the country.

Wherefore, &c. MAYES & HARRIS, *Att'ys.*

Endorsed: Filed February 27, 1895. F. B. Neal, clerk, by W. J. Brown, Jr., D. C.

Notice to Produce Documents.

THE STATE OF MISSISSIPPI, *County of Hinds.*

Circuit Court, January Term, 1896.

WIRT ADAMS, State Revenue Agent, Use, &c., Plaintiff, *vs.* YAZOO & MISSISSIPPI VALLEY RAILROAD Company *et al.*, Def't-.	2788.	Consolidated Case.

To The Yazoo & Mississippi Valley Railroad Company and The Illinois Central Railroad Company, defendants, or Messrs. Mayes & Harris, their attorneys of record:

You are hereby notified to produce in court, upon the trial of the above-stated case, the following written or printed documents, and in case you fail to produce the same secondary evidence will be introduced upon said trial to prove the matters contained in said written or printed documents, to wit:

1st. All the contracts between the Louisville, New Orleans and Texas Railway Company with contractors for earth-work, trestling, culverts, waterways, bridges, cattle-guards, and any and all other kinds of wood-work, timber, lumber, and materials in the construction of said company's railroad, branches, switches, and side tracks

in the State of Mississippi, on which suit is brought for taxes in said case.

2nd. All the final estimates of the engineers of said Louisville, New Orleans & Texas Railway Company, showing amount and cost of all said earth-work, trestlings, culverts, waterways, cattle-guards, bridges, and all other work, timber, lumber, and materials done, furnished, or used in the original construction of said company's said railroad, branches, switches, and side tracks in the State of Mississippi, for the taxes on which said suit is brought.

3rd. The receipts showing all the money or other things paid out by said Louisville, New Orleans & Texas Railway Company for or on account of said earth-work, trestling, culverts, waterways, cattle-guards, bridges, and all other work, timber, and materials of every kind done, furnished, or used in said original construction of said railroad, branches, switches, and side tracks.

4th. All the contracts of said company for cross-ties used in the original construction of its said railroad, branches, switches, and side tracks.

5th. Said engineers' final estimates, showing the number and cost of said cross-ties so used.

6th. All contracts of said company for steel or iron rails, bolts, spikes, frogs, nails, fish-bars, and all other iron or steel material used in the construction of said railroad, branches, switches, and side tracks.

7th. The final estimates of said company's engineers, show-
96 ing all said rails, bolts, spikes, nails, fish-bars, and other iron or steel material so used and the cost of the same.

7th. Receipts showing all the money or other thing or things paid out by said company for said cross-ties, rails, bolts, spikes, frogs, nails, fish-bars, and other material.

8th. All contracts of said company for putting down the cross-ties and laying the track upon its said railroad, branches, switches, and side tracks.

9th. The final estimates of the engineers, showing the cost of putting said cross-ties and laying said track.

10th. Receipts showing all the money or things paid out for putting down said cross-ties or laying said track.

11th. All contracts of said company for the purchase of engines, freight and passenger cars, and other rolling stock for its entire railroad, branches, switches, yards, side tracks in Tennessee, Mississippi, and Louisiana, including only what it took to supply said railroad, branches, switches, and side tracks one time, not including any renewals.

12th. Receipts showing all money or other thing or things paid out by said company for such engines and other rolling stock.

13th. Contracts of said company for the building of all its depots, turning tables, water tanks, and platforms in Mississippi, and all material used therein, but not including contracts for any renewals thereof.

14th. Receipts showing all the money paid out by said company for such depots, turning tables, water tanks, and platforms, and all

other materials used therein, and for all pumps for said water tanks, but including no receipts for money paid out for renewals.

15th. All books, either written or printed, into which the final estimates of said company's engineers are entered or copied, showing the amount of earth-work, wood-work, iron or steel work, and materials of all kinds done or used in the construction of said railroad, branches, side tracks, and switches in Mississippi.

16th. All quarterly, semi-annual, an- annual reports of said Louisville, New Orleans and Texas Railway Company, of said Yazoo & Mississippi Valley Railroad Company, and of said Illinois Central Railroad Company as to the gross earnings and the net earnings of said Louisville, New Orleans & Texas railroad in the States of Tennessee, Mississippi, and Louisiana, including all its branches, and as to the separate gross earnings and net earnings of said railroad and all its branches in Mississippi for the years 1891, 1892, 1893, and 1894—that is to say, all the quarterly, semi-annual, and annual reports of the gross earnings of the entire railroad and all its branches for said years, and all the quarterly, semi-annual, and annual reports of the net earnings of said railroad and all its branches for said years, and all the quarterly, semi-annual, and annual reports of the gross earnings of said railroad and all its branches in Mississippi, and all the quarterly, semi-annual, and annual reports of the net earnings of said railroad and all its branches in Mississippi for said years.

17th. All stock books or other books, records, writings, or papers showing the original issuance of shares of stock, and to whom each share was issued, in said Louisville, New Orleans & Texas Railway Company and in the consolidated Yazoo & Mississippi Valley Railroad Company, and the books, records, writings, and papers showing the amount paid for each of said shares and by whom paid.

18. All books, papers, writings, or records showing any donations of right of way, lands, bonds, or money or other property to said Louisville, New Orleans & Texas Railway Company by individuals, corporations, municipalities, State or counties, and all deeds for right of way and depot grounds of said company.

19th. All written or printed books, papers, records, or other documents of any kind whatever, showing the entire original cost of said railway and all of its branches, and showing the entire original cost of all of said railway and its branches in the State of Mississippi, including depots, depot grounds, water tanks, turning tables, side tracks, switches, and platforms, but not including rolling stock.

20th. All written or printed books, papers, or records or other documents of any kind whatever, showing the cost of the purchase or lease of rolling stock for the original equipment of said
97 railway and all its branches, and for said railway and all its branches in Mississippi.

CRITZ & BECKETT,
Attorneys for Plaintiff.

To the sheriff of Hinds county to execute and return this Dec. 20, 1895.

F. B. NEAL,
Circuit Clerk.

Endorsed: Received December 20, 1895. R. J. Harding, sh'ff. Executed on The Yazoo & Mississippi Valley Railroad Company and The Illinois Central Railroad Company, defendants, by handing to E. Mayes, of the firm of Mayes & Harris, their attorneys of record, a true copy of this writ Dec. 21st, 1895. R. J. Harding, sheriff, by L. F. Chiles, D. S. Filed December 20, 1895. F. B. Neal, clerk.

Notice to Produce Documents.

THE STATE OF MISSISSIPPI, }
Hinds County. }

Circuit Court.

WIRT ADAMS, State Revenue Agent, Use, &c., Plaintiff,
vs.
THE YAZOO & MISSISSIPPI VALLEY AND ILLINOIS CENTRAL Railroad Companies, Defendants. } 2788.

To said defendants or Messrs. Mayes & Harris, their attorneys of record:

You are hereby notified to produce on the trial of the above consolidated cause in the circuit court, at Jackson, Miss., the following documents and writings, and in default thereof the plaintiff will offer secondary evidence on the subjects therein contained:

1st. All books, papers, writings, deeds, and documents showing the grants and titles to and for and of the former Louisville, New Orleans & Texas Railway Company to lands and real estate in Mississippi in addition to the titles for right of way.

2nd. All books, papers, writings, documents, lists, and receipts showing the sales and receipts and amounts paid and unpaid and contracts of lease for any of said lands by or for the said Louisville, New Orleans & Texas Railway Company and Yazoo & Mississippi Valley Railroad Company.

CRITZ & BECKETT,
Attorneys for Plaintiff.

Endorsed: Received Dec. 24th, 1895. R. J. Harding, sh'ff. Executed by handing to Mess-. Mayes & Harris a true copy of this writ Dec. 26th, 1895. R. J. Harding, sheriff, by L. F. Chiles, D. S. Filed December 23, 1895. F. B. Neal, clerk, by W. J. Brown, Jr., D. C.

Notice to Produce Documents.

THE STATE OF MISSISSIPPI,
Hinds County.

Circuit Court, First District.

WIRT ADAMS, State Revenue Agent, *vs.* YAZOO & MISSISSIPPI VALLEY RAILROAD Company *et al.*	2788.	Consolidated Case.

To the Yazoo & Mississippi Valley and Illinois Central Railroad Companies or their attorneys of record, Messrs. Mayes & Harris:

You are hereby notified to produce on the trial of this
98 cause, at the January term, 1896, of said court, on Tuesday, January 14th, 1896, and thereafter, the following books, letters, minutes, documents, and papers, or the copies thereof, which are in the possession of said attorneys, Messrs. Mayes & Harris, and exhibited to us in the year 1895, or the plaintiff will introduce secondary evidence thereof and the matters therein contained or evidenced.

1. Supplemental trust deed of April 15, 1895, of the said Y. & M. V. R. R. Co. to mortgage of the L., N. O. & T. R'y Co. of Aug 26th, 1886.

2. Minutes or list of stockholders of the Yazoo & Mississippi Valley R. R. Co. on March 21st, 1884, marked Exhibit 4 in said copies.

3. Lease of the Yazoo & Mississippi Valley R. R. Co. to Illinois Central Railroad Co. of March 31st, 1888, marked Exhibit 3 in said copies.

4. Letter-book copy of stockholders of the L., N. O. & T. R. R. Co., marked in pencil No. 5, in answ*re* to question 5, showing 48,242 shares.

5. Officers of the L., N. O. & T. R. R. Co., letter-book copy, pencil mark No. 12, answ*re* to question 12.

6. Letter-book copy of stockholders of L., N. O. & T. R'y Co., marked Exhibit 7, in answer to question 16, showing 48,242 shares.

7. Letter-book copy of officers of Illinois Central Railroad Company from June 1st to October 25th, 1892, marked in pencil No. 9, in answer to question 9.

8. Officers of Illinois Central Railroad Company, letter-book copy, marked in pencil 10.

9. Order of Mississippi Valley Company of Oct. 14, 1892, to its president to buy 50,000 shares of the L., N. O. & T. R'y Co., marked Exhibit 6 in the copies.

10. List of stockholders of the Y. & M. V. R. R. Co. on Oct. 24, 1892, marked in pencil 6.

11. Articles of consolidation of the Y. & M. V. R. R. Co. with L., N. O. & T. R'y Co. on Oct. 24, 1892.

12. Letter-book copy with the words "purchased Oct. 29, 1892, $43,141 shares from the following persons," &c., meaning shares of the L., N. O. & T. R'y Co., marked in pencil No. 3, answer to question 3.

13. Code of rules of Y. & M. V. R. R. Co. adopted Jan'y 5, 1893.

14. Minutes of directors' meeting of March 3rd, 1893, of Y. & M. V. R. R. Co.

15. Minutes of directors' meeting of April 13, 1893, of Y. & M. V. R. R. Co.

16. Letter from secretary of Y. & M. V. R. R. Co. in May, 1893, sending Maj. J. M. Edwards list of the stockholders for meeting of May 17, 1893.

17. Minutes of stockholders' meeting of Y. & M. V. R. R. Co. on May 25, 1893.

18. Minutes of directors' meeting of Y. & M. V. R. R. Co. on June 21st, 1893.

18½. Minutes of stockholders' meeting of Y. & M. V. R. R. Co. on Aug. 1st, 1893.

19. Minutes of directors' meeting of Sept. 20, 1893, of the Y. & M. V. R. R. Co.

20. Minutes of stockholders' meeting of Y. & M. V. R. R. Co. of Oct. 4, 1893.

99 21. Minutes of directors' meeting of Oct. 18, 1893, of Y. & M. V. R. R. Co.

22. Minutes of directors' meeting of Dec. 20th, 1893, of Y. & M. V. R. R. Co.

23. List of stockholders of I. C. R. R. Co. on Oct. 24, 1892, marked in pencil 7.

24. Charter and supplemental charter of the Miss. Valley Co. of April 2nd, 1872.

25. I. C. R. R. Co. trust deed of Sept. 1st, 1892.

26. Trust deed of Y. & M. V. R. R. Co. of April 4th, 1893.

27. List of stockholders and number of shares held by each in Oct., 1892, in Miss. Valley Co.

28. List of directors and officers of the Miss. Valley Co. in Oct., 1892.

You can either produce the original books, letters, entries, and minutes or the copies thereof in the possession of said attorneys, Messrs. Mayes & Harris.

CRITZ & BECKETT,
Att'ys for Plaintiff.

Endorsed: Received January 8th, 1896. R. J. Harding, sheriff, by L. F. Chiles, D. S. Executed personally on the Y. & M. V. R. R. Co. by handing to J. B. Harris, of the firm of Mayes & Harris, their attorneys, a copy hereof this January 8, 1896. W. T. Ratliff, sheriff, by L. F. Chiles, D. S. Filed January 9, 1896. F. B. Neal, clerk, by W. J. Brown, Jr., D. C.

Declaration and Exhibits in No. 3018.

THE STATE OF MISSISSIPPI,
Hinds County.

Circuit Court, First District.

WIRT ADAMS, State Revenue Agent, for the Use of THE STATE of Mississippi *et al.*, Plaintiff,
vs.
THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMMPANY ET AL., Defendants.

Now comes the plaintiff, Wirt Adams, State revenue agent, who sues for the use of The State of Mississippi and of the counties therein of De Soto, Tunica, Coahoma, Bolivar, Washington, Sharkey, Issaquena, Warren, Claiborne, Jefferson, Franklin, Amite, Wilkinson, Tallahatchie, and Leflore and of the municipalities or towns of Tunica, in said Tunica county; Lula, Coahoma, Clarksdale, Jonestown, Friars Point, in said Coahoma county; Shelby, Cleveland, Shaw, Rosedale, Gunnison, in said Bolivar county; Leland, Hollandale, Greenville, in said Washington county; Rolling Fork, in said Sharkey county; Vicksburg, in said Warren county; Port Gibson, Russum, in said Claiborne county; Harriston, in said Jefferson county; Hamburg, Roxie, Knoxville, in said Franklin county; Gloster, in said Amite county; Centerville, in said Wilkinson county, under and by virtue of the statutes in such cases made and provided, and complains of the defendants, the said Yazoo & Mississippi Valley Railroad Company, a corporation organized and chartered under the laws of said State, and of The Illinois Central Railroad Company, a foreign corporation chartered and organized under the laws of the State of Illinois, and both having a part of their lines of railway, depots, and agents in said first district of Hinds county, in an action of debt on the statute in such cases made and provided—

For that whereas in the month of October, 1892, the railroads and property of the Louisville, New Orleans & Texas Railway Company, a corporation chartered and organized under the
100 laws of said State of Mississippi, became the property of said defendants and has since been owned by them and was duly assessed for State, county, and municipal taxation for the year 1895 in said State of Mississippi, under and in accordance with its laws, by its Mississippi railroad commission as State railroad assessors, after objections heard and considered, and was also by said railroad commission duly classified for privilege taxation under said laws for said year, the main line being classified as first class and the Riverside division as second class, the Helena branch as third class, and the Tallahatchie branch as third class, and the said assessment-rolls were duly sent to the clerks of the boards of supervisors of said several counties and by them filed, as required by law, and the said assessments were as follows:

For the said main line:

In De Soto county	$164,427
In Tunica county	376,639
In Coahoma county	392,081
In Bolivar county	562,743
In Washington county	416,866
In Sharkey county	420,471
In Issaquena county	82,214
In Warren county	571,538
In Claiborne county	256,986
In Jefferson county	250,408
In Franklin county	270,927
In Amite county	208,850
In Wilkinson county	142,615

For the Riverside division:

In Coahoma county		262,135
In Bolivar county	450,099 84,920	535,019
In Washington county	19,590 460,627	480,217
In Issaquena county		50,497
In Sharkey county		23,824

For the Helena branch:

In Coahoma county, east of main line	73,169
West of main line	51,945

For the Tallahatchie branch:

In Coahoma county	88,124
In Tallahatchie county	129,933
In Leflore county	33,531

For the said towns:

In Tunica	8,240
In Lula	14,460
In Coahoma	14,830
In Clarksdale	15,680
In Jonestown	3,738
In Friars Point	10,175
In Shelby	14,345
In Cleveland	20,967
In Shaw	7,420
In Rosedale	6,450
In Gunnison	10,267
In Leland	29,515
In Hollandale	8,830
In Rolling Fork	
In Vicksburg	150,134
In Port Gibson	17,928
In Russum	9,144

In Harriston	11,657
In Hamburg	14,524
In Roxie	15,241
In Knoxville	
In Gloster	15,469
In Centerville	10,320
Greenville	23,722

101 And whereas the levy of State taxes for said year was five mills on the dollar's valuation of property;

And whereas the privilege taxes for said year *was* $20 per mile for 1st class, $15.00 for second class, and $10.00 for third-class railroads per mile;

And whereas the boards of supervisors of said several counties did for said year duly levy county taxes on said railroads and all the taxable property within their respective counties as follows:

In De Soto county	5 mills;
In Tunica county	7½ mills;
In Coahoma county	7 mills;
In Bolivar county	17½ mills;
In Washington county	5 mills;
In Sharkey county	6 mills;
In Issaquena county	3½ mills;
In Warren county	12 mills;
In Claiborne county	8 mills;
In Jefferson county	8½ mills;
In Franklin county	9 mills;
In Amite county	3¼ mills;
In Wilkinson county	6½ mills;
In Tallahatchie county	6 mills;
In Leflore county	6 mills;

on the dollar's worth of taxable property;

And whereas the municipal or town taxes for said year duly levied were:

In Tunica	3½ mills.
In Lula	— mills.
In Coahoma	— mills.
In Clarksdale	10 mills.
In Jonestown	— mills.
In Friars Point	— mills.
In Shelby	— mills.
In Cleveland	— mills.
In Shaw	— mills.
In Rosedale	— mills.
In Gunnison	— mills.
In Leland	— mills.
In Hollandale	— mills.
In Rolling Fork	— mills.
In Vicksburg	20 mills.
In Port Gibson	— mills.

In Russum..... — mills.
In Harriston..... — mills.
In Hamburg..... — mills.
In Roxie..... 2 mills.
In Knoxville .. .. — mills.
In Gloster..... — mills.
In Centerville..... — mills.

And whereas the mileage of said railroads in said respective counties was as follows:

For the main line and main track:

In De Soto county...	12.863 miles.
In Tunica county.....	30.623 miles.
In Coahoma county....	30.234 miles.
In Bolivar county...	44.322 miles.
In Washington county.....	32.173 miles.
In Sharkey county.....	33.527 miles.
In Issaquena county.....	6.645 miles.
In Warren county...	33.768 miles.
In Claiborne county...	20.373 miles.
In Jefferson county.....	19.837 miles.
In Franklin county.....	21.752 miles.
In Amite county.....	16.577 miles.
In Wilkinson county.....	10.826 miles.

102 For the Riverside division, main track:

In Coahoma county....		27.713 miles.
In Bolivar county.....	8.883 and	47.891 miles.
In Washington county..... ...	47.999 and	2.175 miles.
In Issaquena county..... ..		5.460 miles.
In Sharkey county.....		2.615 miles.

For the Helena branch, main track:

In Coahoma county...	11.906 & 8.336	20.242 miles.

For the Tallahatchie branch, main track:

In Coahoma county.....	14.109 miles.
In Tallahatchie county.....	20.445 miles.
In Leflore county.....	5.045 miles.

And whereas the said Yazoo & Mississippi Valley and Illinois Central Railroad Companies became and are liable to pay all taxes duly assessed on said railroads and property, whereby and by force of the statute in such cases made and provided the said Yazoo & Mississippi Valley and Illinois Central Railroad Companies became and are indebted to the said State of Mississippi and to said several counties and towns respectively for current and privilege taxes as follows:

In De Soto county:

Privilege tax	$257.26
State tax	822.13
County tax	822.13

In Tunica county:

Privilege tax	612.46
State tax	1,883.19
County tax	2,824.78

In Coahoma county:

Privilege tax	604.08
State tax	1,960.40
County tax	2,744.56

In Bolivar county:

Privilege tax	886.44
State tax	2,813.17
County tax	9,848.03

In Washington county:

Privilege tax	643.46
State tax	2,084.33
County tax	2,084.33

In Sharkey county:

Privilege tax	670.54
State tax	2,102.75
County tax	2,523.22

In Issaquena county:

Privilege tax	132.90
State tax	411.07
County tax	287.74

In Warren county:

Privilege tax	715.36
State tax	2,857.69
County tax	6,858.45

103 In Claiborne county:

Privilege tax	407.56
State tax	1,284.93
County tax	2,055.88

In Jefferson county:

Privilege tax	396.74
State tax	1,252.04
County tax	2,128.46

In Franklin county:

Privilege tax	435.04
State tax	1,354.63
County tax	2,438.34

In Amite county:

Privilege tax	331.54
State tax	1,044.25
County tax	678.76

In Wilkinson county:

Privilege tax	216.52
State tax	713.07
County tax	926.99

For the Helena branch.

In Coahoma county:

Privilege tax, 83.36 and 119.06	202.42
State tax, 259.72 and 365.84	625.56
County tax, 363.61 and 512 18	875.79

For the Tallahatchie branch.

In Coahoma county:

Privilege tax	141.09
State tax	440.62
County tax	574.86

In Tallahatchie county:

Privilege tax	204.45
State tax	649.66
County tax	839.59

In Leflore county:

Privilege tax	50.45
State tax	167.65
County tax	184.35

For the Riverside division.

In Coahoma county:

Privilege tax	415.69
State tax	1,310.67
County tax	1,834.94

In Bolivar county:

Privilege tax, 718.36 & 133.24	851.60
State tax, 2,250.45 & 424.60	2,675.05
County tax, 7,876.73 & 1,486.10	9,362.83

In Washington county:

Privilege tax, 32.62 & 719.98	752.60
State tax, 97.95 & 2,303.13	2,401.08
County tax, 97.95 & 2,303.13	2,401.08

In Issaquena county:

Privilege tax	81.90
State tax	252.48
County tax	176.73

104 In Sharkey county:

Privilege tax	$39.22
State tax	119.12
County tax	142.94

And municipal taxes as follows:

In Tunica	28.84
In Lula	
In Coahoma	
In Clarksdale	156.80
In Jonestown	
In Friars Point	
In Shelby	
In Cleveland	
In Shaw	
In Rosedale	
In Gunnison	
In Leland	
In Hollandale	
In Rolling Fork	
In Vicksburg	3,002.68
In Port Gibson	
In Russum	
In Harriston	
In Hamburg	
In Roxie	30.48
In Knoxville	
In Gloster	
In Centerville	

And the plaintiff in fact avers that all the railroads on which the taxes are herein sued for had the first rails laid more than three years before January 1st, 1890, and although the said defendants were and are still indebted to said State of Mississippi and to the said several counties and towns in said several amounts, aggregating a large sum of money, to wit, $—, and although said several amounts are due and delinquent and have been duly demanded, yet said defendants have each and both hitherto failed and refused and still fail and refuse to pay the same or any part or parcel thereof, to plaintiff's damage $150,000.00, and hence he sues for the uses aforesaid, and files a copy of said assessment-roll as Exhibit "A" to this

declaration and asks that the same be made a part thereof, and, as by the statute in such cases made and required, he makes parties to this suit the Honorables J. F. Sessions, of Lincoln county; Walter McLaurin, of Warren county, and J. H. Askew, of Oktibbeha county, constituting said railroad commission and State railroad assessors, and W. H. Rollins, T. O. King, R. N. Harris, G. P. Melchoir, William Griffin, H. J. Wright, A. N. Smith, J. M. A. Brennan, Chas. Kennard, L. W. Caradine, R. S. Butler, D. M. Butler, C. H. Neyland, C. H. Fonda, J. L. Sullivan, sheriffs and tax collectors of said De Soto, Tunica, Coahoma, Bolivar, Washington, Sharkey, Issaquena, Warren, Claiborne, Jefferson, Franklin, Amite, Wilkinson, Tallahatchie, and Leflore counties respectively, under sec. 4200 of the Annotated Code of Mississippi, and asks that they and said defendant railroad companies be summoned, &c.

CRITZ & BECKETT,
Attorneys for Plaintiff.

Endorsed: Filed January 1st, 1896, and summons issued to Hinds, Lincoln, Warren, Oktibbeha, De Soto, Tunica, Coahoma, Bolivar, Sharkey, Issaquena, Washington, Claiborne, Jefferson, Franklin, Amite, Wilkinson, Tallahatchie, and Leflore counties. F. B. Neal, clerk, by W. J. Brown, Jr., D. C.

105 *Order of Consolidation.*

July term, 1896.

JULY 21ST, 1896.

WIRT ADAMS, State Revenue Agent, Use, &c.,
vs.
THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY *et al.* } 2788, 2916, & 3018.

By consent of parties, these cases are consolidated, and it is ordered that all the orders, proceedings, and pleadings in one shall be applicable to all, with the proper changes in dates and amounts, for the years 1892, 1893, 1894, and 1895. This order is made to save the expense and inconvenience of seperate pleadings in each case and is not to be construed to the prejudice of either party, and all objections and exceptions are reserved which *which* could be reserved if said orders, proceedings, and pleadings were all seperate.

Issue Joined.

July term, 1896.

JULY 22, 1896.

WIRT ADAMS, State Revenue Agent, Use, &c.,
vs.
THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY ET AL. } 2788.

Came the parties, by their attorneys; and, issue being joined, came a jury of good and lawful men, to wit, E. B. Pool and eleven

others, who were duly elected, empaneled, and sworn. The plaintiff having submitted his evidence to the jury and rested the case, the defendants move to exclude the plaintiff's testimony; which motion the court overruled. The defendant excepted to the action of the court in overruling said motion, and his exception was allowed. The further consideration of this cause was then postponed until tomorrow morning.

JULY 23RD, 1896.

WIRT ADAMS, State Revenue Agent, Use, &c.,
vs.
THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY ET AL. } 2788.

Came the parties, by their attorneys; and thereupon came the jury heretofore empaneled in this cause; and having heard more testimony, the further consideration hereof was postponed until tomorrow morning.

JULY 24TH, 1896.

WIRT ADAMS, State Revenue Agent, Use, &c.,
vs.
THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY ET AL. } 2788.

Came the parties, by their attorneys; and thereupon came the jury heretofore empaneled in this cause; and, having heard more of the testimony, the further consideration thereof was postponed until tomorrow morning.

Dismissal as to Helena Branch, &c.

JULY 25TH, 1896.

WIRT ADAMS, State Revenue Agent, Use, &c.,
vs.
THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY ET AL. } 2788.

This day came on to be heard this consolidated cause, and
106 the plaintiff dismisses as to what is denominated on the assessment-rolls as the Helena branch and the Riverside division, special charter, and Bayou Sara division.

Judgment.

WIRT ADAMS, State Revenue Agent, Use, &c.,
vs.
THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY ET AL. } 2788.

Came the parties, by their attorneys, and thereupon came the jury heretofore empaneled, to wit, E. B. Pool and eleven others, and the evidence being concluded and the jury, having heard the argument of counsel, retired under the instructions of the court to consider of their verdict, and presently returned into court and say: We, the jury, find for the plaintiff for the year 1895 as follows: For the use of the State of Mississippi, in De Soto county, State tax,

$822.13; privilege tax, $257.26, and for use of said De Soto county, $822.13. In Tunica county, for use of said State, $1,883.19; privilege tax, $612.46, and for use of said Tunica county, $2,824.78. In Coahoma county, for use of said State, $3,711.69; privilege tax, $1,161.46, and for use of said Coahoma county, $5,154.36. In Bolivar county, for the use of said State, $5,014.16; privilege tax, $1,604.86; for use of said Bolivar county, $17,724.76. In Washington county, for use of said State, $2,182.28; privilege tax, $676.08; for use of said Washington county, $2,182.28. In Sharkey county, for the use of said State, $2,221.87; privilege tax, $709.76; for use of said county of Sharkey, $2,666.16. In Issaquena county, for use of said State, $663.55; privilege tax, $214.80, and for use of said Issaquena county, $464.47. In Warren county, for use of said State, $2,857.69; privilege tax, $715.36, and for the use of said Warren county, $6,858.45. In Claiborne county, for the use of said State, $1,284.93; privilege tax, $407.56, and for the use of said Claiborne county, $2,055.88. In Jefferson county, for the use of said State, $1,252.04; privilege tax, $396.74, and for the use of said Jefferson county, $2,128.46. In Franklin county, for the use of said State, $1,354.63; privilege tax, 453.04, and for the use of said Franklin county, $2,438.34.

In Amite county, for the use of said State, 1,044.25; privilege tax, $331.54, and for the use of said Amite county, $678.76. In Wilkinson county, for the use of said State, $713.07; privilege tax, $216.52, and for the use of said Wilkinson county, $926.99. In Tallahatchie county, for the use of said State, $649.66; privilege tax, $304.45, and for the use of said Tallahatchie county, $839.59. In Leflore county, for the use of said State, $167.65; privilege tax, $50.45, and for the use of said Leflore county, $184.35, and for the use of said towns of Tunica, $28.84; Clarksdale, $156.80; Vicksburg, $3,002.68; Roxie, $30.48, with interest, at the rate of six per cent. per annum, from December 15, 1895; and the jury find for the defendants for the years 1892, 1893, and 1894. It is therefore considered by the court, and so ordered and adjudged, that the plaintiff, for uses aforesaid, do have and recover of defendants, The Yazoo & Mississippi Valley Railroad Company and The Illinois Central Railroad Company, the said several sums of money, amounting in the aggregate to the sum of $84,985.63, with interest on each of said several sums at the rate of six per cent. per annum from the 15th day of December, 1895, aggregating the sum of $3,144.45, together with the cost of this suit, to be taxed, for all of which execution may issue, and as to the years 1892, 1893, and 1894 it is ordered that the defendants go hence without day.

107 *Plaintiff's Instructions Given.*

STATE OF MISSISSIPPI, *Hinds County.*

Circuit Court, First District.

WIRT ADAMS, State Revenue Agent, Use, etc., Plaintiff,
v.
YAZOO & MISSISSIPPI VALLEY R. R. CO. ET AL., Defendant-.

17th. An exemption from taxation to be allowed must be claimed and established by the defendant, and if the jury believe from the evidence that the property on which the taxes are sought to be recovered in this case was and is the property of the consolidated Yazoo & Mississippi Valley Railroad Company, and that the taxes therein were duly assessed by the Mississippi railroad commission, acting as State railroad assessors, and are unpaid in money, they will find for the plaintiff, unless they further believe from the evidence that the exemption claimed by the said railroad company has been established on the terms and conditions and in the manner prescribed by the charters and laws under which the consolidation occurred.

Given.

F. B. NEAL, *Clerk*,
By W. J. BROWN, JR., *D. C.*

18th. The court charges the jury that neither the Memphis & Vicksburg Railroad Company, nor the New Orleans, Baton Rouge, Vicksburg & Memphis Short Line Railroad Co., nor the Louisville, New Orleans & Texas Railway Co. was authorized under their charters to dispose of the capital stock at less than the par or face value thereof, and in calculating whether the said Louisville, New Orleans & Texas Railway Co. or said consolidated Yazoo & Mississippi Valley Railroad Co. earned sufficient profits to enable it to declare and pay an annual dividend of eight per cent. on its capital stock over and above the payment of its debts and liabilities as defined
108 and specified in its charter the jury will deduct from such debts and liabilities the amount shown to have been paid in for capital stock, and they will disregard and omit from the right to dividends all stock which is not shown to have deen paid for at its face or par value.

Given.

F. B. NEAL, *Clerk*,
By W. J. BROWN, JR., *D. C.*

19th. If the jury believe from the evidence that the Louisville, New Orleans & Texas Railway Co. issued three series of bonds substantially as follows: One series for about $13,805,000, bearing interest at the rate of four per cent.; one series for about $8,731,000, bearing interest at the rate of five per cent., and one series for

about $8,347,000, bearing interest at the rate of six per cent., and that it did not take or require said aggregate sum of $30,883,000 to construct said railroad and branches which were constructed, then it devolves on the defendant The Yazoo & Mississippi Valley Railroad Co. to separate the money used for the construction of said railroads from the money used for other purposes and to identify and show in what bonds or series of bonds and to what extent it is embraced in them, or any claim of exemption will be considered as waived and surrendered, and unless the jury are able to make this separation and identification from the evidence before them, they will find for the plaintiff.

Given.

F. B. NEAL, *Clerk*,
By W. J. BROWN, JR., *D. C.*

20th. The cost of construction of the said Louisville, New Orleans & Texas railroad and the annual profits from operating the same being matters peculiarly within the knowledge or means of knowledge of the defendant The Yazoo & Mississippi Valley Railroad Co., it devolves on it to make such a plain and full
109 showing of the same as will enable the jury to determine definitely and satisfactorily whether its annual profits for each of the years 1892, 1893, 1894, and 1895 have enabled it to declare and pay an annual dividend of eight per cent. on its proper capital stock over and above the payment of its debts and liabilities as defined and specified in its charter, and the jury will find for the plaintiff for all and each of said years where such showing is not made by it or does not otherwise appear from the evidence.

Given.

F. B. NEAL, *Clerk*,
By W. J. BROWN, JR., *D. C.*

20½. The law required of the Louisville, New Orleans & Texas Railway Co., in order to acquire and preserve its exemption, that it should act in good faith with the State; and if the jury believe from the evidence that said Louisville, New Orleans & Texas Railway Co. and the Financial Improvement Company, which constructed its railroad, were composed of the same persons, then the jury may go behind the contracts made between them to find the reasonable cost of constructing said railroad, and if they believe from the evidence that the construction debts so contracted were unreasonable and exorbitant they may allow in their calculations as construction debts such amounts as they believe from the evidence to be reasonable and just.

Given.

F. B. NEAL, *Clerk*,
By W. J. BROWN, JR., *D. C.*

21st. If the jury believe from the evidence that the Louisville, New Orleans & Texas Railway Co. purchased other railroads or built railroads under other charters which were not exempt from

taxation, and that such other railroads were so joined onto the railroads built under the charters as to make the traffic continuous, so that they and the defendant The Yazoo & Mississippi Valley
110 Railroad Co. were unable to separate and distinguish the respective profits of each, then any claim of exemption will be considered as waived and surrendered and the jury will find for the plaintiff.

Given.

F. B. NEAL, *Clerk*,
By W. J. BROWN, JR., *D. C.*

22nd. If the jury believe from the evidence that the defendant The Illinois Central Railroad Co. paid off the debts and liabilities and bonds of the Louisville, New Orleans & Texas Railway Co. with its own bonds, and that the profits of said defendant, The Yazoo & Mississippi Valley Railroad, on the former property of said Louisville, New Orleans & Texas Railway Co. have since been sufficient to enable it to declare and pay an annual dividend of eight per cent. on the proper capital stock of the Louisville, New Orleans & Texas Railway Co., they will find for the plaintiff for the years in which such facts existed of the years 1892, 1893, 1894, and 1895.

Given.

F. B. NEAL, *Clerk*,
By W. J. BROWN, JR., *D. C.*

22½. If the jury believe from the evidence that the profits of the Yazoo & Mississippi Valley R. R. Co. on that part of its line formerly owned by the Louisville, New Orleans & Texas Railway Co. have been sufficient to enable it to declare an annual dividend of eight per cent. on its proper capital stock over and above the payment of its debts and liabilities, as defined in its charter, for either of the years 1892, 1893, 1894, or 1895, then the appropriation of taxes ceased and was not revived ever, though they may believe from the evidence that such profits were not sufficient in some subsequent year.

Given.

F. B. NEAL, *Clerk*,
By W. J. BROWN, JR., *D. C.*

111 23rd. If the jury believe from the evidence that on or since the consolidation of the Louisville, New Orleans & Texas Railway Co. with the Yazoo & Mississippi Valley R. R. Co. on or about Oct. 24th, 1892, the respective capital stocks of the two companies have been so merged or united into one, and that new stock has been issued by said Yazoo & Mississippi Valley R. R. Co. since the consolidation, so that the former stocks of said Louisville, New Orleans & Texas Railway Co. has lost its identity and cannot be separated or distinguished and no dividend can be declared thereon, then such stock must be disregarded in determining whether the profits of said railroad have enabled it to declare and pay an annual dividend of eight per cent. on its proper capital stock after the

payment of its debts and liabilities, as defined and specified in the charter of the Louisville, New Orleans & Texas Railway Co. for the years after such new stock was issued.

Given.

F. B. NEAL, *Clerk*,
By W. J. BROWN, JR., *D. C.*

24th. If the jury believe from the evidence that the defendant The Illinois Central R. R. Co., a foreign corporation, operating a railroad from Memphis, Tennessee, to New Orleans, Louisiana, through this State, through its officers, and ownership of the stock of the Louisville, New Orleans & Texas Railway Co. and of the ownership of the stock of the consolidated Yazoo & Mississippi Valley Railroad Co. previous to and on and since Oct. 24th, 1892, acquired and has kept control of said consolidated Yazoo & Mississippi Valley Railroad Co., and that said former Louisville, New Orleans & Texas railroad and said Illinois Central railroad, from Memphis to New Orleans through this State, were and are competing and virtually parallel lines, so that said Illinois Central railroad was and is enabled to divert the through and part of the
112 local traffic from said Louisville, New Orleans & Texas railroad to its line at will, and thus increase or diminish the profits and the traffic over the line of said Louisville, New Orleans & Texas railroad at will, then, unless it affirmatively appears to the satisfaction of the jury, from the evidence, that the legitimate traffic and profits of said Louisville, New Orleans & Texas railroad would not have enabled it to declare and pay a dividend of eight per cent. on its capital stock after payment of debts and liabilities, defined and specified in its charter, they will find for the plaintiff.

Given.

F. B. NEAL, *Clerk*,
By W. J. BROWN, JR., *D. C.*

25th. The court charges the jury that in estimating the cost of construction of the railroad they will only take into consideration the cost of construction of those parts of the railroad in Mississippi which the defendants claim to be exempt from taxation, and they will treat the amounts of net profits proven as the net profits upon said parts of said railroad in the State of Mississippi which the defendants claim to be exempt from taxation.

Given.

F. B. NEAL, *Clerk*,
By W. J. BROWN, JR., *D. C.*

26th. The court charges the jury that the burden of proof is upon the defendants to show the net profits on that part or those parts of the railroad in the State of Mississippi which the defendants claim to be exempt from taxation.

Given.

F. B. NEAL, *Clerk*,
By W. J. BROWN, JR., *D. C.*

113 27th. If the jury believe from the evidence that the Illinois Central Railroad Co., through its ownership of stock and bonds, is really and substantially the owner of the Yazoo & Mississippi Valley Railroad Co. and of the property formerly belonging to the Louisville, New Orleans & Texas Railway Co., and has agreed to pay all taxes and assessments that had been or might be lawfully levied on said property, then if the taxes now sued for were lawfully levied and the assessment of said property lawfully made, the said Illinois Central Railroad Co. would be equally liable for the same with said Yazoo & Mississippi Valley Railroad Company.

Given.

F. B. NEAL, *Clerk*,
By W. J. BROWN, JR., *D. C.*

Endorsed: We, the jury, find for the plaintiff for the year 1895. 7, 27, 1896.

114 *Plaintiff's Instructions Refused.*

THE STATE OF MISSISSIPPI, *Hinds County.*

Circuit Court, First District.

WIRT ADAMS, State Revenue Agent, etc., Plaintiff,
v.
YAZOO & MISSISSIPPI VALLEY R. R. CO. ET AL., Defendants.

The court charges the jury for plaintiff as follows:

1st. That they will find for the plaintiff for each of the years 1892, 1893, 1894, and 1895.

Refused.

2nd. That they will find for the plaintiff against the Yazoo & Mississippi Valley R. R. Co. for each of the years 1892, 1893, 1894, and 1895.

Refused.

3rd. That they will find for the plaintiff for the years 1893, 1894, and 1895, being the years since the consolidation of the companies.

Refused.

4th. That they will find for the plaintiff against the defendant The Yazoo & Mississippi Valley Railroad Co. for the years 1893, 1894, and 1895.

Refused.

5th. The jury will find for the plaintiff as to the county taxes sued for.

Refused.

6th. The jury will find for the plaintiff as to the privilege taxes sued for.

Refused.

115 6½. That the exemption of the Louisville, New Orleans & Texas Railway Co. was dependent on whether out of their profits they could pay an annual dividend of eight per cent. on

their capital stock, and the charter of the Yazoo & Mississippi Valley Railroad Companies gave to the consolidating companies all the rights, privileges, powers, liberties, and immunities and franchises therein granted; and as one of these rights, powers, and privileges was to issue paid-up stock, and as this power to issue paid-up stock was availed of and incorporated in the deed of consolidation, any claim to exemption on the part of said Louisville, New Orleans & Texas Railway Company would be waived and surrendered by such consolidation.

Refused.

7th. That they will find for the plaintiff for the years 1892, 1893, 1894, and 1895 as to the Riverside division, exclusive of the Riverside Division special charter.

Refused.

8th. That they will find for the plaintiff against the Yazoo & Mississippi Valley Railroad Company for the years 1892, 1893, 1894, and 1895 as to what is denominated on the assessment-rolls the Riverside division.

Refused.

9th. That they will find for the plaintiff as to that part of the railroad south of Vicksburg for the years 1892, 1893, 1894, and 1895.

Refused.

10th. That they will find for the plaintiff as against the defendant The Yazoo & Mississippi Valley Railroad Company as to that part of the railroad south of Vicksburg for the years 1892, 1893, 1894, and 1895.

Refused.

116 11th. If the jury believe from the evidence that the Yazoo & Mississippi Valley Railroad Company and the Louisville, New Orleans & Texas Railway Company by their consolidation on Oct. 24th, 1892, "were united and merged into a single corporation under the name of the Yazoo & Mississippi Valley Railroad Company," then, under the provisions of the Mississippi constitution of 1890, an exemption from taxation in the charter of the Louisville, New Orleans & Texas Railway Company would not pass into the consolidated company.

Refused.

12th. If the jury believe from the evidence that in October, 1892, the Yazoo & Mississippi Valley Railroad Company consolidated with the Louisville, New Orleans & Texas Railway Company under the authority conferred by their respective charters, then a new corporation was thereby formed into which an exemption from taxation did not enter under the provisions of the Mississippi constitution of 1890.

Refused.

13th. If the jury believe from the evidence that on or about Oct. 24th, 1892, the Louisville, New Orleans & Texas Railway Company voluntarily consolidated with the Yazoo & Mississippi Valley Railroad Company, then under the charter of the said Yazoo & Mississippi Valley Railroad Company "the rights, privileges, powers,

liberties, and immunities and franchises" of the said Yazoo & Mississippi Valley Railroad Co. became "the rights, privileges, powers, liberties, and immunities and franchises" of the consolidated company, except that any claim or right of exemption from taxation of said Louisville, New Orleans & Texas Railway Co. did not pass to the consolidated company.

Refused.

117 14th. The court charges the jury that the right to consolidate with other companies of the charter of a railroad company is the "grant of a corporate franchise," and if they believe from the evidence that the consolidation and organization thereunder of the Yazoo & Mississippi Valley Railroad Company and the Louisville, New Orleans & Texas Railway Company did not take place until after Nov. 1st, 1890, they will find for the plaintiff.

Refused.

15th. The court charges the jury that under the lease existing in 1892, 1893, 1894, and 1895, if a railroad company claimed any of its property to be exempt from taxation, it was required to file with the railroad commission a claim to such exemption and to cite the law under which the claim was made. The court further charges the jury that such claim to exemption should embrace all statements of law or facts which would be necessary to enable the said railroad commission, sitting as State railroad assessors, to determine whether the exemption was then in force, and unless they believe from the evidence that such claim to exemption and citation of the law under which it was claimed was so filed in any of said years, they will find for the plaintiff as to the years in which they were not filed.

Refused.

16th. The court charges the jury that under the laws existing in 1892, 1893, 1894, and 1895, if a railroad company claimed any of its property to be exempt from taxation, it was required to file with the railroad commission a claim to such exemption and to cite the law under which the claim was made, and if the right to exemption depended on a given state of facts, it was the duty of the said railroad commission, sitting as State railroad assessors, to determine whether such state of facts existed, and if the jury believe

118 that the Louisville, New Orleans & Texas Railway Company or Yazoo & Mississippi Valley Railroad Company could have and either did or did not furnish the said railroad commission, as State railroad assessors, with the necessary evidence of the facts to enable them to determine whether its claim to exemption was in force and operation at the time, and that the said railroad assessors for any of the said years did duly assess said property as liable to taxation and not exempt, then such finding and assessment cannot be assailed or set aside in this suit, and the jury will find for the plaintiff as to such years.

Refused.

119 *Instructions for Defendants Given.*

1st. The court instructs the jury that if they believe from the evidence that during the years 1882 to 1892, inclusive, the net profits resulting from the operation of that railroad, which was the L., N. O. & T. railroad, including its branches, were not sufficient in any year to enable it to pay a dividend of eight per cent. to the holders of the proper capital stock of the L., N. O. & T. railway, after paying all of its then due liabilities incurred in and about the construction of the said L., N. O. & T. railway and such of its branches as were built under the L., N. O. & T. charter, then they must find for the defendant as to the taxes of 1892.

Given.

F. B. NEAL, *Clerk*,
By W. J. BROWN, *D. C.*

2nd. The court instructs the jury that if they believe from the evidence that during the years 1882 to 1893, inclusive, the net profits resulting from the operation of that railroad, which was the L., N. O. & T. railroad, including its branches, were not sufficient in any year to enable it to pay a dividend of eight per cent. to the holders of the proper capital stock of the L., N. O. & T. railway, after paying all of its then due liabilities incurred in and about the construction of the said L., N. O. & T. railroad and such of its branches as were built under the L., N. O. & T. charter, then they must find for the defendants as to the taxes of 1893.

Given.

F. B. NEAL, *Clerk*,
By W. J. BROWN, JR., *D. C.*

120 3rd. The court instructs the jury that if they believe from the evidence that during the years from 1882 to 1884, inclusive, the net profits resulting from the operation of that railroad, which was the L., N. O. & T. railroad, including its branches, were not sufficient in any year to enable it to pay a dividend of eight per cent. to the holders of the proper capital stock of the L., N. O. & T. railway, after paying all of its then due liabilities incurred in and about the construction of the said L., N. O. & T. railway and such of its branches as were built under the L., N. O. & T. charter, then they must find for the defendants as to the taxes of 1894.

Given.

F. B. NEAL, *Clerk*,
By W. J. BROWN, JR., *D. C.*

4th. The court instructs the jury that if they believe from the evidence that during the years 1882 to 1895 the net profits resulting from the operation of that railroad, which was the L., N. O. & T. railroad, including its branches, were not sufficient in any year to enable it to pay a dividend of eight per cent. to the holder- of the proper capital stock of the L., N. O. & T. railway, after paying all of

its then due liabilities incurred in and about the construction of the said L., N. O. & T. railroad and such of its branches as were built under the L., N. O. & T. charter, then they must find for the defendants as to the taxes of 1895.

Given.

F. B. NEAL, *Clerk*,
By W. J. BROWN, JR., *D. C.*

5th. The court instructs the jury that they must find for the defendants so far as one-half of the privilege taxes are concerned, which are described in the declaration as payable for the year 1892.

Given.

F. B. NEAL, *Clerk*,
By W. J. BROWN, JR., *D. C.*

121 *Instructions for Defendants Refused.*

1st. The court instructs the jury to find for defendants.

Refused.

2nd. The court instructs the jury to find for the defendang The Illinois Central Railroad Company.

Refused.

3rd. The court instructs the jury to find for the defendant- so far as the municipal or town taxes are concerned.

Refused.

4th. The court instructs the jury that if the- believe from the evidence that during the year 1892 the net profits resulti . m the operation of that railroad, which was the L., N. O. & T. rail. , including its branches, were not sufficient to enable it to pay a dividend of eight per cent. to the holders of the five millions of stock after paying all of its then due liabilities incurred in and because of the construction of the L., N. O. & T. railroad and such of its branches as were built under the L., N. O. & T. charter, then they must find for the defendants as to all taxes demanded for the year 1892.

Refused.

5th. The court instructs the jury that if they believe from the evidence that during the year 1893 the net profits resulting from the operation of that railroad, which was the L., N. O. & T. railroad, including its branches, were not sufficient to enable it to pay a dividend of eight per cent. to the holders of the five million- of
122 stock after paying all of its then due liabilites incurred in and because of the construction of the said L., N. O. & T. railroad and such of its branches as were built under the L., N. O. & T. charter, then they must find for the defendants as to all taxes demanded for the year 1893.

Refused.

6th. The court instructs the jury that if they believe from the evidence that during the year 1894 the net profits resulting from the operation of that railroad, which was the L., N. O. & T. railroad, including its branches, were not sufficient to enable it to pay a divi-

dend of eight per cent. to the holders of the five millions of stock after paying all of its then due liabilities incurred in and because of the construction of the L., N. O. & T. railroad and such of its branches as were built under the L., N. O. & T. charter, then they must find for the defendants as to all taxes demanded for the year 1894.

Refused.

7th. The court instructs the jury that if they believe from the evidence that during the year 1895 the net profits resulting from the operation of that railroad, which was the L., N. O. & T. railroad, including its branches, were not sufficient to enable it to pay a dividend of eight per cent. to the holders of the five millions of stock after paying all of its then due liabilities incurred in and because of the construction of the said L., N. O. & T. railroad and such of its branches as were built under the L., N. O. & T. charter, then they must find for the defendants as to all taxes demanded for the year 1895.

Refused.

123 8th. The court instructs the jury that if they believe from the evidence that in the year 1892 the Yazoo & Mississippi Valley Railroad Company paid on the debt incurred in constructing the L., N. O. & T. railway, main line, and such of the branches as were constructed under the L., N. O. & T. charter, a sum of money equal to one hundred thousand dollars, whether such payment was made on principal or interest, and if they further believe from the evidence that during said year the net profits resulting from the operation of that railroad, which was the L., N. O. & T. railroad, including its branches, were not sufficient to enable it to pay a dividend of eight per cent. to the holders of the five millions of stock, after paying all of its then due liabilities incurred in and because of the construction of the said L., N. O. & T. railroad and such of its branches as were built under the L., N. O. & T. charter, they *they* must find for the defendants as to all taxes demanded for the year 1892.

Refused.

9th. The court instructs the jury that if they believe from the evidence that in the year 1893 the Yazoo & Mississippi Valley Railroad Company paid on the debt incurred in constructing the L., N. O. & T. railway, main line, and such of the branches as were constructed under the L., N. O. & T. charter, a sum of money equal to ninety-five thousand dollars, whether such payment was made on principal or interest, and if they further believe from the evidence that during said year the net profits resulting from the operation of that railroad, which was the L., N. O. & T. railroad, including its branches, were not sufficient to enable it to pay a dividend of eight per cent. to the holders of the five millions of stock, after paying all of its then due liabilities incurred in and because of the con-

124 struction of the said L., N. O. & T. railroad and such of its branches as were built under the L., N. O. & T. charter, then they must find for the defendants as to all taxes demanded for the year 1893.

Refused.

10th. The court instructs the jury that if the- believe from the evidence that in the year 1894 the Yazoo & Mississippi Valley R. R. Co. paid on the debt incurred in constructing the L., N. O. & T. railway, main line, and such of the branches as were constructed under the L., N. O. & T. charter, a sum of money equal to ninety-five thousand dollars, whether such payment was made on principal or interest, and if they further believe from the evidence that during said year the net profits resulting from the operation of that railroad, which was the L., N. O. & T. railroad, including its branches, were not sufficient to enable it to pay a dividend of eight per cent. to the holders of the five millions of stock, after paying all of its then due liabilities incurred in and because of the construction of the said L., N. O. & T. railroad and such of its branches as were built under the L., N. O. &. T. charter, then they must find for the defendant- as to all taxes demanded for the year 1894.

Refused.

11th. The court instructs the jury that if the- believe from the evidence that in the year 1895 the Yazoo & Miss. Valley R. R. Co. paid on the debt incurred in constructing the L., N. O. & T. railway, main line, and such of its branches as were constructed under the L., N. O. & T. charter, a sum of money equal to ninety-five thousand dollars, whether such payment was made on the principal or interest, and if they further believe from the evidence that during said year the net profits resulting from the operation of that railroad which was the L., N. O. & T. railroad, including its branches,
125 were not sufficient to enable it to pay a dividend of eight per cent. to the holders of the five millions of stock, after paying all of its then due liabilities incurred in and because of the construction of the said L., N. O. & T. railroad and such of its branches as were built under the L., N. O. & T. charter, then they must find for the defendants as to all taxes demanded for the year 1895.

Refused.

126 *Plaintiff's Motion for a New Trial.*

WIRT ADAMS, State Rev. Ag't,
vs.
THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMpany *et al.* } 2788. Consol.

Now comes the plaintiff and moves the court to set aside the judgment in this consolidated case, and to set aside the verdict in favor of the defendants for the years 1892, 1893, and 1894, and to grant a new trial as to said years 1892, 1893, and 1894, because:

1st. The verdict is contrary to law.
2. It is contrary to the evidence.
3. It is contrary to the charges of the court.
4. It is shown by the record to be a compromise verdict.
5. It is shown from the evidence to be a compromise verdict.
6. It is shown by the affidavit of Willis Chiles, herewith filed, to

be a compromise verdict and obtained by duress and unfair means by one of the jurors from the other eleven.

7. The court erred in refusing charges No. 1, 2, 3, 4, 5, 6, 6½, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16 asked by the plaintiff.

8. The court erred in giving the charges given for the defendants.

9. The court erred in overruling the objections of plaintiff and in sustaining the objections of the defendants to testimony of J. M. Edwards, as shown in the stenographer's transcribed notes.

10. The court erred in overruling the objections of plaintiff and in sustaining the exceptions of the defendants to testimony of J. M. Edwards in his second examination, as shown in said stenographer's transcribed notes.

11. The court erred in overruling the objections of plaintiff and in sustaining the exceptions of the defendants to testimony of J. C. Welling, as shown in said stenographer's transcribed notes.

12. The court erred in overruling the objections of plaintiff to testimony of B. C. Pfouts, as shown in said stenographer's transcribed notes.

13. The court erred in overruling the objections of plaintiff to testimony of Major Wm. Starling, as shown in said stenographer's transcribed notes.

14. The court erred in overruling the demurrer of plaintiff to the plea of defendants setting up a claim to exemption from taxation.

15. The court erred in its action on plaintiff's 4, 5, 6, 7, 8, 12, and 13 replications in sustaining demurrers thereto.

16. The court erred in overruling the objections of plaintiff to testimony of Ridgeley, as shown in the stenographer's transcribed notes.

17. Other causes apparent from the record and testimony.

CRITZ, BECKETT & JONES,
For Motion.

MAYES & HARRIS & YERGER, *Contra.*

Endorsed: Filed and entered July 28, 1896. F. B. Neal, clerk, by W. J. Brown, Jr., D. C.

127 *Plaintiff's Motion for New Trial Overruled.*

July Term, 1896.

AUGUST 1ST, 1896.

WIRT ADAMS, State Rev. Agent,
vs.
THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY *et al.* } 2788. Consol.

Came on to be heard the motion of plaintiff to set aside the verdict and grant a new trial herein, and the court having duly considered the same, it is hereby ordered and adjudged that said motion be, and the same is hereby, overruled; to which ruling of the court the plaintiff excepted, and his exception was allowed.

Defendants' Motion for New Trial.

STATE OF MISSISSIPPI,
County of Hinds.

In the Circuit Court, at the July Term, 1896.

WIRT ADAMS, State Revenue Agent, Use, &c.,
vs.
THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY *et al.* } 2788. Consol.

Comes the defendants in t-e above-entitled cause and move the court to set aside the verdict of the jury herein rendered and the judgment of the court based thereupon and to grant a new trial, and for causes assign as follows, to wit:

1. The court erred in admitting as evidence of value the assessment-rolls from the office of the railway commission, showing the value placed by the Yazoo & Mississippi Valley Railway Company on the property in controversy for the purpose of taxation during the years 1892, 1893, 1894, and 1895.

2. The court erred in admitting in evidence the deed of trust made on the first day of September, 1892, between the Illinois Central Railroad Company and the United States Trust Company of New York, for the purpose of supporting the declaration and of showing that the Illinois Central Railroad Company was owner of the bonds and stock of the Louisville, New Orleans & Texas Railway Company.

3. The court erred in permitting the plaintiff to introduce the lease made on the 3rd day of March, 1888, between the Yazoo & Mississippi Valley Railroad Company and the Illinois Central Railroad Company.

4. The court erred in allowing the plaintiff to show who were the stockholders of the Yazoo & Mississippi Valley Railroad Company at the time of said lease and who were the stockholders and directors in the Yazoo & Mississippi Valley Railroad Company on the 4th day of October, 1893; also who were the stockholders and officers of the Mississippi Valley Company on the 14th October, 1892; also who were the stockholders and officers of the original Yazoo & Mississippi Valley Railroad Company and the directors of the same, being Exhibit D, from January 1st to Oct. 25th, 1892; also the list of stockholders, marked Exhibit E to the stenographer's notes; also the minutes of the 18th October, 1893, of the Yazoo & Mississippi Valley Railroad Company, showing who were the officers of that company, and that on motion those officers were elected to serve without salary, and that they were the same officers of the Illinois Central Railroad Company.

5. The court erred in allowing the plaintiff to offer in evidence the charter of the Mississippi Valley Railroad Company for the purpose stated.

128 6. The court erred in allowing the plaintiff to offer in evidence the minutes of the Yazoo & Mississippi Valley Railroad Company on the 1st of August, 1893, marked Exhibit H to the stenographer's notes; also in allowing the plaintiff to introduce the list of the directors of the Illinois Central Railroad Company at the time of the consolidation from June 1st to Oct. 21, 1892, marked Exhibit I to the stenographer's notes; also in allowing the plaintiff to introduce the list of the stockholders of the Illinois Central Railroad Company at the time of the consolidation and at the close of business, Oct. 24, 1892, marked Exhibit J to the stenographer's notes.

7. The court erred in overruling the motion of the defendants to exclude the testimony of the plaintiff after the plaintiff had rested his case and before the defendant had opened its case.

8. The court erred in refusing to allow the defendant to ask the witness J. C. Willing the following question: "State whether or not in the year 1892 the Louisville, New Orleans & Texas Railway Company or the Yazoo & Mississippi Valley Railroad Company, as its successor, was enabled to declare and pay an annual dividend of eight per cent. upon its capital stock over and above the payment of its due debts and liabilities."

9. The court erred in refusing to allow the defendant to ask the same witness the same question in respect to the years 1893, 1894, and 1895 or any of them.

10. The court erred in refusing to allow the defendant to ask the said witness, J. C. Willing, the following question: "State whether or not in the years 1892, 1893, 1894, and 1895 or either of said years the Yazoo & Mississippi Valley Railroad Company, as the successor and assignee of the Louisville, New Orleans & Texas Railway Company, was enabled to declare and pay an annual dividend of eight per cent. upon its proper capital stock over and above the payment of its due debts and liabilities which the Louisville, New Orleans & Texas Railway Company or the Yazoo & Mississippi Valley Railway Company had incurred in the construction of the railroad, or either of said companies, and for money borrowed by said company upon lands and otherwise to be used in the construction of said railroad and in paying debts incurred by said company or either of them in constructing the same."

11. The court erred in refusing to allow the defendant to ask of the said witness, J. C. Willing, the following question: "State whether or not in the years 1892, 1893, 1894, and 1895 or either of said years the Yazoo & Mississippi Valley Railroad Company, as the successor and assignee of the Louisville, New Orleans, & Texas Railway Company, was enabled to declare and pay an annual dividend of eight per cent. upon its proper capital stock over and above the payment of its due debts and liabilities which the Louisville, New Orleans & Texas Railway Company or the Yazoo & Mississippi Valley Railroad Company had incurred in the construction of the railroad, or either of said companies, for money borrowed by said company upon lands or otherwise to be used in the construction of said railroad and in paying debts incurred by said companies or

either of them in constructing the same under the charter rights of the Louisville, New Orleans & Texas Railway Company."

12. The court erred in refusing to allow the defendant to ask the said witness, J. C. Willing, the following question:

"State whether or not in the years 1892, 1893, 1894, and 1895 or either of said years the Yazoo & Mississippi Valley Railroad Company, as the successor and assignee of the Louisville, New Orleans & Texas Railway Company, was enabled to declare and pay an annual dividend of eight per cent. upon its proper capital stock over and above the payment of its due debts and liabilities which the Louisville, New Orleans & Texas or the Yazoo & Mississippi
129 Valley Railroad Company had incurred in construction of said railroad by either of said companies for money borrowed by said company upon lands or otherwise to be used in the construction of said railroads and in paying debts incurred by said companies or either of them in constructing the same under the charter rights of the Louisville, New Orleans & Texas Railway Company in so far as they include any debts after the consolidation, including only such as were incurred for maintaining and improving such lines of railroad only as were constructed by the Louisville, New Orleans & Texas Railway Company under its charter prior to the consolidation of 1892."

13. The court erred in allowing the plaintiff on the cross-examination of the said witness, J. C. Willing, to interrogate him as to the holding of stock in the various companies alleged to be connected with these transactions, to wit: The Illinois Central Railroad Company, the Louisville, New Orleans & Texas Railway Company, the Yazoo & Mississippi Valley Railroad Company, and the Mississippi Valley Railroad Company.

14. The court erred in allowing the plaintiff on cross-examination to ask the said witness, J. C. Willing, about the holding of stock in the Mississippi Valley Company by Skene, Craft, and others, and about the value of their holding, and in allowing the asking of the following question: "State, Mr. Willing, how these several parties who on this lease are put down as holding one share each of stock in the Yazoo & Mississippi Valley Railroad Company procured that stock."

15. The court erred in overruling the objections interposed by the defendants to the question of R. T. Wilson, a witness for the defendants, by the plaintiff, on his cross-examination, the said objection being in writing and filed amongst the papers in this cause.

16. The court erred in allowing the plaintiff to interrogate, on cross-examination, the witness J. M. Edwards in regard to the method of movements of trains continuously over the main and branch lines and over the upper and lower portion of the main line of said railroad.

17. The court erred in allowing the plaintiff on cross-examination to ask the witness J. M. Edwards the following question: "Was not the Financial Improvement Company owned, or owned in part, by R. T. Wilson?" and in allowing the further questions

to be asked of said witness on cross-examination in respect to the constitution of said Financial Improvement Company.

19. The court erred in overruling the objections interposed by defendants to the deposition of R. H. Elliott, a witness for the plaintiff; which said objection- to questions asked of him in his direct and redirect examination are in writing and are filed amongst the papers in this cause.

20. The court erred in allowing the plaintiff to introduce the assessment-rolls from the office of the railroad commission for the years 1886, 1887, 1888, 1889, 1890, and 1891, respectively, for the purpose of showing the valuation placed by the Yazoo & Mississippi Valley Railroad Company in the year 1895 or the year 1896, under order of the railroad commission, upon the property in controversy for the purpose of back taxation.

21. The court erred in refusing peremptory instructions asked by the defendants.

22. The court erred in refusing the peremptory instruction asked by defendant The Illinois Central Railroad Company.

23. The court erred in refusing the several other instructions asked by the defendants, as shown by the record in this cause.

130 24. The court erred in giving each and every one of the instructions given in this case for the plaintiff.

25. Because the verdict is contrary to the evidence.

26. Because the verdict is contrary to the law and the evidence.

27. For other good reasons to be assigned at the hearing.

MAYES & HARRIS,
For Motion.

CRITZ & BECKETT, *Contra.*

Endorsed: Filed and entered Aug. 3, 1896. F. B. Neal, clerk, by W. J. Brown, Jr., D. C.

Defendants' Motion for New Trial Overruled.

July Term, 1896.

AUGUST 6TH, 1896.

WIRT ADAMS, State Revenue Agent,
vs.
THE YAZOO & MISSISSIPPI VALLEY RAILROAD Company *et al.* } 2788. Consol.

Came on to be heard the motion of defendants to set aside the verdict of the jury and judgment herein and to grant a new trial, and the court having duly considered the same, it is ordered and adjudged that the said motion be, and the same is hereby, overruled; to which action of the court in overruling said motion the defendants then and there excepted, and their exception was allowed.

Special Bill of Exceptions.

STATE OF MISSISSIPPI,
County of Hinds.

In the Circuit Court, July Term, 1896.

WIRT ADAMS, State Revenue Agent,
vs.
YAZOO & MISSISSIPPI VALLEY R. R. Co. ET AL. } Consolidated Cases.

Be it remembered that at this the July term, 1896, of this court came on to be heard the above-entitled cause from July 21st until July 25th, inclusive, being days of said term, and pending the trial of said cause, a jury having been empaneled therein and the cause being in course of submission to them, and while the plaintiff was introducing his testimony in rebuttal, the said plaintiff offered in evidence the deposition of one O. A. Gibson, and to said deposition the defendants interposed certain objections to the questions and answers therein severally propounded and made; which said objections are in writing and are on file amongst the papers of this cause. In presenting said objections the defendants supported the same by presenting to the court the three several notices which had been served upon them by the plaintiff herein, requiring them, the said defendants, to produce on the trial of said cause documents and papers, as will appear in and by said notices themselves, which are part of the record herein, and in connection with said notice it was shown to the court that there were five large dry-goods boxes and one large bundle in the court-room, which the defendants, by their counsel, stated contained the documents and books
131 therein called for, and which were then and there in court and at their disposal and subject to the use of the said plaintiff for the purpose of showing the cost of constructing said railroad, and the fact of the presence of said papers in court and their offer to the plaintiff for the purposes aforesaid was not in any way questioned.

Also, pending the presentation by the said plaintiff of his case in rebuttal, the said plaintiff offered the deposition of one R. H. Elliott, and to said deposition the defendants interposed certain objections to the questions and answers therein severally propounded and made, which said objections are in writing and are on file amongst the papers of this cause. In presenting said objections to said two depositions the defendants supported the same by presenting to the court the three several notices which had been served upon them by the plaintiff herein requiring them, the said defendants, to produce on the trial of said cause documents and papers, as will appear in said notices themselves, which are a part of the record herein, and in connection with said notices it was shown to the court that there were 8 or 9 large dry-goods boxes and several large bundles which, the defendants stated to the court, contained the documents and

books therein called for and were then and there in court and at the disposal and subject to the use of the said plaintiff for the purpose of showing the actual cost of constructing said railroad, and the fact of the presence of said papers in court and their offer to the plaintiff for the purposed aforesaid was not in any way questioned.

The court, howev-r, overruled the objections of the said defendant to said deposition of said Gibson, except that the court did rule out his answer to the 59th direct interrogatory and his answer to the 69th direct interrogatory, and also the court ruled out all that part of his answer to the 230th question forming part of his cross-examination, which follows the word "commission;" to which action of the court in admitting the said deposition to be read over the objection of the defendants as stated, with the exceptions as stated, the said defendants then and there objected.

And further, notwithstanding said objections made to the deposition of said Elliott, the court overruled the said objections and allowed the said deposition to be read; to which said action of the court the said defendants then and there objected.

And they present this their special bill of exceptions in the above-entitled cause in open court, presenting said points of objection, which is hereby signed and made part of the record in said cause.

ROB'T POWELL,
Circuit Judge.

Endorsed: Filed August 7, 1896. F. B. Neal, clerk, by W. J. Brown, Jr., D. C.

132 *Plaintiff's Bill of Exceptions.*

THE STATE OF MISSISSIPPI, }
Hinds County. }

Circuit Court, First District.

WIRT ADAMS, State Revenue Agent, Use, &c., Plaintiff,
vs.
YAZOO & MISSISSIPPI VALLEY R. R. Co. *et al.*, Defendants.
} Nos. 2788, 2916, & 3018. Consolidated.

Bill of exceptions for plaintiff.

Be it remembered that on the 21st day of July, A. D. 1896, the same being a day of the regular July term of this court, came on to be heard the above-consolidated cause, and both sides having announced themselves ready for trial, thereupon came a jury of twelve good and lawful men, who being duly elected, empaneled, and sworn to well and truly try the issue joined between the parties, the pleadings and exhibits being read to the jury, thereupon the plaintiff introduced the following evidence:

W. M. MASSIE, who, being first duly sworn, testified as follows:

Q. Mr. Massie, look at that and see what it is.

A. That is the original assessment of the Yazoo & Mississippi Valley railroad and branches, as returned to the railroad commission for the year 1892.

Q. Mr. Massie, state what position you occupied on the Mississippi railroad commission, and how long you have occupied it.

A. I was the clerk in the office of the secretary from the 1st of October, 1893, until the 20th of January, 1896. I think it was the 20th of January, or the 22nd or the 23rd, or somewhere along there.

Q. Did you stay in the office and attend to it personally?

A. Yes, sir; all of the time I had charge of the office.

Q. Now, Mr. Massie, as to how these assessments were made. Here are three columns here—valuation by company, valuation by commission, and valuation by commission after objections heard.

A. These blanks were sent to Mr. Morehouse, the tax commissioner of the railroad system at Chicago. They were returned with the first column filled out.

Q. State what system.

A. The Yazoo & Mississippi Valley and the Illinois Central, and then the commission met after that.

Q. The first column was——

A. Was filled by the railroad; headed, valuation by company.

Q. That is, filled by the railroad company?

A. Yes, sir; and returned to the commission with those figures.

Q. The second column?

A. Afterwards the commission met and made this assessment under the valuation by the commission.

Q. Of the third column—how was this made?

A. The third column, the railroad authorities were notified to appear and make objections to the assessment made by the commission, and these figures resulted in the assessments made by the board.

Q. After hearing the objections?

A. Yes, sir.

Q. And this third column is——

A. Valuation by commission after the objections heard.

Q. State what this is.

A. That is objections of the Louisville, New Orleans & Texas Railway Company after assessment made at the July meeting in 1892; that paper has never come under my observation before.

Q. Whose handwriting is that on the back of it?

A. Mr. Sidney McLaurin's; the secretary himself.

Q. That is filed when?

A. Aug. 20th, 1892, the year before I went into the office. I don't remember to have seen it before. It is possible that I might have seen it, but I don't remember it.

133 Q. It is filed by the regular secretary of the commission?

A. Yes, sir.

The assessment-roll and the objections to it for 1892 are here offered in evidence.

Q. Mr. Massie, state what this is.

A. That is the same as the other, except for the year 1893 instead of 1892; the assessment of the Yazoo & Mississippi Valley railroad, main line and branches, for 1893.

The above roll is here offered in evidence, and the objections by the R. R. Co. filed Sept. 5th, 1893.

Q. Filed by whom?

A. I don't know, sir; I don't recognize the handwriting.

Q. These are objections of whom?

A. The Yazoo & Mississippi Valley R. R. Co. filed objections to this 1893 assessment.

Q. State to the jury what this is.

A. That is the assessment of the main line of the Y. & M. V. for the year 1894.

Q. What is this?

A. That is the assessment of the Bayou Sara branch of the Y. & M. V. R. R. for 1894.

Q. What is this?

A. That is the assessment of the Riverside division of the Y. & M. V. R. R. for the year 1894.

Q. That is the road that runs from Coahoma through Rolling Fork?

A. There are two Riverside divisions.

Q. Are they both in there?

A. No, sir; they are assessed separately. There are two separate divisions.

Q. What is this?

A. This is the Riverside division of the Y. & M. V. R. R., what is usually called the Special Charter division—charter of the Memphis & New Orleans Railway and the Levee Company charter.

Q. State what that is.

A. That is an assessment of the Tallahatchie branch of the same railroad for the year 1894.

Q. The words "exempt," who put that on there?

A. Presumably, the railroad. I don't know. It came into my possession that way.

Q. Where "exempt" appears on the back in red ink it was that way at the time it was filed in the office?

A. Yes, sir.

Q. Those entries were not made by the railroad commission?

A. No, sir.

Q. What is that?

A. That is an assessment of the Helena branch of the Y. & M. V. R. R. Co. for the year 1894.

Q. State what this is.

A. That is an assessment of the main line of the Y. & M. V. R. R. Co. for the year 1895.

Q. State what that is.

A. That is the assessment of the Riverside division of the Y. & M. V. R. R. for the year 1895.

Q. What is that?

—. That is the assessment of the Taliahatchie branch of the Y. & M. V. R. R. for 1895.

Q. What is that?

A. That is the assessment of the Bayou Sara branch of the Y. & M. V. R. R. for the year 1895.

Q. What is that?

—. That is the assessment of the Helena branch of the Y. & M. V. R. R. for 1895.

134 —. What is that?

A. That is the assessment of the Riverside division, special charter, of the Mississippi Valley railroad for the year 1895.

The plaintiff here introduces all the assessment-rolls as referred to by the witness in his testimony.

Q. Mr. Massie, please look at these books and state whether all of the books that have been submitted to you for the year 1893, 1894, and 1895 were made out in a similar manner to what you have testified about 1892—that is, who made out the first column?

A. The 1892 was in the office before I ever became connected with it. The 1893 I find this column, the first column, valuation by company, made out, and by instructions of the commission I filed it and made the second column, and then after objections being heard I filled out the third column, and that third column stood as the assessment.

Q. Under whose direction did you fill out the third?

A. By the instruction of the commission. The secretary and myself were instructed to fill it out. I did the principal part of the work. Mr. McLaurin might have assisted me some, but not a great deal. You see that is signed by myself there, and it is in my handwriting.

Q. Now, those are the original assessment-rolls for those years?

A. Yes, sir; those are the originals.

Q. These rolls made in 1893, 1894, and 1895, while you were in the office, they were filed there in reference to the assessment, and they contain these assessments?

A. So far as I know. I remember nothing else in connection with it. All that we had to do was to fill out these assessments as adopted by the commission and make a copy of it and send it to the different tax collectors of the different counties. That is all we had to do with the assessment.

Q. That is all that was filed by them in those years with reference to the assessment that you have any knowledge or recollection of?

A. Yes, sir.

Q. You state that you staid there and attended to the business personally?

A. Yes, sir; I was in the office all the time. I was very seldom

absent in the three years. I don't think I lost more than ten days' time, maybe a little more than that, but I was there almost every day.

The plaintiff offers in evidence all of the assessment-rolls for 1892, 1893, 1894, and 1895 of what was formerly the L., N. O. & T. and its branches.

Objected to by the defense on the grounds that it does not reasonably tend to show what the railroad cost, and on the ground furthermore that it is secondary evidence and not the best evidence.

By the COURT: I will permit it to be introduced now, but I will control their effect in the instructions.

Defendants excepted.

The defense objects to these schedules further, so far as they have anything to say about privilege taxes. They do not object so far as they undertake to classify railroads and give the miles of railroad in each county. They object to them so far as they undertake to fix municipal taxes.

Overruled, and defendants excepted.

The plaintiff offers in evidence the articles of consolidation of the 24th of October, 1892, between the Louisville, New Orleans & Texas R. R. Co. and the Yazoo & Mississippi Valley R. R. Co., and the acts of consolidation on the 12th day of August, 1884, between the Tennessee Southern R. R. Co. and the Memphis & Vicksburg railroad, and the New Orleans & Baton Rouge and Vicksburg & Memphis R. R. Co. and the New Orleans & Mississippi Valley R. R. Co., forming the Louisville, New Orleans & Texas Railroad Company.

Originals of above to be used by consent.

The plaintiff offers in evidence the deed of trust made on
135 the 1st day of September, 1892, between the Illinois Central R. R. Co. and the United States Trust Company of New York to prove two things. The principal reason for introducing it is, first, in support of the declaration, and in support of the plea of novation. One is to show that the I. C. R. R. Co. was the owner of the bonds and stocks of the L., N. O. & T. R'y Co., as alleged in the declaration, and the other is to show that the I. C. R. R. Co. issued twenty-five million dollars in bonds and substituted them in the place of the original bonds of the L., N. O. & T. R'y Co.

(See charter book.)

The defense objects on the ground that it is irrelevant to the case, immaterial and incompetent as to the first purpose to show ownership of property, but as to the second purpose—that is, to the alleged novation—they do not object.

The plaintiff introduces in evidence the lease made on the 31st day of March, 1888, between the Y. & M. V. R. R. Co. and the I. C. R. R. Co.

(See charter book.)

Objected to.

136 *Deed of Trust, September*, 1892.

This indenture, made the first day of September, A. D. 1892, by and between the Illinois Central Railroad Company, a corporation created, organized and existing under and by virtue of the laws of the State of Illinois, party of the first part, and the United States Trust Company of New York, a corporation created, organized and existing under and by virtue of the laws of the State of New York, party of the second part, witnesseth:

Whereas, the party of the first part, in pursuance of its corporate powers, has acquired and now holds the bonds and stock hereinafter described of the Louisville, New Orleans and Texas Railway Company, a corporation created, organized and existing under the laws of the States of Tennessee, Mississippi and Louisiana; and

Whereas, on the twenty-first day of July, A. D. 1892, at a meeting of the board of directors of the said Illinois Central Railroad Company, it was resolved as follows:

"*Resolved*, That in pursuance of the authority in it vested by law, "this company do make and execute its bonds for the sum of "twenty-five millions of dollars ($25,000,000); that is to say, twenty- "eight thousand bonds, to be numbered consecutively from one to "twenty-eight thousand, both inclusive, twenty-two thousand bonds "for the sum of one thousand dollars each, and six thousand bonds "for the sum of five hundred dollars each, to be issued and used "from time to time as may be required for the payment of indebt- "edness contracted in acquiring the bonds and stock of the said "Louisville, New Orleans and Texas Railway Company recently "purchased by this company, and for such other objects and pur- "poses as shall be specified in the deed of trust made to secure the "payment of the said bonds and be authorized by the board
137 "of directors, all of the said bonds to bear date as of the "first day of September, A. D. 1892, and to be made payable "in the city of New York on the first day of November, A. D. 1953, "in gold coin of the United States of America, of the present stand- "ard of weight and fineness, and to bear interest from November 1, "1892, at the rate of four per cent. per annum, payable in like gold "coin on the first days of May and November in each year, the said "bonds to be in the general form and to contain the provisions fol- "lowing, that is to say:

"Total issue, $25,000,000.

"UNITED STATES OF AMERICA, *State of Illinois.*

"Illinois Central Railroad Company.

"No. —. $1,000 (or $500).

"*Four Per Cent. Gold Bond of* 1953.

"Payable, principal and interest, in gold.

"The Illinois Central Railroad Company hereby acknowledges "its indebtedness in the sum of one thousand dollars (or five hun-

" dred dollars), which it promises to pay, in the city of New York,
" to the holder of this bond on November 1, A. D. 1953, in gold
" coin of the United States of America, of the present standard of
" weight and fineness. And the said company also, and hereby,
" promises to pay interest on the said sum from November 1, 1892,
" in like gold coin at the rate of 4 per cent. per annum, on the first
" days of May and November in each year, upon the surrender of
" the coupons hereto attached (authenticated by the engraved signa-
" ture of its treasurer) as they respectively become payable and
" until such principal sum of one thousand dollars (or five hundred
" dollars) shall be paid.

" The holder hereof may have the ownership of this bond
138 " registered on the books of the said railroad company, such
" registry being noted on the bond, after which no transfer
" shall be valid unless made on the said books by the registered
" holder in person, or by his attorney duly authorized, and noted
" on the bond, but the same may be discharged from registry by
" being in like manner transferred to bearer, after which it shall be
" transferable by delivery. Or the holder hereof may at any time
" surrender to the said railroad company all the coupons hereto an-
" nexed not then due, for cancellation and have this bond entered
" on the company's books as a registered bond. The surrender and
" cancellation of the coupons shall be noted on the back hereof, after
" which this bond shall finally cease to be transferable by delivery
" and become a registered bond, transferable only on the books of
" the company, and in that case the interest thereon semi-annually,
" and the principal thereof when due, shall be payable only to the
" registered holder hereof, or his legal representatives or assigns.

" This is one of a series of bonds authorized to be issued to the
" total amount of twenty-five million dollars, all of the same date
" and payable at the same time, certain of which bonds are for $1,000
" each, and certain others for $500 each ; which bonds are described
" in a certain deed of trust between the Illinois Central Railroad
" Company and the United States Trust Company of New York,
" bearing date, September 1, A. D. 1892, all of which bonds are
" equally secured as therein provided by the deposit and pledge of
" certain securities of the Louisville, New Orleans and Texas Rail-
" way Company representing a par value of more than thirty-four
" million dollars.

" In witness whereof, the said Illinois Central Railroad Company
" has, by a resolution of its board of directors, passed July 21st,
" A. D. 1892, caused its common seal and the signatures of its presi-
" dent or vice-president and secretary to be hereto affixed the first
" day of September, 1892.

"—— ——, *President.*

"—— ——, *Secretary.*

139 " with coupons attached thereto for the installments of inter-
" est to become due upon such bonds in the following form:

"*Coupon.*

"The Illinois Central Railroad Company will pay bearer twenty "dollars (or ten dollars) in go'd coin, in New York, on May 1, (or "November 1)—being six months' interest on its four per cent. gold "bond of 1953, No. —.

"—— ——, *Treasurer.*

"And that the following form of certificate shall be placed upon "each of said bonds, to be signed by the president or one of the "vice-presidents of the party of the second part:

"*Trustee's Certificate.*

"The within is one of a series of twenty-eight thousand bonds, of "which 22,000 bonds are for $1,000 each, and 6,000 bonds for $500 "each, mentioned in the deed of trust dated September 1, A. D. "1892, between the Illinois Central Railroad Company and the United "States Trust Company of New York, and secured by the deposit "of securities as therein provided.

"UNITED STATES TRUST COMPANY
OF NEW YORK,
"By —— ——, *President.*"

And whereas, it was at the said meeting of the said board of directors, further

"*Resolved*, that to secure the payment of the said bonds, this com- "pany do make, execute and deliver to the United States Trust "Company of New York, as trustee, an indenture or agreement "pledging and depositing with the said trustee all the bonds and "stock of the Louisville, New Orleans and Texas Railway Company "held and owned by this company or which may be here-
140 "after acquired by it, upon and subject to the terms and con- "ditions set forth in the following form of indenture, which "is hereby approved."

(Here follows an exact copy of this indenture which is inscribed at length upon the minutes of the board.)

And whereas, it was at said meeting of the said board of directors, further

"*Resolved*, That the president or vice-president and secretary of "this company be and they are hereby authorized, for and in behalf "of the company, and as its acts and deeds, to affix the corporate "seal of the company to said indenture or agreement, and to duly "attest, acknowledge and deliver the same, and to affix the corpo- "rate seal of the company to each of said bonds, and sign and duly "attest the same, and cause the engraved signature of the treasurer "of the company to be placed upon the interest coupons thereon, "and to do each and every other act necessary and proper to be done "in and about the premises."

Now, therefore, the said parties hereto, in consideration of the premises and of one dollar to each by the other in hand paid at or

before the ensealing and delivering of these presents, the receipt whereof is hereby acknowledged, and for other good and valuable considerations, do each covenant, promise and agree, for themselves and their respective successors and assigns, in manner and form following, that is to say:

First. The said party of the first part shall and doth hereby assign, transfer and set over to the said party of the second part, the following-described bonds and stock of the said Louisville, New Orleans and Texas Railway Company, namely:

1. Thirteen thousand eight hundred and five (13,805) one-
141 thousand-dollar "first-mortgage four per cent. gold bonds" of the said railway company, issued under and secured by two several mortgages or deeds of trust made by that company, under date of August 25, 1886, to the Union Trust Company of New York, amounting in all at their par or face value to the sum of $13,805,000, with interest coupons attached to each, due March 1, 1893, and after.

2. Eight thousand seven hundred and thirty-one (8,731) one-thousand-dollar five per cent. second-mortgage bonds of the said railway company, issued under and secured by two several mortgages or deeds of trust made by that company under date respectively of August 25 and August 26, 1886, to the Union Trust Company of New York, amounting in all at their par or face value to the sum of $8,731,000.

3. Eight thousand three hundred and forty-seven (8,347) six per cent. income bonds of the said railway company, for one thousand dollars each, issued under and secured by the two several mortgages or deeds of trust made by that company under date respectively of September 18, 1884, and August 25, 1885, to Edward H. Pardee and Albert Crolius, trustees, amounting in all at their par or face value to the sum of $8,347,000.

4. Thirty-seven thousand five hundred and thirty-nine (37,539) shares of the full-paid capital stock of the said railway company of the par value of one hundred dollars per share, amounting in all at their par or face value to the sum of $3,753,900.

All the bonds above described, and certificates representing all the said stock assigned in blank with irrevocable power to transfer by the Mississippi Valley Company, a corporation created, organized and existing under the laws of the State of Mississippi, in whose name the said stock is registered, are, simultaneously with the execution of these presents, delivered to the party of the second
142 part, to be held by the said party of the second part and its successors in this trust, subject to the reservations, terms and conditions hereinafter expressed, upon trust for the benefit of the several persons and corporations who shall be or become holders respectively of any of the above-mentioned bonds issued or to be issued hereunder by the party of the first part, to secure to such holders equally and without preference of one over another by reason of priority of time of issue thereof or otherwise, the due and punctual payment of the said bonds and the interest thereon as it

shall become due, according to the tenor and effect of the said bonds and the interest coupons attached thereto.

Second. The said party of the first part further covenants and agrees that it will in like manner assign, transfer, set over and deliver to the said party of the second part, or its successors in this trust, by like irrevocable power, all such additional bonds and stock of the said Louisville, New Orleans and Texas Railway Company as shall be purchased or acquired by it, such transfers to be made promptly from time to time as soon as practicable after the purchase or acquisition thereof, the same to be held by the said party of the second part and its successors in trust for the uses and purposes, and upon the trusts, and subject to the reservations, terms and conditions set forth and declared in this indenture.

Third. The party of the first part also hereby covenants with the party of the second part, that it, its successors or assigns, shall and will punctually pay to the holders of the bonds aforesaid intended to be secured hereby, the interest thereon when and as the same shall become due and payable, according to the terms and conditions in the said bonds and coupons set forth and contained, and shall and will also, when the principal sums of the said bonds shall, according to the provisions thereof, become due and payable, fully and entirely pay, satisfy and discharge the whole of the said bonds, both principal and interest.

143 And the party of the first part further covenants and agrees that it will cause to be paid off and discharged in due season all taxes and assessments which may from time to time be lawfully levied or imposed by competent authority upon the railroads and other real property and premises described in the several mortgages by which the bonds of the said Louisville, New Orleans and Texas Railway Company described in the first article of this indenture are secured, so that the lien of the said mortgages shall at all times remain unimpaired until all the bonds secured hereby shall be fully paid and satisfied.

Fourth. All the bonds issued and authenticated in compliance with the provisions of this indenture shall be equally secured hereby, without regard to the time or times when the said bonds shall have been actually issued or otherwise, and without any discrimination or preference of one over another.

And it is hereby understood and agreed that the bonds issued and authenticated hereunder, or their proceeds, may be used and applied by the party of the first part, in its discretion, for any of the following purposes, that is to say: (1) For the acquisition of or payment for stock of the said Louisville, New Orleans and Texas Railway Company and bonds of said company of the several issues or classes described in the first article of this indenture, including as well the stock and bonds heretofore purchased and deposited hereunder, as stock and bonds that may be hereafter purchased; (2) for the payment of obligations or indebtedness of the said Louisville, New Orleans and Texas Railway Company; (3) for protecting, repairing, completing, improving or extending the railroad and branches now owned by the said Louisville, New Orleans and Texas Railway

Company, and providing elevators and docks for use in connection therewith, and such works and structures, rolling stock and other equipment as will enable the said railroad and branches to be operated to the best advantage, or in the payment of debts and
144 liabilities incurred for such improvements. And the party of the first part hereby covenants and agrees with the party of the second part and with the holders of the bonds intended to be secured by this indenture, that the said bonds and their proceeds shall be used and applied only to the objects and purposes above specified.

Fifth. Until default shall be made in the payment of the principal or interest of the bonds authenticated hereunder and intended to be secured hereby, or some of them, the party of the second part and its successors in trust shall permit and suffer the party of the first part to retain all the authority, powers and privileges belonging or incident to the bonds and stock hereby pledged or agreed to be pledged, not inconsistent with the rights of the party of the second part as herein expressed. And it is an express condition of this indenture, that the party of the first part, its successors or assigns, shall be permitted at any time, and from time to time, provided it or they shall be in no default as aforesaid, to offer to the trustees under the two mortgages or deeds of trust made by the said Louisville, New Orleans and Texas Railway Company, under date respectively of September 18, 1884, and August 25, 1885, to Edward H. Pardee and Albert Crolius, trustees, for redemption and cancellation, the whole or any part of the income bonds issued under and secured thereby, which have been or shall be deposited by the party of the first part with the party of the second part pursuant to the provisions of this instrument, at such price or prices as the party of the first part may think proper, and upon the terms and conditions expressed in said mortgages and deeds of trust; and to withdraw from the custody of the said party of the second part, or its successors in trust, for presentation to the said trustees, to accompany such offer or offers, such number or amount of the said income bonds as may be offered to the said trustees, *provided*, that all income bonds so withdrawn from the custody of the said party of the sec-
145 ond part or its successors in trust shall be forthwith filed by the party of the first part, to accompany such offer or offers, with the trustees under the two mortgages or deeds of trust securing the said income bonds, in manner and form as prescribed in such mortgages or deeds of trust; and *provided further*, that if any such offer or offers shall be accepted by the said trustees, the party of the first part shall, as it hereby covenants and agrees to do, cause all moneys received by it from such trustees for, or as the price of, any of such income bonds, to be applied to the payment of expenses incurred for betterments and improvements of the said Louisville, New Orleans and Texas Railway and its appurtenances; and *provided further*, that if any offer or offers so made to the said trustees shall not be accepted by them, the said party of the first part shall return to the party of the second part, or its successors in trust, the income bonds withdrawn to accompany the offer or offers so re-

jected, to be held upon the trust and subject to the terms and conditions of this indenture. And it is likewise an express condition of this indenture that until default shall be made in the payment of the principal or interest of the bonds authenticated hereunder and intended to be secured hereby, or some of them, the shares of the capital stock of the said Louisville, New Orleans and Texas Railway Company deposited by the party of the first part with the party of the second part, or its successors, in trust upon the trusts herein declared, shall be registered in the name of the said The Mississippi Valley Company, or in the name of the party of the first part, or in the name or names of such other party or parties as it may from time to time designate or appoint, provided the certificates representing such stock assigned in blank, with irrevocable power to transfer by the registered owners, shall be deposited with the party of the second part, or its successors in trust, under and subject to the terms and conditions of this trust, and the person or persons, corporation or corporations, in whose name the said
146 stock shall be registered, shall have and enjoy all the rights of a stockholder with respect to the said shares of stock, including the voting power belonging thereto; but the party of the first part hereby covenants and agrees that while said stock remains so on deposit with the party of the second part, or its successors in trust, no further mortgage lien or incumbrance shall be imposed upon the railways or railway lines or other property now belonging to the said Louisville, New Orleans and Texas Railway Company, except in accordance with the next article of this indenture.

Sixth. It is a further express condition of this indenture, that if the said Louisville, New Orleans and Texas Railway Company, its successors or assigns, shall hereafter secure the twenty-eight thousand four per cent. gold bonds, issued, or proposed to be issued by the party of the first part hereunder, and intended to be secured hereby, by a mortgage or deed of trust covering all the railways and railway lines now belonging to that company, and their appurtenances, and also all the lands of that company which shall then remain unsold, situated in the counties of De Soto, Tunica, Quitman, Coahoma, Bolivar, Washington, Issaquena, Sharkey, Warren and Tate, in the State of Mississippi, which shall be subject only to the outstanding mortgages heretofore made and executed by that company, other than the land-grant income mortgage to Edward H. Pardee and Albert Crolius, trustees, dated August 27, 1886, then all the stock of the said Louisville, New Orleans and Texas Railway Company deposited under this trust shall be released and surrendered to the party of the first part free and discharged from all the liens and obligations of this indenture. And it is expressly understood that suitable provisions may be inserted in such new mortgage permitting the said Louisville, New Orleans and Texas Railway Company, its successors or assigns to sell and dispose
147 of the mortgaged lands above referred to, and to give title thereto free and discharged from the lien of the said mortgage, similar to the provisions in that behalf contained in the supplementary mortgage or deed of trust made by the said Louisville

New Orleans and Texas Railway Company, under date of August 25, 1885, to Edward H. Pardee and Albert Crolius, trustees.

After the execution and delivery of such new mortgage, and when all the bonds issued under and secured by the several mortgages heretofore made by the said Louisville, New Orleans and Texas Railway Company shall have been deposited with the party of the second part, said party of the second part may, if requested so to do by the party of the first part, and if said party of the second part shall deem it desirable so to do, but not otherwise, cause all such bonds to be cancelled and the mortgages securing the same to be discharged of record, to the end that the said new mortgage may become and be a first-mortgage lien upon the property therein described, subject, however, to the provisions to be therein inserted permitting sales of the said mortgaged lands as above contemplated and provided.

Seventh. If by reason of any proceedings taken by the holders of any bonds, which shall not have been deposited with the party of the second part or its successors in trust hereunder, either of the mortgages or deeds of trust securing any of the bonds hereby pledged shall be foreclosed, or if any sale shall be made of the property covered by either of such mortgages, or any part thereof, which shall in anywise cut off the lien of such mortgage, the said party of the second part, or its successors in trust, shall be entitled to and shall exercise all the rights, privileges and powers which any other holder of the bonds deposited hereunder would be entitled to exercise, subject only in respect to the manner of exercising and enforcing the same in any such case to the directions of the holders of a majority of the outstanding bonds intended to be secured by this indenture.

148 Eighth. In case default shall be made at any time by the party of the first part in the payment of the principal or interest due on any one of its bonds issued and authenticated under the provisions of this indenture, and such default shall continue for six months the party of the second part and its successors in this trust, is and are hereby authorized and empowered, at the request of the holders of one-third in amount of the said bonds then outstanding to resort to any proceedings legal or equitable, that may be deemed necessary or expedient for the enforcement of the lien hereby created upon all or any part of the bonds or stock deposited under the provisions of this trust, or upon any property or premises mortgaged to secure their payment, and may proceed to subject the whole or any part of the property or premises so mortgaged to the payment of the principal and interest of the bonds thereby secured then outstanding and unpaid, in any manner, not inconsistent with the principles of law or equity, which shall be deemed most advantageous to the holders of the bonds issued under and intended to be secured by this indenture. All moneys so collected shall be applied *pro rata* to the payment of the principal and interest of the bonds secured hereby in the manner provided in the next article of this indenture.

Ninth. And it shall also be lawful for the said party of the second

part and its successors in this trust, in case default shall be made as aforesaid by the party of the first part, and continued as aforesaid, upon like request of the holders of one-third in amount of the bonds issued and authenticated under the provisions of this indenture then outstanding, to sell at public sale in the city of New York, after advertising notice of the time and place of such sale not less than once a week for six consecutive weeks in one or more daily newspapers published in each of the cities of New York and Chicago for the best price that can be obtained therefor, all the unpaid bonds and all the stocks hereby pledged, which shall then be in its or their possession as trustee or trustees, under the provisions
149 hereof, or such portions thereof as may be necessary to pay the outstanding bonds of the party of the first part secured hereby, and all arrears of interest thereon, and all expenses attending as well the execution of this trust as the said sale, and any other costs and charges that may be necessarily incurred in consequence of such sale; such sale to be made in such lots or parcels, as the party of the second part or its successors in trust may deem most beneficial. The party of the second part or its successors in trust may adjourn the sale of the whole or any part of the said bonds and stock from time to time in its or their discretion, and may make all necessary deliveries and transfers to the purchaser or purchasers, discharged from all and every the trusts hereby created, and without liability on the part of the purchaser to see to the application of the purchase-money. After deducting from the proceeds of such sale or sales the cost and expenses thereof, or which may have been necessarily incurred thereby, and enough to indemnify itself or themselves for all advances which may have been made, and against all liabilities which may have been incurred in the execution of this trust, as well as a reasonable compensation for its or their own services; the said party of the second part or its successors in trust shall apply the residue of the said proceeds, or so much thereof as may be necessary, to or towards the payment and discharge, with *pro rata* equality, of the principal and interest which shall then be due and unpaid upon all and singular of the said bonds issued by the party of the first part hereunder, and then remaining outstanding and unpaid, and without preference of interest over principal or principal over interest, and so that no priority or preference shall be given to any bond which shall have been issued under and be secured by this indenture, and be then due and outstanding over any other bond so issued and secured; and if any surplus of such moneys shall thereafter remain, then the said party of the second part or its successors in trust shall pay over such balance of the trust funds in its or their hands, and transfer and assign any residue of the trust estate or property, unto
150 the said party of the first part, its successors or assigns.

Any and every sale of bonds or stock made pursuant to the foregoing power shall absolutely bar and foreclose all right, interest and equity of redemption of the party of the first part in or to the bonds and stock so sold; and it is hereby expressly understood and agreed, that in the event of any sale of the pledged bonds or stock

pursuant to the provisions of this article, the party of the second part or its successors in trust, may declare the principal of all the bonds issued by the party of the first part hereunder, and then unpaid and outstanding, to be due and payable forthwith, and thereupon the same shall become immediately due and payable, anything in the said bonds contained to the contrary thereof notwithstanding. And if it shall occur that after the exhaustion of all the property and assets hereby pledged as a security for the payment of the said bonds, or which are subject to the provisions of this trust, there shall be a deficiency in the payment of the principal or interest due on any of the bonds issued and authenticated under this indenture, then the said party of the second part and its successors in trust is and are hereby authorized to take such further proceedings in law or equity as it or they may be advised to recover the same.

Tenth. In case of the resignation, insolvency, neglect or incapacity to act, of the said party of the second part or any successor in this trust, the holders of a majority in interest of the bonds issued hereunder, then outstanding, may select or designate some other trust company or corporation authorized to hold and execute trusts of this nature, and the company or corporation so selected shall be thereupon entitled to receive and hold the deposited bonds and stock funds and other assets belonging to this trust, upon the trusts herein mentioned and declared, and shall have all the rights and powers, and be subject to all the duties expressed in this indenture. In case of a failure of the bondholders to fill such vacancy in the manner above prescribed, the president for the time being of the party of the first part, shall make a temporary appointment
151 for such vacancy, which shall continue until the holders of a majority in interest of said outstanding bonds shall have designated a new trustee to act hereunder. When the holders of a majority in interest of the said outstanding bonds shall by an instrument in writing, executed by themselves or their attorneys-in-fact, designate a new trustee under this indenture, the estates, powers, rights and privileges of any trustee hereunder under any such temporary appointment shall immediately cease and determine and be transferred to and vest in the new trustee so designated, and thereafter such new trustee shall hold such estates, rights, powers and privileges, with like effect as if it had been designated as the party of the second part hereunder.

Eleventh. Any and all costs, charges and expenses incurred in, or in respect of, or in connection with the execution of this trust by or on behalf of the said party of the second part, or its successors in this trust, or for which the said party of the second part, or its successors in trust shall be or become in anywise liable or responsible, shall be borne and defrayed by the said party of the first part, and said party of the first part undertakes, covenants and agrees for itself, and its successors and assigns, that it and they will, upon demand, pay all such costs, charges and expenses, in-

cluding therein just and reasonable compensation to said party of the second part or its successors in trust for such services as it or they may be called upon to render in or about or in respect of the trust hereby created.

Twelfth. The party of the second part hereby accepts the trusts created and declared by this indenture, and shall and will, at the request of the party of the first part, certify the bonds intended to be hereby secured, and deliver the same to the party of the first part, to be by it issued. But it is hereby expressly understood and agreed that neither the said party of the second part, nor any successor in the trust hereby created shall incur any re-
152 sponsibility or liability whatever, by reason of permitting or allowing the said party of the first part to exercise the rights, privileges and authority hereinbefore reserved to said party of the first part in regard to the securities that may under the terms hereof become subject hereto; and it is hereby further provided that neither the party of the second part, nor any successor in the trust hereby created, shall incur any responsibility or liability whatever, except for the negligent, willful or intentional breaches by such trustee of the trust herein expressed and contained; and neither the said party of the second part, nor any successor in this trust shall at any time be bound or required to undertake any proceeding at law or in equity, or otherwise, for the protection of the bondholders, involving expenditures of or liability for the payment of money, unless, if it shall see fit to require it, adequate indemnity against such liability or outlay be furnished by the bondholders asking such action or proceeding.

Thirteenth. The said party of the first part shall, from time to time, execute any further instruments or assurances necessary or requisite to carry out the purposes hereof.

Fourteenth. If the principal and interest upon the bonds issued by the party of the first part hereunder and intended to be secured hereby, shall be paid to the holders thereof, when and as the said principal and interest shall become due, according to the tenor and effect of the said bonds and in accordance with the provisions of this indenture, then the said party of the second part or its successors in this trust, upon the delivery thereof to it, shall cancel and destroy the said bonds; and thereupon all the securities and stock hereby pledged or agreed to be pledged which shall then remain in the hands of the said trustee, and any residue of the trust estate or property, shall at once be transferred to the said party of the first part, its successors or assigns, and upon such trans-
153 fer the said trustee shall be thenceforth discharged from further duties under this trust.

In witness whereof, the parties hereto have caused their corporate names to be subscribed hereto by their respective presidents or vice-presidents, and their several corporate seals, attested by their secre-

taries, to be hereunto affixed on the day and year first above written.

ILLINOIS CENTRAL RAILROAD COMPANY,

[CORPORATE SEAL.] By STUYVESANT FISH, *President.*

Attest: A. G. HACKSTAFF, *Secretary.*

UNITED STATES TRUST COMPANY OF NEW YORK,

[CORPORATE SEAL.] By JOHN A. STEWART, *President.*

Attest: H. L. THORNELL, *Secretary.*

154 STATE OF NEW YORK, } ss:
City and County of New York, }

Be it remembered, that on this 31st day of October, in the year one thousand eight hundred and ninety-two, before me, George H. Taylor, a commissioner of deeds of the State of Illinois in and for the State of New York, and notary public for New York county aforesaid, personally appeared Stuyvesant Fish, president of the Illinois Central Railroad Company, and A. G. Hackstaff, secretary of the same company, personally known to me to be the same persons whose names are subscribed to the foregoing instrument as having executed the same, and acknowledged that they signed, sealed, and delivered the said instrument as their free and voluntary act and deed, and the free and voluntary act and deed of said company, for the uses and purposes therein set forth. And the said Stuyvesant Fish and A. G. Hackstaff, being by me duly sworn, they did depose and say: That they were the above-described officers of said company; that the seal affixed to the foregoing instrument, purporting to be the corporate seal of said company, was such corporate seal; that it was affixed thereto by order of the board of directors of said company, and that they signed their names thereto by the like order as the president and secretary of the said company respectively. And on the same day before me also personally appeared John A. Stewart, president, and H. L. Thornell, secretary, of the United States Trust Company of New York, personally known to me to be the same persons whose names are subscribed to the foregoing instrument as having executed the same on the part and behalf of the last-named company, and acknowledged that they signed, sealed and delivered the said instrument as their free and voluntary act and deed, and the free and voluntary act and deed of the last-named company, for the uses and purposes therein set forth. And the said John A. Stewart and H. L. Thornell, being by me duly sworn, they did depose and say: That they were the president and secretary respectively of the United States Trust
155 Company of New York; that the seal affixed to the foregoing instrument purporting to be the corporate seal of said trust company was such corporate seal; that it was affixed thereto by order of the board of trustees of said company, and that they

signed their names thereto by the like order as the president and secretary of the said company respectively.

In witness whereof, I have hereunto set my hand and affixed my official seals this 31st day of October, in the year one thousand eight hundred and ninety-two.

GEORGE H. TAYLOR,
Commissioner for the State of Illinois in New York and Notary Public for New York County, N. Y.

[OFFICIAL SEAL.]
[OFFICIAL SEAL.]

156 *Lease of* 1888.

This indenture, made the 31st day of March, A. D. 1888, by and between the Yazoo and Mississippi Valley Railroad Company, a corporation created under the laws of the State of Mississippi, herein designated as party of the first part, and the Illinois Central Railroad Company, a corporation created under the laws of the State of Illinois, hereinafter designated as the party of the second part, witnesseth:

1. That for the considerations hereinafter mentioned, the said The Yazoo and Mississippi Valley Railroad Company, party of the first part aforesaid, being thereunto duly authorized by law and also by the action of its executive committee and its stockholders, doth hereby demise and lease to the Illinois Central Railroad Company, party of the second part aforesaid, the railroad and the telegraph line of the party of the first part which are now built and in operation, consisting of its railroad extending from its junction with the Chicago, St. Louis and New Orleans railroad at or near Jackson, in the county of Hinds, and State of Mississippi, thence through Yazoo City to Parsons, in the State of Mississippi, and also the railroad extending from Tchula junction through Lexington to Durant, Mississippi, in all one hundred and forty miles of railroad, more or less (it being all the railroads which the party of the first part has now in operation), including the road-bed, superstructure and rights of way of the railroads aforesaid, and the side tracks, spurs, bridges, station-houses and station grounds, engine-house and grounds, ware-
157 houses and grounds, turn-tables, water tanks, fences, and all other buildings or structures, fixtures, tools, or appurtenances of, in or to the said railroads belonging, which are now owned by the party of the first part.

Including also the engines and cars and other rolling stock of every description now owned by the party of the first part, and all and singular the easements, servitudes, hereditaments and appurtenances of said railroads and the right and franchise to use, operate and enjoy said divisions or parts of the railroad system which the party of the first part is by its charter authorized to build or acquire, being all that it has up to this time built or acquired and put in operation. Including also the franchise and right, as authorized and granted by its said charter, to fix, demand and collect toll

or charges for transporting passengers and freight, mail or express matter thereon, as fully as the party of the first part could under its charter do. Including also the exemption from taxation of the leased premises aforesaid under the provisions of said charter. Together with all the telegraph line, poles, wires, batteries and all its fixtures and appurtenances which are now owned and operated by the party of the first part along said railroads or elsewhere. (But this lease does not include or encumber any part or division of the railroad or telegraph line, or their appurtenances, which the party of the first part may hereafter build or acquire; or any of its lands which are now owned except those which are appurtenant to the leased premises and used as rights of way or station grounds, or which are situated within one hundred feet from the centre of the main or side tracks of the railroads so leased as aforesaid; or any of its charter rights, privileges, powers, exemptions or fran-
158 chises, except such as are necessary to the full enjoyment, use, control or dominion of the leased premises aforesaid by said lessee during the term of this lease.)

To have and to hold the leased premises aforesaid, with the appurtenances, unto the party of the second part aforesaid, and its successors, from the date of this indenture until and to the first day of June, A. D. nineteen hundred and fifty-two (1952).

2. And the party of the first part covenants that it will at any and at all times during the continuance of this lease, upon the reasonable request of the party of the second part, do all acts, and sign, seal, acknowledge and deliver all such further or other papers, deeds, transfers or agreements which are or may be necessary to assure and make certain unto said party of the second part the leased premises aforesaid and the possession, use, and enjoyment of every part thereof for and during the full term of this indenture.

3. And the party of the second part hereby covenants and agrees, that it will, during the term that this indenture may continue in force, operate said leased railroads and telegraph lines in compliance with the charter of the party of the first part, and will indemnify and hold harmless the said party of the first part from all and every of the liabilities or penalties which may arise from or be founded on its acts or omissions as such lessee in the use of the leased premises in anywise whatsoever; and at the termination of this lease will surrender and restore the possession and control of the leased premises to the party of the first part in as good condition as
159 the same now are, and that as to anything included in this lease, which from any cause cannot be returned in as good condition as it now is, it will replace the same by one as good as the one which it receives under this lease.

4. The party of the second part further covenants and agrees that it will pay to the party of the first part the net earnings of said leased premises, semi-annually, to wit, on the first days of June and December in each year, and that said net earnings shall amount to at least one hundred thousand dollars per annum during the continuance of this lease, and that in case said net earnings do not amount to said last-mentioned sum it will pay such an amount in

addition to such year's net income as shall, together with such net income, amount to the sum of one hundred thousand dollars for that year.

5. It is covenanted and agreed by both parties hereto that this lease may be terminated upon six months' written notice by either party to the other of its desire to end the same; and at the time so fixed in said notice, if the same be six months or more from the time of the service thereof on the other party, this lease shall be as fully determined and ended as if said date was herein declared to be the end of the term of this lease.

6. The covenants and agreements hereinbefore set out are not only in behalf of and by the respective parties hereto, but also in behalf of and binding on their successors, respectively, whether the same be so expressed in each covenant or not.

160 In witness whereof, the Yazoo and Mississippi Valley Railroad Company and the Illinois Central Railroad Company have hereunto set their respectives names and common seals, this the day and date first above written.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY,
By STUYVESANT FISH,
[SEAL.] *President.*

Attest: JOHN ANTHON, *Secretary.*

ILLINOIS CENTRAL RAILROAD COMPANY,
By STUYVESANT FISH,
[SEAL.] *President.*

Attest: A. G. HACKSTAFF, *Secretary.*

161 STATE OF NEW YORK, }
City and County of New York, } ss:

Be it remembered that on this 10th day of April, A. D. 1888, before me, William H. Clarkson, a commissioner of the State of Mississippi, in and for the State of New York, residing in said city of New York, and notary public for New York county, personally appeared the foregoing-named Stuyvesant Fish, president of the Yazoo and Mississippi Valley Railroad Company, and John Anthon, secretary thereof, who acknowledged that they signed, sealed and delivered the foregoing instrument, on the day and year therein named, as their voluntary act and deed, and the voluntary act and deed of said company.

And the said Stuyvesant Fish and John Anthon, being duly sworn, deposed and said that they were the above-described officers of said company, that the seal affixed to the foregoing instrument purporting to be the corporate seal of said company was such corporate seal, that it was affixed thereto by order of the executive committee and the stockholders of said company, and that they signed their names thereto by the same authority as the president and secretary of said company respectively. And on the same day

before me also personally appeared the said Stuyvesant Fish, as the president, and A. G. Hackstaff, secretary, of the Illinois Central Railroad Company, who acknowledged that they signed, sealed and delivered the foregoing instrument as their voluntary act and deed as such officers of said company, and the voluntary act and deed of said company.

And the said Stuyvesant Fish and A. G. Hackstaff, being by me first duly sworn, they did depose and say, that he the said
162 Stuyvesant Fish was the president of the said Illinois Central Railroad Company, that he the said A. G. Hackstaff was the secretary of the same company, that the seal affixed to the foregoing instrument was the corporate seal of said company, that it was affixed thereto by order of the board of directors of said company, and that they signed their names thereto by the like order as the president and secretary of said company respectively.

Witness my hand and official seals.

[Commissioner's Seal.]

WILLIAM H. CLARKSON,
Commissioner for the State of Mississippi in New York and Notary Public for New York County, N. Y.

[NOTARY'S SEAL.]

163 The plaintiff proposes to show who the stockholders were in the Y. & M. V. R. R. at the time of the lease. In other words, *they* propose- to show that the Y. & M. V. R. R. was the Illinois Central R. R. Co.

The plaintiff offers the list of stockholders of the Y. & M. V. R. R. Co. at the time of the lease, which is on the 31st of March, 1888, which is marked Exhibit "A," and is in words and figures following, to wit:

List of Stockholders of the Yazoo & Mississippi Valley R. R. Co. at the Close of Business March 31, 1888.

Neely, R. P.	1	
Elliott, John	1 #	
Fish, Stuyvesant	1 #	
Schreiber, Adolphe	1	
McConnico, S. B.	1	
Shepherd, R. C.	1	# Stockholders in Illinois Central R. R. Co. at above date.
Illinois Central R. R. Co.	4,993	
Luttgen, Walther	1 #	
Harriman, E. H.	1 #	
Cruger, S. V. R.	1 #	
Webster, Sidney	1 #	
Harriman, Oliver	1 #	
Goelet, Robert	1 #	

I hereby certify that the foregoing is a correct list of the shareholders of the Yazoo & Mississippi Valley Railroad Company, registered on the company's books at the close of the 31st day of March,

1888, with the amount of stock then standing in their names respectively.

[SEAL.] A. G. HACKSTAFF,
Secretary Y. & M. V. R. R. Co.

The plaintiff introduced the minutes of meeting of stockholders and directors of the Y. & M. V. R. R. Co. held Oct. 4, 1893, directly after the consolidation, marked Exhibit "B."

Objected to on the ground that it is incompetent and immaterial.

Said Exhibit "B" is in words and figures following, to wit:

At a regular meeting of the stockholders of the Yazoo & Mississippi Valley Railroad Company, held at their office in New Orleans on Wednesday, 4th October, 1893, at 11.30 o'clock a. m., due notice of said meeting having been given by the secretary of said company in accordance with article I of the by-laws, the following proceedings were had:

164 Maj. J. M. Edwards was called to the chair and R. S. Charles appointed secretary of the meeting.

On motion, the chaid appointed R. S. Charles teller to ascertain and report how much and what stock was present and represented at this meeting.

The teller, after due inspection, reported that there were present in person and by proxy 51,307 shares of the capital stock of the company, all of which were entitled to vote, as follows:

	Shares.
J. M. Edwards	1
Walther Luttgen	1
C. A. Peabody, Jr.	1
Stuyvesant Fish	2
E. H. Harriman	1
J. T. Harriman	1
R. C. Shepherd	1
J. W. Auchincloss	1
Financial Imp't Co.	479
Illinois Central R. R. Co.	6,418
W. C. Craig	1
Mississippi Valley Co.	44,399
S. V. R. Cruger	1
Total	51,307 shares.

Whereupon the chair declared a quorum to be present, and the meeting organized for business.

The temporary chairman and secretary were then made permanent officers of the meeting.

The secretary submitted a record of the proceedings of the stockholders, board of directors, and executive committee held during the past year, as follows:

Stockholders, held	in New Orleans	on	29 Oct.,	1892.
Board of directors,	" do.	"	30 Nov.,	"
Executive committee,	" New York	"	5 Jan.,	"
Board of directors,	" do.	"	3 M'ch.	"
Do.	" do.	"	13 Apr.,	"
Stockholders,	" Memphis	"	25 May,	"
Board of directors,	" New York	"	21 June,	"
Stockholders,	" Memphis	"	1 Aug.,	"
Board of directors,	" New York	"	20 Sept.,	"

The aforesaid minutes, acts, and doings of the stockholders, board of directors, and executive committee having been read, it was, on motion, unanimously

Resolved, That all and singular the acts and doings, resolutions, and votes of all of said meetings, as shown by the record book before this meeting, and each of them, be, and the same are hereby, ratified, approved, and confirmed.

On motion, it was

Resolved, That this meeting do now proceed to the election of four directors, to serve for three years and until their successors are elected and qualified, in place of Messrs. Fish, Craig, Peabody, and Schreiber, whose terms expire this day.

The chair appointed R. S. Charles teller to receive and count the votes.

The election having been held, the teller reported that the following votes had been cast for the persons named below:

Stuyvesant Fish	51,307	votes.
W. C. Craig	51,307	"
C. A. Peabody, Jr.	51,307	"
Albert Baldwin	51,307	"

Whereupon the chair declared the above-named gentlemen had been unanimously elected directors of this company to serve until the first Wednesday of October, 1896, and until their successors are duly elected and qualified.

It was also, on motion,

Resolved, That Major J. M. Edwards be, and he is hereby, duly elected a director to fill the unexpired term of Gen. R. P. Neely, in class of 1895, Gen. Neely having resigned.

On motion, the meeting adjourned.

R. S. CHARLES, *Secretary.*

I hereby certify that the foregoing is a true and correct copy of the minutes of the meeting of the stockholders of the Yazoo & Mississippi Valley Railroad Company held at their office in New Orleans, on Wednesday, 4th Oct., 1893.

[SEAL.] A. G. HACHSTAFF,
Secretary Yazoo & Mississippi Valley Railroad Co.

The plaintiff offers in evidence a list of the stockholders and officers of the Miss. Valley Company on the 14th of October, 1892, which is marked "C."

Objected to.

EXHIBIT "C."

THE MISSISSIPPI VALLEY COMPANY,
OFFICE OF THE SECRETARY,
McCOMB CITY, MISS., *June 28th*, 1894.

The stockholders of the Mississippi Valley Company on the 14th day of October, 1892, were:

Illinois Central Railroad Company	5,910	shares.
E. P. Skene	10	"
E. H. Harriman	10	"
Stuyvesant Fish	10	"
J. W. Auchencloss	10	"
W. Luttgen	10	"
S. V. R. Cruger	10	"
O. Harriman	10	"
J. C. Willing	10	"
Heber Craft	10	"
	6,000	"

I certify to the correctness of the above statement as shown by the books of the Mississippi Valley Co.

[SEAL.] HEBER CRAFT, *Secretary.*

The officers of the Mississippi Valley Co. on the 14th day of October, 1892, were:

Stuyvesant Fish, president.
J. C. Willing, vice-president.
R. S. Charles, treasurer.
Heber Craft, secretary.

The directors of the Mississippi Valley Co. on the 14th day of October, 1892, were:

Stuyvesant Fish, J. C. Willing, E. H. Harriman, O. Harriman, E. P. Skene, S. V. R. Cruger, W. Luttgen, J. W. Auchencloss, Heber Craft.

I certify to the correctness of the above statement as shown by the books of the Mississippi Valley Co.

[SEAL.] HEBER CRAFT, *Secretary.*

The plaintiff introduces in evidence a list of the stockholders and officers of the original Y. & M. V. R. R. Co. and at the same time a list of the directors of the Y. & M. V. R. R. Co., which is marked Exhibit "D," from Jan. 1st to Oct. 25th, 1892.

Objected to.

EXHIBIT "D."

Yazoo & Mississippi Valley Railroad Company.

166 *List of Directors from June 1 to Oct. 25, 1892.*

Oliver Harriman, to Oct. 15, '92.
Chas. A. Peabody, Jr., elected Oct. 15, '92.
Stuyvesant Fish.
Adolphe Schreiber.
W. C. Craig.
John W. Auchincloss.
Walter Luttgen.
Edward H. Harriman.
John Anthon (dec'd July, 1892; vacant July, '92, to Oct. 15, '92).
J. T. Harrahan, elected Oct. 15, '92.
S. V. R. Cruger.
R. P. Neely.
R. C. Shepherd.
J. C. Willing.
Vice-president, J. C. Willing.
General manager, office abolished; duties performed by second vice-president, J. T. Harahan.

The list of stockholders is here offered in evidence, which is marked Exhibit "E."
Objected to.

EXHIBIT "E."

List of Stockholders of the Yazoo & Mississippi Valley R. R. Co. at Close of Business Oct. 24, 1892.

Neely, R. P	1
Fish, Stuyvesant	1
Schreiber, Adolphe	1
McConico, S. B	1
Shepherd, R. C	1
Illinois Central R. R. Co	6,421
Luttgen, Walther	1
Harriman, E. H	1
Cruger, S. V. R	1
Auchincloss, Jno. W	1
Craig, W. C	1
Weiling, J. C	1
Peabody, Jr., Chas. A	1
Harrahan, J. T	1

I certify that the foregoing is a correct list of the stockholders of the Yazoo & Mississippi Valley Railroad Company registered on the company's books at the close of the 24th day of October, 1892, with the amount of stock then standing in their names respectively.

A. G. HACKSTAFF,
Secretary Y. & M. V. R. R. Co.

[SEAL.]

The plaintiff introduces in evidence the minutes of the meeting of the board of directors of the 18th of October, 1893, of the Y. & M. V. R. R. Co., showing who the officers were, and that on motion that these officers were elected to serve without salary, and that they are the same officers that the I. C. R. R. Co. has, marked Exhibit "F."

Objected to.

EXHIBIT "F."

At a duly called meeting of the board of directors of the Yazoo & Mississippi Valley Railroad Company held at the company's office in Chicago, Illinois, on Wednesday, the 18th day of October, 1893.

Present: Messrs. Fish (president), Peabody, Auchincloss, Luttgen, E. H. Harriman, Cruger, and Welling—7.

The minutes of the meeting of the board of directors held
167 in New York September 20, 1893, were read and approved.

On the written recommendation of the president, it was, on motion—

Resolved, That on and after December 1, 1893, $2,000 be taken monthly from the earnings of the railway and credited to insurance fund; that said fund be invested from time to time as the board may direct, and that all losses by fire be charged against said fund.

The president read a communication addressed by him to the board under date of Sept. 23, 1893, transmitting the annual report of the second vice-president, covering the operations of the Yazoo & Mississippi Valley railroad for the 8 months ended June 30, 1893.

On motion, the papers were placed on file.

On motion, the board proceeded to the election of officers, to serve without salary.

The following-named gentlemen were placed in nomination:

Stuyvesant Fish for president.
J. C. Welling " vice-president.
E. T. H. Gibson " treasurer.
A. G. Hackstaff " secretary.

Each of whom, having received five votes, was thereupon declared duly elected.

On motion, it was—

Resolved, That the action of the president in appointing Mr. J. F. Titus local treasurer of the company at Chicago is hereby ratified and approved.

On motion, it was—

Resolved, That Joseph F. Titus be, and he is hereby, appointed agent of the Yazoo & Mississippi Valley Railroad Company, to receive and to receipt for all moneys due or to become due to said company from the United States of America, and to endorse on behalf of said company all United States Treasury drafts and United States warrants which shall be payable to said company in respect therefore.

On motion, it was—

Resolved, That Joseph F. Titus be, and he is hereby, appointed agent of the Yazoo & Mississippi Valley Railroad Company to receive and receipt for all moneys due or to become due said company for the transportation of the United States mails, and to endorse, on behalf of said company, all post-office warrants or other drafts payable to said company in respect of said service.

The meeting then adjourned.

I hereby certify that the foregoing is a true and correct copy of the minutes of the meeting of the board of directors of the Yazoo & Mississippi Valley Railroad Company held at the company's office in Chicago, Illinois, on Wednesday, the 18th day of October, 1893.

A. G. HACKSTAFF,
Secretary Yazoo & Mississippi Valley Railroad Co.

The plaintiff offers in evidence the charter of the Mississippi Valley Company, showing that they were required to have a certain number of directors, and that each director was required to have ten shares of stock, and that the I. C. R. R. Co. owned that stock, and that they were the exact number that it made it necessary for them to have to hold office, which is marked Exhibit "G."

Objected to.

(See charter book for Exhibit "G.")

168 The plaintiff offers in evidence the minutes of the Y. & M. V. R. R. Co. on the 1st day of August, 1893, which is marked Exhibit "H" and which is objected to by the defense.

EXHIBIT "H."

MEMPHIS, TENN., *August 1st*, 1893.

The meeting of the stockholders of the Yazoo & Mississippi Valley Railroad Company was held at the company's office, in the city of Memphis, Tenn., on this the first day of August, 1893, under the call of the president.

Upon motion, J. M. Edwards was elected chairman and G. W. McGinnis, secretary.

The chairman submitted the call for this meeting in following words and figures, to wit:

The Yazoo & Mississippi Valley Railroad Company.

Notice is hereby given that a meeting of the stockholders of the Yazoo & Mississippi Valley Railroad Company will be held at the office of the company, in the city of Memphis, State of Tennessee, on Tuesday, the first day of August, 1893, at 11 o'clock in the forenoon, for the purpose of taking action with reference to the execution by said company of the following indentures:

1. A mortgage to the United States Trust Company to secure twenty-eight thousand four per cent. gold bonds for the total sum

of twenty-five millions of dollars issued or to be issued by the Illinois Central Railroad Company, dated Sept. 1, 1892, and payable Nov. 1, 1953.

2. An indenture supplemental to the second mortgage, dated August 26, 1886, made by the Louisville, New Orleans & Texas Railway Company to the Union Trust Company of New York.

And to act upon any other matters incidental to the foregoing that may come before the meeting.

By order of the president.

Witness my hand this 26th day of May, A. D. 1893.

ALEXANDER G. HACKSTAFF, *Secretary.*

And the following certificates of publication of the call, showing that due notice of the meeting and its object had been given according to law:

NASHVILLE, TENN., *July* 28, 1893.

I, William E. McNeilly, secretary of the American Publishing Company, publisher of the American, a daily newspaper published at Nashville, Tennessee, do hereby certify that the attached advertisement notice of stockholders' meeting of the Yazoo & Mississippi Valley R. R. Company to be holden on August 1, 1893, has appeared every day in the said newspaper, beginning May 30, 1893, to date, and is still standing to appear on the 29th and 30th days of July instant, as per bill attached, which is the proper and correct charge therefor, to wit, $64.00.

W. E. McNEILLY,
Secretary American Pub. Co.

STATE OF TENNESSEE, }
Knox County. }

Personally appeared before me, Walter McCoy, a notary public for said county, H. C. Story and made oath that the attached notice was published in the Knoxville Tribune (a daily newspaper published at Knoxville, Tenn.) for sixty days.

H. C. STORY,
Mgr. Tribune.

Subscribed and sworn to before me this 28th day of July, 1893.

WALTER McCOY, *N. P.*

MEMPHIS, TENN., *July* 31, 1893.

I certify that the accompanying notice has been published in the editions of the Memphis Daily Commercial as follows:

Beginning May 30, 1893, and daily to and including July 30, 1893.

W. G. HOLMES,
Bus. Manager.

Sworn to before me this 31 day of July, 1893.

W. Y. THOMPSON,
Notary Public.

169 STATE OF MISSISSIPPI, }
Warren County. }

Personally appeared before the undersigned, a justice of the peace in and for said county and State, T. W. Campbell, acting secretary and treasurer of the Vicksburg Printing and Publishing Company, a corporation, who, being duly sworn, says that said company is the publisher of a newspaper called the "Vicksburg Daily & Weekly Commercial Herald," published in the city of Vicksburg, county and State aforesaid; that the notice of Yazoo & Mississippi Valley Railroad Company, a copy of which is attached above, was published in said paper successively in the dates and numbers following, to wit:

On the 28, 29, 30 days of June, 1893, Nos. 152, 153, 154.

On the 1st, 2nd, 4th, 5th days of July, 1893, Nos. 155, 156, 157, 158.

On the 6th, 7th, 8th, 9th, 10th days of July, 1893, Nos. 159, 160, 161, 162, 163.

On the 12th, 13th, 14th, 15th, 16th days of July, 1893, Nos. 164, 165, 166, 167, 168.

On the 18th, 19th, 20th, 21st, 22nd days of July, 1893, Nos. 169, 170, 171, 172, 173.

On the 23d, 25th, 26th, 27th, 28th days of July, 1893, Nos. 174, 174, 176, 177, 178.

T. W. CAMPBELL.

Sworn to and subscribed before me this the 31st day of July, 1893.

W. A. MURCH,
Justice of the Peace.

STATE OF MISSISSIPPI, }
Warren County. }

I, W. A. Murch, a justice of the peace in and for said county, do hereby certify that T. W. Campbell produced the newspaper called the "Vicksburg Daily Commercial Herald" before me, and having examined and compared the copy of the advertisement above attached and mentioned in the affidavit of said T. W. Campbell, find it to be a correct and true copy of the one published in said newspaper, and that it was published in the numbers following, to wit:

Nos. 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178.

Given under my hand and seal this 31st day of July, 1893.

W. A. MURCH,
Justice of the Peace.

THE STATE OF MISSISSIPPI, }
Coahoma County. }

Personally appeared before me, J. P. Reilly, of the county of Coahoma, State of Mississippi, Geo. W. Sanderson, the proprietor and publisher of the public newspaper printed and published in the town of Clarksdale, in the county and State aforesaid, called the "Clarksdale Banner," who, being duly sworn, deposed and said that the publication of the notice, of which a true copy is hereto affixed,

has been made in said paper for the period of five weeks consecutively, to wit:

In No. 41, dated the 30th of June, 1893.
In No. 42, " " 7th " July, 1893.
In No. 43, " " 14th " " "
In No. 44, " " 21st " " "
In No. 45, " " 28th " " "

GEO. W. SANDERSON, *Publisher.*

Sworn to and subscribed before me this 29th day of July, 1893.
J. P. RILEY, *J. P.*

170 The chairman submitted the list of shareholders and stock held by each as of record at close of business on the 20th of July, 1893, as certified by the secretary of the company.

G. W. McGinnis and G. W. Wise were appointed a committee to ascertain what stock was represented in person or by proxy. They submitted the following report:

AUGUST 1, 1893.

To the chairman and members of the meeting of stockholders of the Y. & M. V. R. R. Co., now in session at the company's office in Memphis:

Your committee, appointed to ascertain what shareholders of this company are present here, either in person or by proxy, beg leave to report that the following persons are present, in person or by proxy, viz:

G. W. McGinnis.....	1 share in person.		
Board of supervisors of Bolivar Co, Miss	1,500	"	Represented by G. W. Wise, pres't.
And Stuyvesant Fish.....	2	"	Each of whom are represented by their attorney-in-fact, Jas. M. Edwards.
Adolphe Schreiber.....	1	"	
R. G. She-herd..	1	"	
Walther Luttgen.	1	"	
E. H. Harriman	1	"	
S. V. R. Cruger....	1	"	
Jno. W. Auchincloss...	1	"	
W. C. Craig	1	"	
Chas. A. Peabody, Jr	1	"	
J. T. Harrahan.....	1	"	
J. C. Welling.....	1	"	
J. C. Inches.....	100	"	
Illinois Central Railroad Company	6,420	"	
Mississippi Valley Co.....	44,399	"	

Total number of shares present, in person or by proxy, 52,432.

G. W. WISE.
G. W. McGINNIS.

The chairman announced that the report of the committee showed 52,432 shares of stock represented, in person or by proxy, out of a total of 54,934 shares, and that the meeting was duly organized and ready for business.

The chairman submitted to the stockholders for their consideration the draft of a mortgage which, as he said, had been prepared by the counsel of the company and approved by the directors, intended to secure the payment of twenty-eight thousand four per cent. gold bonds of the Illinois Central Railroad Company for the total amount of twenty-five millions of dollars.

The said draft having been read, Mr. McGinnis offered the following:

Whereas by the act of the legislature of Mississippi approved February 17, 1882, "incorporating the Yazoo & Mississippi Valley Railroad Company and declaring its powers," the said company was expressly authorized to execute a mortgage or mortgages and trusts to secure bonds or obligations of other railroad companies, or to endorse the bonds of any other railroad company or companies, or in any other manner to guarantee such bonds and secure the same by a mortgage or mortgages on its own property and franchises, then owned or thereafter to be acquired, as fully as it could do if the bonds were issued by it; and

Whereas it was further provided in said act that said company might consolidate with any other railroad company in or out of the State of Mississippi upon such terms as the consolidating companies might agree, and that upon any such consolidation the consolidated companies should have and enjoy all the property, rights, privileges, powers, liberties, immunities, and franchises therein granted; and

Whereas by articles of consolidation made the 24th day of
171 October, A. D. 1892, the Louisville, New Orleans & Texas Railway Company, a corporation of the States of Tennessee, Mississippi, and Louisiana, became consolidated with the said Yazoo & Mississippi Valley Railroad Company, and the stock, property, franchises of said two corporations were thereby united or merged in one single corporation, under the corporate name of the Yazoo & Mississippi Valley Railroad Company; and

Whereas in the said articles of consolidation it was, among other things, agreed that said consolidated company should be, and the same was thereby, authorized and empowered, in such manner and upon such conditions as are permitted by law, to issue its bonds and secure the same, as well as all bonds theretofore issued by either of the constituent companies, or that had been theretofore or might be thereafter issued by any other railroad company, by mortgage or deed of trust upon all or any of its railroad, rights, franchises, and property, real or personal, wherever the same might be situated, and whether the same might be owned by the said company at the time said consolidation was effected or might be thereafter acquired, and might also exercise any and every other corporate right or power then vested in or which might have been theretofore lawfully exercised by either of said constituent companies; and

Whereas on the first day of September, A. D. 1892, the Illinois

Central Railroad Company, a corporation created, organized, and existing under and by virtue of the laws of the State of Illinois, did enter into an indenture with the United States Trust Company of New York, by which indenture the said railroad company, being the owner of a large amount of the bonds and stocks of the said Louisville, New Orleans & Texas Railway Company, did deposit and pledge the same with and to the said trust company to secure an authorized issue of twenty-eight thousand of its four per cent. gold bonds, such bonds being for the total sum of twenty-five millions of dollars; and

Whereas it is now deemed advisable and expedient in the interest of this company, as the successor or assignee of the said Louisville, New Orleans & Texas Railway Company, by virtue of such consolidation, that it should now secure the said twenty-eight thousand four per cent. gold bonds issued by the said Illinois Central Railroad Company by a mortgage or deed of trust in the form submitted to the stockholders at this meeting:

Now, therefore, it is resolved that in pursuance of the powers originally given to the said Yazoo & Mississippi Valley Railroad Company, and afterwards expressly adopted and agreed to in the said articles of consolidation, a mortgage or deed of trust shall be executed and delivered by this company, through its proper officers, to the United States Trust Company of New York to secure the said twenty-eight thousand four per cent. gold bonds of said Illinois Central Railroad Company in the form following:

(Here follows mortgage.)

The stock vote being taken on these preambles and the resolution, all of the stock represented voted aye, G. W. Wise, for Bolivar county, Mississippi, holding 1,500 shares, qualifying his vote to the extent that the bonds be payable in lawful money instead of in gold. More than three-fourths of all the stock having voted aye without qualification, the chairman declared the resolution adopted.

The chairman submitted to the stockholders for their consideration an indenture supplemental to the second mortgage made by the Louisville, New Orleans & Texas Railway Company to the Union Trust Company of New York, which bore date of August 26, 1886. The said indenture was read, being of the tenor following:

(Here follows supplemental mortgage.)

The stockholders were informed that the said supplemental mortgage has been approved by the board of directors at a meeting held in the city of New York April 13, 1893, and that the president or vice-president and secretary of this company had been authorized by the board, for and in behalf of this company and as its act and deed, to affix the corporate seal of the company to the said
172 mortgage or deed of trust, and to duly execute, attest, acknowledge, and deliver the same.

Mr. G. W. McInnis offered the following:

Resolved, That the action taken by the board of directors be ap-

proved and the execution and delivery of the said supplemental mortgage to the Union Trust Company of New York be, and the same is hereby, approved, ratified, and confirmed.

The stock vote being taken on this resolution, all of the stock represented voted aye, G. W. Wise, for Bolivar county, Mississippi, holding 1,500 shares, qualifying his vote to the extent that the bonds be payable in lawful money instead of in gold. More than three-fourths of all the stock having voted aye, without qualification, the chairman declared the resolution adopted.

No further business being presented for consideration, the meeting of stockholders, on motion of G. W. Wise, adjourned.

G. W. McINNIS,
Secretary of the Meeting.

J. M. EDWARDS, *Chairman.*

I hereby certify that the foregoing is a true and correct copy of the minutes of the meeting of the stockholders of the Yazoo & Mississippi Valley Railroad Company held at the company's office, in the city of Memphis, Tenn., on the first day of August, 1893.

A. G. HACKSTAFF,
Secretary Yazoo & Mississippi Valley Railroad Co.

The plaintiff introduces a list of the directors of the I. C. R. R. Co. at the time of the consolidation from June 1st to Oct. 25, 1892, and which is marked Exhibit "I."

(Objected to as irrelevant and incompetent.)

EXHIBIT "I."

Illinois Central Railroad Company.

List of Directors from June 1 to Oct. 25, 1892.

Hon. Jos. W. Fifer, *ex officio.*
Stuyvesant Fish.
Edward H. Harriman.
Arthur Leary.
S. V. R. Cruger.
Chas. A. Peabody, Jr.
N. B. Ream, to July 21, 1892.
J. C. Welling, elected Oct. 18, 1892 (vacant July 21 to Oct. 18).
B. F. Ayer.
Walther Lutgen.
John W. Auchincloss.
Chas. M. Beach.
John W. Doane.
Oliver Harriman.
Vice-president: J. C. Welling.
General manager: Office abolished; duties performed by second vice-president, J. T. Harrihan.

Plaintiff rests.

The defense moves to exclude the testimony of the plaintiff. The motion is overruled, and the defense excepted.

The defense offers in evidence the minutes of the meeting of the board of directors of the Miss. Valley Company, Oct. 4, 1892, and minutes, pages 189 and 199, of the Miss. Valley Minute Book, as follows:

(See Minute Book.)

Mr. JOHN C. WELLING, a witness for the defense, being duly sworn, testified as follows:

173 Q. Mr. Welling, do you hold any official position in the Y. & M. V. R. R. Co.?

A. I am vice-president of that company.

Q. State to the jury whether or not the railroad or property of the L., N. O. & T. R'y Co. has ever been purchased by the I. C. R. R. Co. or any other railroad company, so far as you know.

A. It has not, so far as I know.

Q. Do you occupy any official position with the I. C. R. R. Co.?

A. I am vice-president of that company.

Q. You are familiar, then, with the transactions both of the Y. & M. V. R. R. Co. and the I. C. R. R. Co., I suppose?

A. Yes, sir.

Q. Privy to all the dealings had by these companies in regard to the purchase of property of all sorts, are you not?

A. Yes, sir.

Q. Mr. Welling, state, if you know, how the property of the L., N. O. & T. R'y Co. and its railroad are owned by the Y. & M. V. R. R. Co.—that is, how the latter company acquired that property.

A. The L., N. O. & T. R'y Co. was merged in the Y. & M. V. R. R. Co.

Q. So, then, the Y. & M. V. R. R. Co. acquired the property and railroad and franchises of the L., N. O. & T. R'y Co. by merger and consolidation, did it?

(Objected to because it is a matter that is in writing.)

The objection is overruled, and plaintiff excepts.

The plaintiff moves to exclude the question and answer just preceding this one, on the ground that it is a legal proposition, as shown by the papers, as to whether it is merged in the other company, and on the ground that he has announced the legal conclusion.

By the COURT: I will permit the question to be asked—what arrangement there was looking to the consolidation of interest, or whether there was any—but not a conclusion as to the legal effect of it.

This question was withdrawn by counsel.

Q. What has become of the property of the L., N. O. & T. R'y Co.?

A. I don't know how to answer that question. Its property remains as it was.

Q. Who owns the R. R. at this time?

A. The Y. & M. V. R. R. Co.

Q. How did it get it—through what process?

—. I should say through consolidation.

Q. Mr. Welling, are you the head of the auditing department of the Y. & M. V. R. R. Co.?

A. Yes; the accounting officers report to me.

Q. It is all under your supervision?

A. Under my supervision; yes, sir.

Q. State whether or not, in the year 1892, the L., N. O. & T. R'y Co. or the Y. & M. V. R. R. Co., as its successor, was enabled to declare and pay an annual dividend of eight per cent. upon its proper capital stock over and above the payment of its due debts and liabilities.

A. No.

This question is objected to, and the plaintiff moves to exclude the question and answer thereto, which is sustained, and the defense excepts.

Q. Mr. Welling, state whether or not, in the year 1892, the L., N. O. & T. R'y Co. or the Y. & M. V. R. R. Co., as its successor, were enabled to declare and pay an annual dividend of eight per cent. upon its proper capital stock over and above its due debts and liabilities which said companies or either of them had incurred in the construction of said railroad, and money borrowed by said companies upon lands or otherwise, to be used in the construction of the same, and in paying the debts incurred by the said companies in constructing the same.

(Objected to for the reason that it is the statement of a conclusion and not a statement of facts on which the conclusion is based, and the objection is overruled, and the plaintiff excepts.)

A. No.

Q. Mr. Welling, state whether or not, in the year 1893, 1894, and 1895, or either of them, the Y. & M. V. R. R. Co., as the successor of the L., N. O. & T. R'y Co., was enabled to declare and pay an annual dividend of eight per cent. upon its proper capital stock over and above the payment of its due debts and liabilities.

174 Objected to, and the objection is sustained, and the defense excepts.

Q. State whether or not in the years 1893, 1894, and 1895 or either of said years the Y. & M. V. R. R. Co., as the successor and assignee of the L., N. O. & T. R. R. Co., was enabled to declare and pay an annual dividend of eight per cent. upon its proper capital stock over and above the payment of its *its* due debts and liabilities which the L., N. O. & T. R. R. Co. or the Y. & M. V. R. R. Co. had incurred in the construction of the railroad or eother of said companies and for money borrowed by said company upon lands and otherwise to be used in the construction of the said railroad and in paying debts incurred by said company or either of them in constructing the same.

Objected to because he included there the construction debt of the Y. & M. V., and the objection is sustained, and the defense excepts.

Q. State whether or not in the years 1893, 1894, and 1895 or either of said years the Y. & M. V. R. R. Co., as the successor and assignee of the L., N. O. & T. R'y Co., was enabled to declare and pay an annual dividend of eight per cent. upon its proper capital stock over and above the payment of its *its* due debts and liabilities which the L., N. O. & T. R'y Co. or the Y. & M. V. R. R. Co. had incurred in the construction of the railroad or either of *of* said companies for money borrowed by said company upon lands or otherwise and in paying debts incurred by said companies or either of them in constructing the same under the charter rights of the L., N. O. & T. R'y Co.

Objected to, and the objection is sustained, and the defense excepts.

Q. State whether or not in the year- 1893, 1894, and 1895 or either of said years the Y. & M. V. R. R. Co., as the successor and assignee of the L., N. O. & T. R'y Co., was enabled to declare and pay an annual dividend of eight per cent. upon its proper capital stock over and above the payment of its *its* due debts and liabilities which the L., N. O. & T. R. R. Co. or the Y. & M. V. R. R. Co. had incurred in the construction of the railroads or either of said companies for money borrowed by said company upon lands or otherwise, to be used in the construction of the railroads and in paying debts incurred by said companies or either of them in constructing the same under the charter rights of the L., N. O. & T. R'y Co., in so far as they include any debts after the consolidation, including only such as were incurred for maintaining and improving such lines of railroad only as were constructed by the L., N. O. & T. R'y Co. under its charter prior to the consolidation of 1892.

Objected to, and the objection sustained, and the defense excepts.

Q. State whether or not in the year- 1893, 1894, and 1895 or either of them the Y. & M. V. R. R. Co., as the successor and assignee of the L., N. O. & T. R'y Co., from the profits of said company derived on the property acquired *on* the L., N. O. & T. R'y Co. by merger or consolidation, was enabled to declare and pay to its stockholders an annual dividend of eight per cent. upon its proper capital stock over and above the payment of due debts and liabilities which were incurred by the L., N. O. & T. R'y Co. in the construction of its railroad and for money borrowed by said L., N. O. & T. R. R. Co. upon land *ot* otherwise, to be used in the construction of said railroad and in paying debts incurred by said L., N. O. & T. R. R. Co. in constructing its railroad prior to the consolidation of the L., N. O. & T. R. R. Co. and the Y. & M. V. R. R. Co.

A. It was not.

Q. You say it could not?

A. No, sir.

Objected to because it is a statement of a legal conclusion, and the objection is overruled, and the plaintiff excepts.

Q. State what amount of money, if any, was paid by the Y. & M. V. R. R. Co. in the years 1892, 1893, 1894, and 1895 respectively by the Y. & M. V. R. R. Co. in payment of the debts and liabilities which the L., N. O. & T. R'y Co. had incurred in the construction of the railroad constructed by said L., N. O. & T. R'y Co. and for money borrowed by said L., N. O. & T. R'y Co. upon lands and otherwise, to be used in constructing said railroad.

175 A. In 1892, $645,180; in 1893, $853,064; in 1894, $892,413.75; in 1895, $935,181.26.

Q. Mr. Welling, are you the J. C. Welling who is mentioned in the minutes of the board of directors of the Mississippi Valley Company for 1892 as having been present at a meeting held in McComb city?

A. I am.

Q. Do you know where the five hundred and odd thousand dollars came from that was used in purchasing the stock of the Mississippi Valley Company?

A. The money was advanced by the I. C. R. R. Co.

Q. Do you know what become of the stock after it was purchased?

A. It was held at the time as collateral for the money advanced.

Q. So it was held in the year 1892, when this mortgage was executed?

A. Yes, sir; it was held at that time.

Q. Was it held as collateral to secure that money?

A. Yes, sir; it was held as collateral to secure the money advanced by the I. C. R. R. Co.

Q. Mr. Welling, I will read you this paragraph from the mortgage executed by the I. C. R. R. Co. on the 1st day of Sept., A. D. 1892, to the United States Trust Co. of New York: "After the execution and delivery of said new mortgage, and when all the bonds issued under and secured by the several mortgages heretofore made by the said L., N. O. & T. R. R. shall have been deposited with the party of the second part, said party of the second part may, if requested so to do by the party of the first part, and if the said party of the second part shall deem it desirable so to do, but not otherwise, cause all such bonds to be cancelled, and the mortgages securing the same to be discharged of record, to the end that the said new mortgage may become and be the first-mortgage lien on the property therein described, subject, however, to the provisions therein to be inserted permitting sales of said mortgage lands as above contemplated and provided." They have never been cancelled. Has there been any request for their cancellation ever *been* made by the I. C. R. R. Co.?

A. No, sir; the terms of the mortgage have not been complied with, because all the bonds have not yet been acquired.

Q. By the Illinois Central?

A. By the I. C. R. R. Co.

Q. Are they not still held by the trist Co. in New York?
A. The L., N. O. & T. bonds are still with the United States Trust Co.
Q. Under the purchase mortgage?
A. Yes, sir.
Q. Under the mortgages of 1886 and the mortgage of 1892 also?
A. Yes, sir.
Q. Mr. Welling, is it or is it not true that prior to the year 1893 and prior to the year 1894 and prior to the year 1895, or at any time up to this date, the I. C. R. R. Co. has paid off with its own bonds the debts and liabilities which the said L., N. O. & T. R'y Co. had incurred in the construction of its said road and money borrowed by said company upon lands or otherwise to be used in the construction of the same, or pay debts incurred in the construction of the same? Is that true or not?
A. It is not true.

Objected to as leading. Objection overruled. Plaintiff excepts.

Cross-examination.

By Judge CRITZ:

Q. What position do you hold with the I. C. R. R. Co.?
A. I am vice-president.
Q. The same position you hold with the Y. & M. V. R. R. Co.?
A. Yes, sir.
Q. Is not the Y. & M. V. R. R. Co. under the control of the I. C. R. R. Co.?
A. No.
Q. It is not?
A. Except that the I. C. R. R. Co. owns its stock. It is interested in the company as a stockholder.
Q. You say that the I. C. R. R. Co. does not control the Y. & M. V. R. R. Co.? I mean the Y. & M. V. R. R. Co., including the L., N. O. & T. *R.* R'y Co.?
A. Yes.
Q. It does not control it?
176 A. Yes.
Q. Who does control it?
A. I would like to know what you mean by control. What is meant by control?
Q. That is as plain as I can make it—control.
A. The I. C. is the owner of a part of the stock, and votes that stock which it owns.
Q. Who controls the property of the Y. & M. V.?
A. The Y. & M. — R. R. Co.
Q. It controls it?
A. Yes, sir.
Q. It controls the running of it?
A. Yes, sir.
Q. It pays out all the money that was paid out on the Y. & M. V.?
A. Yes.

Q. Well, don't you claim that the Y. & M. V. R. R., including the L., N. O. & T. R. R., is leased to the Illinois Central?
A. It is not.
Q. It is not leased?
A. The L., N. O. & T. part of the Y. & M. V. is not leased.
Q. The original Y. & M. V. is leased?
A. Yes; it is leased.
Q. Are you, as vice-president, the general manager of the road?
A. I am not.
Q. Who is the general manager of the Y. & M. V. R. R.?
A. It has no general manager.
Q. Who manages it, then?
A. I suppose it might be said that the second vice-president of the company.
Q. Is its general manager; it has an officer under that title? Who is the second vice-president?
A. J. G. Harahan.
Q. Does not he live in Chicago?
A. Yes.
Q. Is not he the second vice-president of the I. C.?
A. Yes.
Q. Does this Y. & M. V. or L., N. O. & T. run to Chicago?
A. It does not.
Q. Where does the president of the Y. & M. V. live?
A. In New York city.
Q. How is it that all the officers of this company live in Chicago, a place to which this does not run?
A. They do not.
Q. Where do the other officers live?
A. Mr. M. Gilleas, the man immediately in control of the property, lives in Memphis.
Q. What connection has he with the I. C. R. R. Co.?
A. His title to the I. C. R. R. Co. is ass't gen. superintendent.
Q. What is his title in connection with the Y. & M. V. R. R. Co.?
A. Ass't gen. superintendent.
Q. He has the same office in each company, then, has he?
A. Yes, sir; the same title.
Q. He is the gen. ass't superintendent, you say?
A. His title is ass't gen. superintendent.
Q. Of both roads?
A. His jurisdiction extends to the lines of the I. C. R. R. south of the Ohio river.
Q. Will you state what salary he gets as an officer of the Y. & M. V. R. R.?
A. I am unable to say; about $3,000.
Q. How much does he get as an officer of the I. C. R. R.?
A. About a like amount; I am not certain.
Q. You mean, then, that he gets $6,000 in all?
A. Approximately.
Q. Is not his salary, then, fixed at $6,000?
A. It is not.

177 Q. Are you in a position to know what his salary is?
A. I would be if I could get to the record. I do not carry it in my mind.
Q. What services does he render to the I. C. R. R.?
A. He has immediate charge of the I. C. R. R. south of the Ohio river.
Q. And all of the L., N. O. & T. R. R., has he not the same charge?
A. Yes, sir.
Q. Who is the president of the I. C. R. R. Co.?
A. Stuyvesant Fish.
Q. Who is the president of the Y. & M. V. R. R. Co.?
A. Stuyvesant Fish.
Q. Where does he live?
A. In New York city.
Q. Where were you living when this L., N. O. & T. R. R. was constructed from Memphis to New Orleans?
A. In Chicago.
Q. What year was it built?
A. I know nothing about it personally; in the year 1882 or 1884, or somewhere along there.
Q. Did you have any connection with the railroad during the time it was being built?
A. I did not.
Q. Do you know of your own knowledge anything about what it cost to build the road?
A. I do not.
Q. Do you know of your own knowledge, then, what the construction debt of this railroad was?
A. I know what the books of the company show is the construction debt.
Q. I did not ask you about the books of the company. They will speak for themselves. I want you to speak as a witness.
A. I do not of my own knowledge.
Q. Then all you have to state as to the construction debt and the cost of construction were as to matters about which you have no personal knowledge, were not they?
A. No; what I have stated about the payments on account of debts of this company I know all about, because the payments were actually made.
Q. You know that these payments were made?
A. Yes.
Q. But you don't know anything about the real construction debt of your own knowledge?
A. I have the evidence of the payment on the surrendered coupons of the bonds.
Q. Do you know what time the work of construction was commenced on this railroad?
A. I do not.
Q. You don't know when it was finished, do you?
A. Only as I have learned incidentally.

Q. I mean of your own knowledge?
A. Not of my own knowledge.
Q. You don't know where the first work was done or what kind of work was done?
A. I do not.
Q. You don't know what any part of the work cost, do you?
A. I do not.
Q. You don't know what amount of earthwork there was?
A. I do not.
Q. You don't know what amount of trestling there was?
A. No.
Q. Or what amount of iron bridging?
A. No.
Q. You don't know any part of the cost as a matter of actual knowledge?
A. No.
Q. Now, on your direct examination you were asked as to payments made on this construction debt from 1892 to 1895. When you come to answer this question did not you read from a paper in your hand?
A. I did.
Q. Who made out that paper?
A. It was prepared by Mr. P. Fouts, the book-keeper, the gentleman who keeps the general books of the Y. & M. V. R. R. Co.
178 Q. Where are those books kept?
A. They are kept in Chicago.
Q. Where are those books now?
A. In this room.
Q. Where is Mr. Fouts, who made out that paper?
A. Mr. Fouts is here and is prepared to explain the books.
Q. The answers you gave as to the amounts paid out you read from this paper, did you?
A. I did.
Q. Do you know these amounts, as a matter of memory, apart from the paper in your hand?
A. Not from memory, although I helped to prepare the statement.
Q. State what were the net earnings of the Y. & M. V. R. R. Co. upon the L., N. O. & T. proper in the year 1892.
A. The receipts in operating in excess of gross earnings was $591,663.49.
Q. That is what you call the net earnings?
A. That is what I understand to be the net earnings.
Q. What did the operating expenses amount to for that year?
A. $2,805,795.55.
Q. What were the gross receipts?
A. $3,397,459.04. That item includes operating expenses and taxes.
Q. What do you include in operating expenses?
A. The usual sums charged in operating a railroad.
Q. What are they?

A. It would cover perhaps a hundred items. I could not enumerate them. It would include conducting the transportation, maintenance of way, and structures, maintenance of equipment, and general expenses.

Q. Does that include all the necessary repairs in keeping up the rolling stock?

A. Yes.

Q. All the necessary repairs in keeping up the road in running condition?

A. Yes.

Q. All the expenses of the hands who renew the bridges and renew the cross-ties and keep up the road in general?

A. It would include the repairs and renewals of all descriptions.

Q. It would include the paying of all the employés and officers, would it not?

A. Yes, sir.

Q. Is there anything else that it includes?

A. Nothing except as covered by the four heads I gave you.

Q. In the operating expenses you included one-half of the salaries of each of these officers, who were also officers of the I. C. R. R. Co.?

A. I include the salaries paid by the Y. & M. V. R. R. Co.

Q. Was not the salary of each officer of the Y. & M. V. R. R. Co. exactly the same as the salary of the same officer of the I. C. R. R. Co.?

A. Do you mean the question to mean that the salary of each general officer was divided equally between the two companies?

Q. Yes.

A. It was not.

Q. What was the amount of salary allowed the president of the Y. & M. V. R. R. Co. in that statement?

A. Nothing.

Q. What is the amount allowed to the vice-president?

A. I am unable to say the exact amount, but if you will accept this answer, the present amount is about $2,200.00.

Q. Please have a copy of this paper from which you took your answers filed as Exhibit I to your deposition.

A. I will be glad to do so.

The paper referred to is here filed as Exhibit I.

Q. Look at this paper which shows the officers of the Y. & M. V. R. R. Co. Are you the J. C. Welling mentioned there?

A. Yes.

Q. As the vice-president of the Y. & M. V. R. R. Co.?

A. Yes.

179 Q. Pay attention to the reading of this paper: "On motion, the board proceeded to the election of officers to serve without salary, meaning the officers of the Y. & M. V. R. R. Co. The following-named gentlemen were placed in nomination: Stuyvesant Fish for president; J. C. Welling, vice-president; E. T. H. Gaison, treasurer; A. J. Hachstaff, secretary." Now, state

when, if ever, that resolution providing that the officers should serve without salary was revoked.

A. I fancy it has never been revoked. Prior to the time of the consolidation of the L., N. O. & T. R'y Co. with the Y. & M. V. R. R. Co. its officers received no salary. Since that time its president has received a salary. The others have not. I would like to make a further explanation. That is not exactly right there. I think that is carried over as a matter of form, but I have, as a matter of fact, received the salary as vice-president of the Y. & M. V. R. R. ever since the consolidation.

Q. Is it not a fact that since the consolidation you have received the same salary you received before the consolidation, and a part of it is apportioned to the Miss. Valley R. R. Co.?

A. That is not true.

Q. Do you receive as much salary now from the I. C. R. R. Co. as you did before the consolidation?

A. Yes.

Q. The same salary?

A. I got the same.

Q. As much?

A. As much.

Q. Then you receive an additional salary from the Y. & M. V. Company?

A. I receive a salary from the Y. & M. V. R. R. Co.

Q. You say Stuyvesant Fish, the president, has not received any salary from the Y. & M. V. R. R. Co.?

A. No.

Q. Does the treasurer receive any, Mr. Gibson?

A. He does not.

Q. Does the secretary receive any?

A. He does not.

Q. Then you say that this order under which you were all elected officers of the Y. & M. V. has never been changed? Or do you mean to say it has simply been modified as to yourself?

A. I have not looked over the minutes to see whether there has been any modification or change.

Q. Will you explain to the jury how it happened that all these officers were elected to serve without salary?

A. At this time they rendered very little service.

Q. This has reference to the future. Were they not elected on Oct. 18th here for the future?

A. Yes, sir; as I understand; but these resolutions were secondary evidence. There is another resolution that was used in the previous year. This is evidently an oversight.

Q. How often do you elect its officers?

A. Once a year.

Q. Look at this paper which has been introduced in evidence by the plaintiff and marked Exhibit C, dated 14th of October, 1892, and state if each of the stockholders, individuals mentioned there, were not also stockholders in the I. C. R. R. at the date of this paper.

A. Some of them were and some were not.
Q. Which ones were and which were not?
A. My recollection is that Mr. Skene and Mr. Craft had no stock in the I. C. R. R. Co.
Q. Where did they live?
A. Mr. Skene, at that time, in Chicago, and Mr. Craft at McComb city.
Q. Was not McComb city the headquarters of the Miss. Valley Company?
A. Yes; its property was there.
Q. Was not the Miss. Valley Company organized at McComb city?
A. It was organized as a Mississippi corporation.
Q. Was it incorporated in any other State besides Mississippi—the Miss. Valley Company?
A. I think not.
180 Q. Well, then, it was not organized anywhere else but at McComb city?
A. I don't know whether its domicil is McComb city; I presume it is.
Q. It is a Mississippi corporation alone?
A. It is a Mississippi corporation.
Q. State, Mr. Welling, if the charter of the company was not procured by the I. C. R. R. Co. from the Mississippi legislature.
A. It was not.
Q. By whom was it procured, if you know?
A. I don't know.
Q. State where these several persons, who each had ten shares of stock in the Mississippi Valley Company, got the stock that they owned.
A. This stock is held by them to enable them to qualify as directors.
Q. That is the only object in holding the stock, was it not?
A. Yes.
Q. The stock was transferred to them by the I. C. R. R. Co., was it not?
A. I presume it was.
Q. Did these parties pay the I. C. R. R. Co. anything for the several ten shares of stock?

The defense objects to the whole interrogation as to the holding of the stock by these parties, and the way they got it, and all about it. The objection is overruled, and the defense excepts.

A. My impression was, the stock was placed in their name and endorsed in blank by them.
Q. Back to the I. C. Company?
A. Endorsed in blank.
Q. And it remained in the hands of the I. C. R. R. Co.?
A. Yes.
Q. Well, the fact is that the whole six thousand shares of stock belonged to the I. C. R. R. Co., is it not?

A. Yes, sir.

Q. Look at the paper now handed to you, the list of stockholders of the I. C. R. R. Co. at the close of business Oct. 24th, 1892, which paper has been introduced by the plaintiff and marked Exhibit E, and state if each of the individuals who are put down in this list as stockholders of the Y. & M. V. R. R. Co. were not at that date also stockholders in the I. C. R. R. Co.

A. I think some were and some were not.

Q. Which ones were not?

A. I think R. T. Neely, Adolph Shriber, S. B. McConico, R. C. Shepherd, and W. C. Prague.

Q. They were not stockholders?

A. They were not stockholders of the Illinois Central. That is my best knowledge and belief.

Q. State, Mr. Welling, how these several parties who on this list are put down as holding one share each of stock in the Y. & M. V. Railroad Co. procured that stock.

Objected to. Overruled. Defendant excepts.

A. The stock was registered in their names to enable them to qualify as directors.

Q. Registered in their name- by the I. C. R. R. Co.?

A. I did not say that.

Q. By whom?

A. They acquired the stock and it was placed in their names before they could qualify as directors. Afterwards they endorsed the stock in blank and passed it back to the I. C. Co.

Q. Then, as a matter of fact, the I. C. R. R. Co. was the owner of all the stock of the Y. & M. V. Railroad Co.?

A. Yes, sir; at that time.

Mr. YERGER: These are the stockholders of the Y. & M. V.?

A. Yes, sir; before the consolidation.

Mr. CRITZ: These shares that are on this list put down to the several parties who are credited with having one share each turned over to them in order to qualify them as directors of the Y. & M. V. Railroad Co.?

A. Yes, sir.

Q. You have spoken of the bonds of the L., N. O. & T. Railroad Co., which you say have not been cancelled. Do you know
181 anything about these bonds of your own knowledge?

A. Just what do you mean?

Q. Mean what I say. Do you know anything about these bonds of your own knowledge—these L., N. O. & T. bonds?

A. Yes, sir; I know the L., N. O. & T. bonds acquired by the Ill. Cent. Railroad Company were lodged with the United States Trust Company.

Q. Do you know that of your own knowledge or by information from others?

A. I have not been in the United States Trust Co.'s offices and counted them, if you mean that.

Q. Do you know that of your own knowledge or by information from others? Have you ever seen any of these bonds?

A. Seen some of them.

Q. Where were they when you saw them?

A. They were in New York.

Q. In whose offices?

A. Offices of the I. C. Co.

Q. When was that?

A. I do not recall the exact date. It was some time ago now.

Q. Was that before or after the consolidation of the L., N. O. & T. R. R. with *with* the Y. & M. V. R. R.?

A. After.

Q. Can you tell me about how long after?

A. No, sir; during the fall of that year some time. I do not recall the exact date.

Q. During the fall of 1892?

A. Yes, sir.

Q. Then you do not know as an actual fact, of your own knowledge, that they are in the hands of these trust companies in New York?

A. I had not seen them there.

Q. You stated, in your direct examination, that the following amounts were paid on the construction debt of the L., N. O. & T. by the Y. & M. V. R. R. Co.: In 1892, $645,280; 1893, $853,064.75; 1894, $892,413.75; 1895, $935,181.26. On what construction debt was that paid?

A. For the year 1892 the $645,280 was the interest on the first-mortgage bonds.

Q. First-mortgage bonds of the Y. & M. V.?

A. The L., N. O. & T. In 1893, of the $853,064.75, the interest on these first-mortgage bonds was $654,613.33; on account of the accrued interest then on the second-mortgage bonds, Sept. 1st, 1893, $2,443,451.42, was paid $198,451.42, making a total of $853,064.75. In the year 1894 the interest on the first-mortgage bonds of the L., N. O. — T. Railway Co., $673,280; on account of the interest on the second-mortgage bonds, $219,133.75; total, $892,413.75. In the year 1895, interest on the first-mortgage bonds L., N. O. & T. R'y Co., $673,280; on account of the accrued interest, second-mortgage bonds, $261,901.26; total, $935,181.26. The total accrued interest on the second-mortgage bonds Sept. 1st, 1895, was $2,931,512 26.

Q. If you made all these payments on bonds, why do you say you paid it out on construction debt?

A. This was a construction debt.

Q. These bonds were construction debt?

A. Yes, sir; these were debts incurred on account of the construction of the road, as I understand it.

Q. How do you know it was debts incurred on account of the construction of the road?

A. Because the books of the company show that these bonds were issued for construction.

Q. You do not know of your own knowledge for what purpose these bonds were issued?

A. The books of the company show that they were issued for construction.

Q. The books of the company show: what books?

A. The books of the L., N. O. & T. Railway Co.

Q. Where are they?

A. In this court-room.

182 Q. In whose possession?

A. Possession of the book-keeper, Mr. Fouts.

Q. Then you speak from entries made by some one else?

A. I speak from record evidence.

Q. You did not make these entries?

A. I did not.

Q. You were not there when these bonds were issued?

A. I was not.

Q. As you stated before, you do not know how much the construction debt was?

A. I stated before I did not know what the cost of construction was.

Q. How much was included in what you call first-mortgage bonds? What did they amount to?

A. In 1892?

Q. Yes, sir.

A. $16,132,000.

Q. What was the date of these bonds?

A. I do not recall the exact date.

Q. What per cent. did they bear?

A. 4% first-mortgage bonds.

Q. Will you please explain why it is that the interest on those bonds for the year 1892 was $645,280, and for the year 1893 it was $654,613.-3. How came the interest to be more for 1893 than 1892, and more for 1894 than it was for 1893?

A. According to the books of the company there were some bonds in the company's treasury which were afterwards disposed of to retire the floating debt.

Q. How many bonds had been disposed of in 1893, first-mortgage bonds?

A. $16,132,000.

Q. That is in 1893?

A. Yes, sir.

Q. How many first-mortgage bonds had been disposed of in 1894?

A. $16,832,000.

Q. Then you say the interest increased from year to year on account of the fact that you had disposed of additional bonds each succeeding year?

A. Yes, sir; as the books were kept.

Q. You sold some of these construction bonds in 1892, did you?

A. I do not recall what was done in 1892.

Q. Were any part of these bonds sold in 1892 after the consolidation with the Y. & M. V. R'y Co.?

A. The only bonds disposed of on or about that time were those $700,000 bonds that I spoke of.

Q. The $700,000 bonds which you spoke of were disposed of about the time of the consolidation?

A. I think—my recollection is that that was done in 1893.

Q. What construction was it that the $700,000 first-mortgage bonds was applied to?

A. That was applied, as I stated before, to retire an indebtedness of the company, which at that time was a floating debt.

Q. What was that floating debt for?

A. It was—my taking the record—I think there were notes receivable and accounts receivable, and from my knowledge of the books my impression is that they were debts incurred and carried along from year to year; it was a growing liability.

Q. When did the Y. & M. V. Railroad Co. buy the depot from the I. C. R. R. Co. at New Orleans?

A. I think that was in December, 1893—trusting to memory now.

Q. What did you pay for the depot?

A. I think the consideration was $590,000.00.

Q. How was that paid for?

A. It has not been paid for.

Q. You gave no consideration for it at all?

A. Yes, sir; the I. C. R. R. Co. holds a claim against the Y. & M. V. R. R. Co. for that amount.

Q. Is not that $590,000 for the railroad depot in New Orleans included in the increase in these construction bonds?

183 A. No, sir.

Q. What is this on $638,894.76, betterments and improvements in 1892, on this paper filed as Exhibit 1 to your deposition; what does that refer to?

A. That relates to a large number of betterments and improvements to the property.

Q. What kind of betterments and improvements?

A. It related to additional side tracks and new buildings, widening the *the* roadway and ballasting the track, and that sort of thing.

Q. Where were the buildings which you speak of; what sort of buildings?

A. I am unable to state definitely and distinctly; I have not the information here.

Q. These were the betterments. What about the improvements?

A. That is a distinction without a difference. I referred to both.

Q. Betterments and improvements?

A. Yes, sir.

Q. You say these betterments and improvements which are paid in the year 1893, in the Exhibit One to your deposition, were for

the betterments and improvements made in the year 1892, or when were they made?

A. In 1892.

Q. Before or after the consolidation of the L., N. O. & T.?

A. Before and after.

Q. How much of these were after the consolidation?

A. I am unable to answer that question.

Q. Now, look at the paper now handed you, endorsed on the back "Board of directors Yazoo & Mississippi Valley Railroad Company, June 21st, 1893," and state, after refreshing your memory from that paper, if the depot in New Orleans was not sold by the Illinois Central Railroad Company to the Yazoo and Mississippi Valley Railroad Company on the 21st of June, 1893 (handing document).

A. It was authorized of that date. I am under the impression that the deed was made later.

Q. Please file the paper to which your attention has just been called as Exhibit 2 to your deposition.

A. I do so, sir.

Paper filed and marked Exhibit 2.

Q. Look at the paper now handed you, which paper is also endorsed on back "Board of directors of the Yazoo & Mississippi Valley Railroad Company, April 13th, 1893," and see if it is not a fact, as shown by that paper, that there was $700,000 of these first-mortgage bonds in the treasury of the Yazoo & Mississippi Valley Railroad Company on the 12th of April, 1893.

A. Yes, sir; it seems so.

Q. Please file that paper as Exhibit 3 to your deposition.

A. I do so, sir.

Paper filed and marked Exhibit 3.

Q. What was done with that $700,000 in bonds that is mentioned there in that paper, as shown in Exhibit 3 to your deposition?

A. These bonds were deposited by the Yazoo & Mississippi Valley Railroad Company with the United States Trust Company.

Q. Were not those $700,000 in bonds part of the L., N. O. & T. R'y Co.'s bonds?

A. Yes, sir.

Q. Look at the paper now handed you and state if it does not show that there was, on the 9th of September, 1893, a surplus resulting from the operation of the railway lately belonging to the L., N. O. & T. R'y Co. for the 8 months ending June 3rd, 1893.

A. This surplus referred to in this resolution means a surplus ap-licable to the interest on the second-mortgage bonds referred to in the receipts.

Q. This resolution was a resolution of the stockholders of the Y. & M. V. R. R. Co.?

A. Board of directors of the Y. & M. V. R. R. Co.

Q. Please file that paper as Exhibit 4 to your deposition.

A. I do, sir.

Paper filed and marked Exhibit 4.

184 Q. What did you say became of this surplus which is mentioned in Exhibit 4 to your deposition?

A. I said that surplus referred to meant the amount in excess after deducting interest on the first-mortgage bonds from the net receipts—left a surplus applicable to the interest on the second-mortgage bonds.

Q. In 1893?

A. Yes, sir; in 1893.

Q. You have stated how many of the first-mortgage bonds there were. Now state how many of the second-mortgage bonds there were on the L., N. O. & T. R'y Co.

A. $9,104,000 is my recollection.

Q. Were there any other series of bonds after the second-mortgage bonds?

A. The income bonds.

Q. What did the income bonds amount to?

A. Ten millions.

Q. What per cent. did the second-mortgage bonds bear?

A. Five per cent.

Q. What per cent. did the income bonds bear?

A. Anything that they could get.

Q. What were the second-mortgage bonds issued for?

A. Construction.

Q. Construction of what?

A. Railroad and branches.

Q. L., N. O. & T. railroad?

A. And branch lines.

Q. What were the income bonds issued for?

A. I do not recall what the record stated in reference to the income bonds.

Q. You don't know anything about what the bonds were issued for except what the record shows?

A. I rely on the record for my information.

Q. Do you mean by the record the deeds of trust under which the bonds were issued?

A. I mean more especially the books of account.

Q. Did you ever see the deeds of trust under which the several series of bonds were issued?

A. I have seen copies of them.

Q. Do you know what those first-mortgage bonds were sold for and to whom they were sold?

A. I am unable to say.

Q. You do not know what per cent. they brought in the market?

A. I do not. I was not familiar with the affairs of that company.

Q. Do you know what the second-mortgage bonds brought in the market?

A. I do not.

—. Do you know what the income bonds brought in the market?

A. I do not.

Q. Do you know what the original stock of the L., N. O. & T. R'y Co. sold for? Did it sell for anything?

A. I do not know.

Q. Don't you know it to be a fact that neither the bonds nor the stock was sold; that they were divided out among those who were in the enterprise for the construction of the road?

A. The larger proportion of them were held by the men who advanced the money for the construction of the road. I suppose that is so.

Q. Were not they all held by Huntingdon and Wilson?

A. I think not.

Q. Were not part of them held by Huntingdon and Wilson?

A. Yes, sir; as I am informed.

Q. They were turned over to the construction company?

A. As I understand it, they were held by Huntingdon and Wilson.

Q. Was not Huntingdon and Wilson the construction company?

A. That I do not know.

Q. Were they not the owners of the stock of the L., N. O. & T.?

A. They had a large interest in the road.

Q. They owned a large interest in the road?

A. They were large investors in the construction company.

185 I understood they had an interest in the construction company.

Q. They had the controlling interest in the stock of the L., N. O. & T. R'y Company?

A. I think they had.

Q. Was not the construction company that built the railroad called the Financial Improvement Company?

A. I think it was; I know nothing about that personally.

Q. Didn't R. T. Wilson own 40% and C. P. Huntingdon own 60%

Q. Didn't C. P. Huntingdon own 60% and R. T. Wilson 40% in in that construction company?

A. I have been so informed.

the L., N. O. & T. R'y Co.?

A. I think their interests were about in that proportion. I am not sure about that; I think so.

Q. They held the same proportion in the railroad that they held in the Financial Improvement Co., as you understood it?

A. About that relation.

Q. Is it not a fact that all these bonds which you have mentioned—the original first-mortgage bonds and second-mortgage bonds and income bonds and the stock of the L., N. O. & T. R'y Co.—were all issued by the L., N. O. & T. R'y Co. to this Financial Improvement Company for the building of the L., N. O. & T. railroad?

A. I do not think they were all issued to that company.

Q. Were not the most of them issued in that way?

A. Well, I do not think so.

Q. The original bonds and stock that were first issued of the L.,

N. O. & T. R'y Co., outside of those which were afterwards issued to purchase and construct the branches of the L., N. O. & T. railroad—were they not all issued to the Financial Improvement Co. for the building of the main line of the railroad?

A. I am unable to answer that question, because I am not familiar with the early affairs of that company.

Q. You do not know whether that is a fact or not?

A. No, sir; I do not.

Q. Look at the pamphlet now handed to you and state if the same is not the first annual report of the L., N. O. & T. R'y Co. for the year ending December 31st, 1887.

A. That is what it says it is.

Q. Now look at the map given in the first part of that pamphlet, which is styled "Map of the L., N. O. & T. R'y," and state whether or not that is a correct map showing how the road extended from Memphis, Tenn., to New Orleans, La., through the State of Mississippi.

A. That is.

Q. Now look at the same map and see if it does not show correctly the line of the I. C. R. R. from New Orleans, La., up to Memphis, Tenn.

A. I think it is as nearly correct as railroad maps are.

Q. Are not the L., N. O. & T. R. R. from Memphis, Tenn., to New Orleans, and the I. C. railroad from Memphis to New Orleans competing lines?

Objected to. Overruled. Defendant excepts.

A. Yes, sir. I think all lines are more or less competing that run in the same direction.

Q. Please file——

It is agreed by counsel on both sides that the pamphlet which is referred to and the map therein are exhibits to the deposition of R. T. Wilson in this case.

Q. Look at the map now handed you, which is an exhibit to the deposition of R. T. Wilson, and state if that does not show correctly, or practically correctly, the main line of the L., N. O. & T. R'y, with all its branches, from Memphis, Tenn., to New Orleans, La.?

A. That map is practically correct.

Q. The trains on what is called the Little J. railroad—the Natchez, Jackson & Columbus—are separate from the main line and run from Natchez to Jackson?

A. I think they do.

Q. Now, what you call the Riverside division—do you know how the trains run on that?

186 A. No, sir; I would have to consult the time-tables before I knew anything of that sort.

Q. You do not know personally yourself how the trains run?

A. No, sir.

Q. State, if you can, why it is that the operating expenses for the year 1892, as shown in Exhibit 1 to your deposition, is so much

larger than the operating expenses for the year 1893, 1894, and 1895, respectively.

A. I think that is owing in good part at least to crevasses and washouts during that year.

Q. In the operating expenses, then, you include all repairs of that sort?

A. Yes, sir.

Q. The repairs for all the washouts and breaks in the road occasioned by water or otherwise were included in the operating expenses?

A. Yes, sir.

Q. Now, the ballasting of the road is included in the betterments?

A. Yes, sir; that is included in betterments.

Q. How many months of the year 1892 is included in that statement in Exhibit 1; is it a full year?

A. A calendar year.

Q. Then it extends back and continues in a portion of the time before the consolidation and a portion of the time after the consolidation?

A. Yes, sir.

Q. Does not this Exhibit 1 to your testimony show a statement as to the whole line from Memphis, Tenn., to New Orleans, La., and all of its branches?

A. Yes, sir.

Q. What proportion of the line of the railroad is in the State of Miss.?

A. I do not remember the exact per cent., but a large proportion.

Q. You do not know how many miles in Miss.?

A. I do not recall the exact mileage.

Q. Now, you include in the operating expenses the taxes, do you not?

A. The figures given there represent the charges on account of the operating expenses and taxes.

Q. That includes taxes on the lands outside of the railroad?

A. No, sir; it does not.

Q. What do you mean by this statement at the bottom of the statement for 1894 in Exhibit No. 1 to your deposition, "Deficit receipts"?

A. That deficit was occasioned by the fact that the expenses exceeded the receipts for that year; you notice the other years the receipts exceeded the expenses.

Redirect examination:

Q. You were asked on cros-examination if you had any personal knowledge as to the issuance, etc., of the bonds of the L., N. O. & T. R. R. Co. Don't you know whether these bonds have been cancelled or are still outstanding and unpaid?

A. I know that they have not been cancelled.

Q. Don't you know that interest on said binds was paid by the Yazoo & Mississippi Valley Railroad Co. to the Union Trust Co. of New York?

A. Yes, sir; as the coupons mature each six months; they are being paid now on the first-mortgage bonds.

Q. From whom do these paid coupons come to you?

A. Those that are held by the trust Co. come from the trust Co.

Q. And the others?

A. The others from the holders, whoever they may be.

Q. Did the payments which were made by the Y. & M. V. R. R. Co. on account of the interest on the first-mortgage bonds, of which you have spoken, include all the interest on the first-mortgage bonds?

A. Yes, sir—that is, all the coupons which have been presented have been paid.

Objected to. Objection overruled. Plaintiff excepts.

Q. Is the cost of the depot in New Orleans, which was sold by the L., N. O. & T. R. R. Co. to the Y. & M. V. R. R. Co., about which you have been interrogated by counsel for plaintiff, included in the amount of expenses submitted by you and filed with your deposition and marked Exhibit 1?

187 A. It is not only not included in the item of operating expenses and taxes, but neither is it included in the item betterments and improvements shown on that statement.

Q. Then it was not included in this account filed here?

A. It is not included in the figures shown on this sheet.

Q. What was done with the surplus remaining in 1893 after the payment of expenses and interest on the first-mortgage bond?

A. The amount at the end of June, 1893, the amount in excess of interest on first-mortgage bonds taken over net receipts was $198,451.42. That is applied on the 1st Sept., 1893, to the accrued interest on second-mortgage bonds.

Q. In speaking of the interest of R. T. Wilson and C. P. Huntingdon in the L., N. O. & T. R. R. Co. and the Financial Improvement Co. do you speak of that interest of your own knowledge or merely on information derived from others?

A. Merely on information derived from other sources.

Q. How are the employés and officers of the Yazoo & Mississippi Valley R. R. Co. paid? I mean on what roster or what form of voucher?

A. They are paid on pay-rolls or vouchers of the Y. & M. V. R. R. Co. in the regular course of business, the same as railroads pay their employés generally.

(By Mr. MAYES:)

Q. In your cross-examination by Judge Critz you had occasion to mention once or twice the item of taxes paid; do you know whether it is or is not true that the Y. & M. V. R. R. Co. paid levee taxes on its railroad property, etc., in the State?

A. Yes, sir; it does.

Q. Does not claim any exemption?

A. No, sir.

Q. Also it pays certain cash taxes on some of its branches?

A. Yes, sir.

Q. You have been asked about the way these railroads run, some of these branches. Do you know anything about how the railroad from Jackson, Miss., which is commonly known as the Yazoo branch, the old property of the old Y. & M. V. R. R., is run?

A. It is operated by the Illinois Central R. R. as its other leased lines are.

Q. It is operated by the Illinois Central and not by the Yazoo & Miss. Valley Co.?

A. Yes, sir.

Q. It is treated on the books of the company as a branch of the I. C.?

A. Yes, sir.

Q. You have been asked a good deal about the two companies having the same officers. Are all the officers of the two companies the same?

A. Not at all. There are a number of officers who happen to be officers of both companies, but comparatively few.

Q. Are all the directors of the two companies the same?

A. Not at all. There are some directors of the Y. & M. V. R. R. Co. who are also directors of the Illinois Central.

Q. Are all the stockholders of the two companies the same?

A. Not at all.

Q. For instance, it appears that Bolivar county owns 1,500 shares of stock in the L., N. O. & T., now the Yazoo & Miss. Valley?

A. Yes, sir.

Q. Has Bolivar county got any stock in the Illinois Central R. R.?

A. No, sir; never has, so far as I know.

Recross-examination:

Q. You have been asked about the Bolivar County stock in the L., N. O. & T. R. C. Co. Did Bolivar county go into this consolidation with the Yazoo & Mississippi Valley R. R. Co. and exchange that L., N. O. & T. stock for the stock of the Yazoo & Miss. Valley R. R. Co. or did Bolivar county stay out of the consolidation entirely?

A. None of the L., N. O. & T. stock has been converted into Yazoo & Miss. Valley stock. I do not know as to that question. I do not recall the fact just what was done.

188 Q. Did Bolivar county go into that consolidation or merger?

A. I am unable to answer.

Objected to.

EXHIBIT "1" TO J. C. WELLING'S TESTIMONY.

Year ended December 31, 1892:		
Gross receipts from operation		$3,397,459.04
Operation expenses & taxes		2,805,795.55
Net receipts from operation		591,665.49
Int. on 1st-m'tg'e bonds	$645,280.00	
Betterments & improvements	638,494.76	
	1,283,774.76	
Net receipts lands, 47,199.83.		
Year ended December 31, 1893:		
Gross receipts from operation		3,492,857.24
Operation expenses & taxes		2,391,969.49
Net receipts from operation		1,100,887.75
Int. on 1st-m'tg'e bonds	654,613.33	
Ac. int. on 2nd-m'tg'e inc. bonds (total due as of Sept. 1, '93, $2,443,875.79)	198,451.42	
Betterments & improvements	127,913.37	
	980,978.12	
Surplus	119,909.63	
Net receipts lands, 12,978.16.		
Year ended December 31, 1894:		
Gross receipts from operation		3,320,075.62
Operation expenses & taxes		2,397,196.03
Net receipts from operation		922,879.59
Int. on 1st-m'tg'e bonds	673,280.00	
Int. " 2nd-m'tg'e inc. bonds (2,819,988.97)	219,133.75	
Betterments & improvements	259,101.18	
	1,151,514.93	
Deficit receipts lands, $6,531.85.		
Year ended December 31, 1895:		
Gross receipts from operation		3,373,384.48
Operation expenses & taxes		2,294,707.26
Net receipts from operation		1,078,677.22
Int. on 1st-m'tg'e bonds	673,280.00	
Ac. int. 2nd-m'tg'e inc. bonds (2,931,512.26)	261,901.26	
Betterments & improvements	188,259.94	
	1,123,441.20	
Net rec'ts lands, 62,883.67.		

189 Defendant introduced a mortgage made by the L., N. O. & T. R. R. Co. on Sept. 18, 1884, for which see Charter Book, page 571.

Defendant introduced mortgage made by the L., N. O. & T. R. R. Co. to Metropolitan Trust Co. of Sept. 18, 1884, for which see Charter Book, page 586.

Defendant introduced mortgage made by the L., N. O. & T. R. R. Co. to the Union Trust Co. of August 25, 1885, for which see Charter Book, page 621.

Defendant introduced mortgage made by the L., N. O. & T. R. R. Co. to the Union Trust Co. of New York on August 25, 1886, for which see Charter Book, page 649.

Defendant introduced mortgage made by the L., N. O. & T. R. R. Co. to the Union Trust Co. of New York on August 26, 1886, for which see Charter Book, page 670.

Defendant introduced mortgage made by the L., N. O. & T. R. R. Co. to Pardee & Trolius, trustees, on August 27, 1886, for which see Charter Book, page 692.

Defendant introduced mortgage made by the L., N. O. & T. R. R. Co. to the Union Trust Co. of New York on Nov. 27, 1886, for which see Charter Book, page 719.

Defendant introduced mortgage made by the Yazoo & Miss. Valley R. R. Co. to the United States Trust Co. of New York on April 14, 1893, for which see Charter Book, page 761.

Defendant introduced mortgage made by the Y. & M. V. R. R. Co. to the Union Trust Co. of New York on the 15th April, 1893, for which see Charter Book, page 788.

190 EXHIBIT 2 TO J. C. WELLING'S TESTIMONY.

At a duly called meeting of the board of directors of the Yazoo & Mississippi Valley Railroad Company held at No. 216 Broadway, in the city of New York, on Wednesday, the 21st day of June, 1893.

Present: Messrs. Fish (president), Cruger, E. H. Harriman, and Luttgen.

The minutes of the meeting of the board of directors held April 13, 1893, were read and approved.

The minutes of the special meeting of the stockholders held in Memphis May 25, 1893, were submitted and read.

The president reported in writing, under date of May 15, 1893, that the supreme court of the State of Mississippi had rendered a decision favorable to this company in the Adams County tax case, and submitted a copy of the decision..

On motion, the president's communication, with accompanying paper, was ordered on file.

The president having reported the purchase of the Illinois Central passenger station in New Orleans and grounds adjacent thereto for the sum of $590,000,

It was, on motion, resolved that said purchase be approved. June 21, 1893.

The meeting then adjourned.

A. G. HACKSTAFF, *Secretary.*

I hereby certify that the foregoing is a true and correct copy of the minutes of the meeting of the board of directors of the Yazoo & Mississippi Valley Railroad Company held at No. 216 Broadway, in the city of New York, on Wednesday, the 21st day of June, 1893.

[SEAL.] A. G. HACKSTAFF,
Secretary Yazoo & Mississippi Valley Railroad Co.

191 EXHIBIT 3 TO J. C. WELLING'S TESTIMONY.

At an adjourned meeting of the board of directors of the Yazoo & Mississippi Valley Railroad Company held at No. 216 Broadway, in the city of New York, on Thursday, the 13th day of April, 1893, pursuant to adjournment from March 3, 1893.

Present: Messrs. Fish (president), Cruger, E. H. Harriman, Luttgen, and Peabody.

The minutes of the meeting of the board of directors held Nov., 1892, and March 3, 1893, were read and approved.

The minutes of the meeting of the executive committee held January 5, 1893, were read, approved, and re-enacted as the action of the board.

The president read a communication addressed by him to the board of directors, under date of April 12, 1893, advising that he had received from F. H. Davis, the former treasurer of the Louisville, New Orleans & Texas Railway Company, $700,000 of the first-mortgage bonds of that company remaining in the treasury, and that these bonds, Nos. 16133 to 16832 (both inclusive), had been deposited with the United Sta-es Trust Company of New York and certificates taken therefore which will entitle this company to receive $661,108 of Illinois Central Railroad Company four per cent. gold bonds of 1953.

On motion, the report of the president was accepted, approved, and ordered on file.

Whereas the Yazoo & Mississippi Valley Railroad Company is largely indebted to the Illinois Central Railroad Company for advances already made, and the latter company is from time to time making further advances for the account of this company: Therefore be it

Resolved, That the interim certificates for $661,108, Illinois Central Railroad Company four per cent. gold bonds of 1953, now in the treasury be deposited with the Illinois Central Railroad Company as collateral security for the above indebtedness, with authority to the Illinois Central Railroad Company to exchange these

192 certificates into bonds and to rehypothecate the said collateral

Whereas this company is interested in the application to be made of the proceeds of certain bonds of the Illinois Central Railroad Company issued or to be issued to the amount of $25,000,000 for the purposes mentioned in a certain indenture or agreement made by that company with the United States Trust Company of New York, under date of September 1, 1892, and has informally agreed to secure the payment of the said bonds by a mortgage or deed of trust

covering that part of its property described in the draft mortgage or deed of trust hereinafter set forth:

Be it therefore resolved, That this company do make, execute, and deliver to the United States Trust Company of New York a mortgage or deed of trust in the form and containing the provisions following—that is to say:

(Here follows mortgage.)

And be it further resolved, That the president or vice-president and secretary of this company be, and they are hereby, authorized for and in behalf of this company and as its act and deed to affix the corporate seal of the company to said mortgage or deed of trust and to duly execute, acknowledge, and deliver the same.

Whereas this company is interested in the application to be made of the proceeds of certain bonds of the Illinois Central Railroad Company issued or to be issued to the amount of $25,000,000 for the purposes mentioned in a certain indenture or agreement made by that company with the United States Trust Company of New York, under date of September 1, 1892, and has informally agreed for the further securing of the said bonds to make, execute, and deliver an indenture to the Union Trust Company of New York supplemental to a certain indenture, known as the second mortgage, executed by the Louisville, New Orleans & Texas Railway Company to said Union Trust Company of New York, under date of August 26, 1886: Be it therefore

Resolved, That this company do make, execute, and de-
193 liver to the Union Trust Company of New York a mortgage or deed of trust in the form and containing the provisions following—that is to say:

(Here follows mortgage.)

And be it further resolved, That the president or vice-president and secretary of this company be, and they are hereby, authorized for and in behalf of this company and as its act and deed to affix the corporate seal of the company to said mortgage or deed of trust and to duly execute, attest, acknowledge, and deliver the same.

On motion, it was

Resolved, That the president is hereby authorized to call a special meeting of the stockholders of the Yazoo & Mississippi Valley Railroad Company, to be held at such time and place as he may deem advisable, to take action on a proposition to approve the two mo*r*gages this day authorized and on any other matters incidental thereto and connected therewith that may come before the meeting.

The meeting then adjourned.

A. G. HACKSTAFF, *Secretary.*

I hereby certify that the foregoing is a true and correct copy of the meeting of the board of directors of the Yazoo & Mississippi Valley Railroad Company held at No. 216 Broadway, in the city of New York, on Thursday, the 13th day of April, 1893.

A. G. HACKSTAFF,

[SEAL.] *Secretary Yazoo & Mississippi Valley Railroad Co.*

194 *First Mortgage of* 1884.

An indenture made the eighteenth day of September, in the year of our Lord one thousand eight hundred and eighty-four, by and between the Louisville, New Orleans and Texas Railway Company, a corporation created, organized, and existing under the laws of the States of Tennessee, Mississippi, and Louisiana, party of the first part, and the Metropolitan Trust Company of the City of New York, a corporation created, organized, and existing under the laws of the State of New York, party of the second part.

Whereas, the party of the first part has been formed by the consolidation under the laws of the States of Tennessee, Mississippi and Louisiana of the Tennessee Southern Railroad Company, a corporation created and existing under the laws of the State of Tennessee, the New Orleans, Baton Rouge, Vicksburg and Memphis Railroad Company, and the Memphis and Vicksburg Railroad Company, corporations created and existing under the laws of the State of Mississippi, and the New Orleans and Mississippi Valley Railroad Company, a corporation created and existing under the laws of the State of Louisiana, and is the owner of a line of railway, extending from Memphis in the State of Tennessee to New Orleans in the State of Louisiana, and is authorized to construct branches thereto.

And whereas, the party of the first part and its successors are about to execute and issue, from time to time, (but with the limitations hereinafter prescribed in respect to the aggregate amount thereof, which may at any time be outstanding, which amount is not in any case to exceed, at the par or face value of such bonds, the sum of twenty million five hundred and fifty thousand dollars) first-mortgage bonds for one thousand dollars each of the general form and tenor following, to wit:

195 UNITED STATES OF AMERICA.

Louisville, New Orleans and Texas Railway Company.

No. —. *First-mortgage Bond.* No. —.

The Louisville, New Orleans and Texas Railway Company, for value received, promises to pay to the bearer hereof, or, if registered, to the registered holder hereof, the sum of one thousand dollars fifty years after date, and, on presentation and surrender at or after maturity of the respective interest warrants hereto annexed, to pay to the person presenting the same, or, if this bond is registered and the interest warrants appertaining thereto cancelled, to pay to the registered holder hereof, interest on such principal sum at the rate of five per centum per annum, semi-annually, on or after the first day of March and September in each year, such payments of prin-

cipal and interest to be made at the office or agency of said company in the city of New York.

This is one of the first-mortgage bonds secured by indenture of mortgage or deed of trust to the Metropolitan Trust Company of the city of New York, trustee, dated September 18th, 1884.

None of said bonds are to be in anywise binding or obligatory unless authenticated by a certificate endorsed thereon, signed by said trustee or its successor or successors in said trust.

This bond may at any time, upon production thereof to said railway company and proper endorsement being made thereon, and either with or without the surrender to said railway company for cancellation of all unpaid interest warrants appertaining thereto, be registered upon the books of the company in the name of the holder thereof, and thereupon its transferability by delivery will cease, and thereafter it can be transferred only by the registered holder or his attorney by transfer duly made upon said books.

196 In witness whereof, the said railway company has caused these presents to be signed by its president, and its corporate seal to be affixed thereto and attested by its secretary, this first day of September, one thousand eight hundred and eighty-four.

LOUISVILLE, NEW ORLEANS AND TEXAS RAILWAY COMPANY,

[SEAL.] By —— ——, *President.*

Attest: —— ——, *Secretary.*

And whereas, the general form of the several interest warrants to be annexed to such bonds (each of which interest warrants is to bear the engraved signature of the treasurer of the railway company) is to be as follows, viz:

(*Form of Interest Warrant.*)

Interest warrant for twenty-five dollars, being semi-annual interest maturing on the first day of ——, —, upon the Louisville, New Orleans and Texas Railway Company's first-mortgage bond No. —.

$25.

—— ——, *Treasurer.*

And whereas, all of the said bonds are to be equally secured by mortgage and hypothecation of the railways and railway lines of the party of the first part and its successors constructed and to be constructed until the length of such constructed railways shall amount, in the aggregate, to eight hundred miles, and of all their appurtenances, and the franchises relating or pertaining thereto.

Now therefore this indenture witnesseth, that the party of
197 the first part, in consideration of the premises, and of one dollar to it paid by the party of the second part, the receipt whereof is hereby acknowledged, and for the purpose of securing the payment of such bonds, with the interest to accrue thereon, according to the true intent and meaning thereof, hath granted, bargained, sold, aliened, remised, released, conveyed, and confirmed,

and by these presents doth grant, bargain, sell, alien, remise, release, convey, and confirm unto the said party of the second part, and its successors and assigns forever, all the railways and railway lines of the party of the first part, and its successors, whether constructed or to be constructed, until the length of such constructed railways shall amount in the aggregate to eight hundred miles, and all their appurtenances, including therein all lands and rights of way, superstructure, rails, tracks, side tracks or sidings, bridges, buildings, fences, depots, station-houses, shops, warehouses, car-houses, engine-houses, machine shops, repair shops, buildings, erections and structures necessary to the operation of said railways or said railway lines, and all and singular the rolling stock, equipment and machinery appertaining thereto, whether now owned or hereafter to be acquired; and also, all the rents, issues, tolls, incomes, earnings and profits of such railways and railway lines; and also all the rights, privileges, immunities and franchises relating or pertaining to such railways or railway lines which the said party of the first part now possesses, owns or is entitled unto, or it or its successors may hereafter become possessed of or entitled unto; and also, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, and its successors, of, in and to the premises, and every part and parcel thereof, with the appurtenances.

To have and to hold, all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, and its successors and assigns for-
198 ever, in trust, nevertheless, for the security and benefit of all and every the persons or bodies corporate who or which shall be or at any time become the holder or holders of any of such bonds, or the interest warrants appertaining thereto, without preference to the holder of any of the said bonds or interest warrants over any of the others, by reason of priority in the date thereof or the time of the issuing or negotiating of the same.

Provided always, and these presents are upon the express condition, that if the party of the first part, or its successors or assigns, shall well and truly pay or cause to be paid to the holders of the said bonds and interest warrants, when and as the same shall become due and payable, the principal and interest moneys secured hereby, according to the terms, provisions and conditions, tenor and effect of the said bonds, then these presents and the estate hereby granted shall cease, determine and be null and void.

And it is covenanted and agreed by and between the parties hereto, that until default shall be made by the said party of the first part, its successors and assigns, in the payment of the principal or interest of the said bonds, or some of them, or some part thereof, the said party of the first part, its successors and assigns, shall be suffered and permitted to possess and enjoy the said premises, with their appurtenances, and all and singular the rights and franchises hereinbefore described, and to receive, take and use the tolls, income, earnings and profits thereof, and the trustee or trustees hereunder shall have full power, in its or their discretion, upon

written request of the party of the first part, its successors or assigns, to convey, by way of release or otherwise, and fully release from the lien of this mortgage, any lands or other property of any description which in its or their judgment shall not be necessary for, or for use in connection with, said railways, and to consent to such changes in the location of tracks, depots and other buildings as in its or their judgment may be expedient, and to make and deliver the releases and conveyances necessary to carry the same into effect, but any lands or other property which may be acquired for permanent use in substitution for any so released or conveyed shall there-
199 upon become subject to the lien of this mortgage, and upon request of the trustee or trustees hereunder shall be conveyed to it or them by the party of the first part, its successors or assigns, upon the trusts of these presents.

But if default shall be made in the payment of the principal or interest moneys mentioned in the said bonds, or any or either of them, or any part thereof, according to the tenor and effect of said bonds or either of them, and if such default shall continue for the period of six months, then, and in that case, the party of the second part, or its successors in the trust, are hereby authorized and empowered, at the request of the holders of one-fourth part of the said bonds then outstanding in respect of which such default shall have been made, to enter into and upon, and take and hold possession of, all and singular the premises, estates, franchises, rights, privileges and property hereby granted and conveyed, or intended so to be, and in person, or by one or more agents, to operate the said railways, to make from time to time all such repairs and replacements as it or they may deem judicious, and all such useful alterations, additions and improvements as the income coming into its or their hands shall be adequate to pay for, and to take, collect and receive all fares, freights, tolls, earnings, issues, profits and income of said railways, and apply such fares, freights, tolls, earnings, issues, profits and income to the proper expenses of holding, operating and managing the said railways and other premises, and conducting the business thereof, to the payment of and for all taxes and assessments which shall be levied or assessed thereon, and all necessary and proper repairs, replacements, alterations, additions and improvements upon said property, and all expenses, costs, charges and counsel fees in the premises of said party of the second part, or its successors in the trust, and a reasonable compensation for its or their services, and next to the payment of the interest and principal of the said bonds, according to the tenor and effect thereof, as the same may be
200 or become due and payable, and in case the principal moneys secured by such bonds shall not have become due, the moneys applicable to the payment of interest shall be applied upon the interest warrants remaining in default, in the order of their maturity; in case the said principal moneys shall have become due, the moneys applicable to the payment of the principal and interest on such bonds shall be applied to such principal and interest *pro rata* without any preference or priority whatsoever.

And further, if default shall be made in the payment of the prin-

cipal or interest moneys mentioned in the said bonds, or any or either of them, or any part thereof, and if such default shall continue for the period of six months, then, and in that case, at the request of the holders of one-fourth part of the said bonds then outstanding in respect of which such default shall have been made, the said party of the second part, or its successors in the said trust, may, and it and they are hereby authorized and empowered to, cause the whole of the said premises, estates, franchises, rights, privileges and property hereby granted and conveyed, or intended so to be, with their appurtenances, and all benefit and equity of redemption of the said party of the first part, and its successors and assigns therein or thereto, to be sold at public auction in the city of New York, in the State of New York, or the city of Memphis, in the State of Tennessee, giving at least three months' previous notice of the time and place of such sale, by publishing the same at least once in each week during such period of three months, in two newspapers published in said city of New York and two newspapers published in said city of Memphis, and giving such other notice of such sale as may be required by law, if any other notice be so required.

And it shall be lawful for the said party of the second part or its successors making such sale, and it and they are hereby authorized and empowered, as the attorney or attorneys of the party of the first part, and its successors, by these presents duly constituted and appointed for that purpose, to make, execute and deliver to the purchaser or purchasers on such sale, all such deeds and conveyances as shall be necessary or proper to convey and assure
201 to, and vest in, him or them, the said premises, estates, franchises, rights, privileges and property, and every part and parcel thereof, and all of the estate, right, title and interest of the said party of the first part, and its successors and assigns therein or thereto; and such sale, and the deeds and conveyances so to be thereupon executed, shall be valid and effectual forever, and shall be a perpetual bar, both in law and equity, against the said party of the first part and its successors and assigns, and against all persons claiming or to claim by, from or under it or them, or any of them.

And it is further declared and agreed, that the receipt of the trustee or trustees who shall make the sale hereinbefore authorized shall be a sufficient discharge to the purchaser or purchasers at such sale for his or their purchase-money, and that such purchaser or purchasers, his or their heirs or assigns or personal representatives, shall not, after paying such purchase-money and receiving such receipt of such trustee or trustees therefor, be obliged to see to the application of such purchase-money upon or for the trusts or purposes of these presents, or be in anywise answerable for any loss, misapplication or non-application of such purchase-money by the trustee or trustees.

And it is hereby declared and agreed, that the said party of the second part, or its successors in the said trust, shall out of the proceeds of such sale, or of any sale which shall, under judicial proceedings or otherwise, be made of the said premises in enforcement of the security afforded by these presents, in the first place, pay and

retain the costs and expenses attending such sale, and all counsel fees and other expenses incurred by it or them in reference to the same, and a reasonable compensation for its or their own services in the premises; and also any balance which may be due to it or them on account of any disbursements or expenses paid or incurred in or about the care and management of the said premises subsequent to the taking possession thereof by it or them, including the reasonable compensation of any agent or agents who may be employed in or about such care and management, and shall apply the residue of the proceeds of such sale, or so much thereof as may be
202 necessary, to the payment of the whole amount of principal and interest which shall then be owing and unpaid upon the bonds secured hereby, or any of them, whether the said principal, by the tenor of the said bonds, be then due or yet to become due. And in case of a deficiency of such proceeds to pay in full the whole amount of principal and interest owing or unpaid upon the said bonds, they shall be paid ratably in proportion to the amounts owing and unpaid upon them respectively, and without discrimination as between principal and interest, and without preference of the holder of any one bond or interest warrant over any of the others; and any surplus which may remain after the full payment of the principal and interest of all of the said bonds shall be paid over to the said party of the first part, or its successors or assigns, upon lawful demand being made therefor.

And it is hereby further provided, declared, granted and agreed, that upon the happening of such event or events as is or are hereinbefore declared agreed or provided to authorize the said party of the second part, or its successors, to sell the said premises, estates, franchises, rights, privileges and property, or to take the requisite proceedings to that end, the said party of the second part, or its successors, shall be entitled, in its or their discretion, instead of taking proceedings for and making sale of said premises, estates, franchises, rights, privileges, and property, under and in virtue of the power of sale hereinbefore contained, to proceed by bill in equity, or other appropriate proceedings, in any court or courts of competent jurisdiction, to foreclose this mortgage or enforce the rights, liens and securities of the trustee or trustees and the bondholders thereunder; and thereupon said trustee or trustees shall be entitled to have the said premises, estates, franchises, rights, privileges and property hereby granted or conveyed or intended so to be, sold by judicial sale under the order or decree of such court or courts, for or towards the satisfaction of the principal and interest due or owing upon the then outstanding first-mortgage bonds, issued under or entitled to the benefit of the security of this mortgage, and
203 for the enforcement of the rights, liens and securities of the trustee or trustees and the bondholders; and in case of such judicial sale, the net proceeds thereof shall be applicable and distributable in like manner as hereinbefore provided in respect of the net proceeds of a sale of such mortgaged premises and properties, rights and franchises, under and in virtue of the power of sale hereinbefore contained; and all the stipulations and provisions in

this indenture contained with reference to or consequent upon a sale of such mortgaged premises and properties, rights, immunities and franchises, when or if sold under said power of sale, shall be applicable and applied as far and as nearly as may be, in case of such judicial sale being made under the order or decree of the court.

And it is hereby further provided, declared and agreed that in case of such sale as is hereinbefore authorized being made by the party of the second part or its successors in said trust, or in case of any judicial sale being made of the said premises, properties, rights and franchises hereby mortgaged, or any part thereof, in enforcement of the mortgage lien hereby created, the purchaser or purchasers at such sale shall be entitled, in making settlement for and payment of the purchase-money bidden at such sale, to turn in or use towards the payment of such purchase-money the bonds held by such purchaser or purchasers, to or towards the payment whereof the net proceeds of such sale shall be legally applicable, reckoning such bonds, or the amount so turned in or used of the same for such purpose, at such sum as would be payable out of the net proceeds of such sale to such purchaser or purchasers, as holder or holders of such bonds, for his or their just share or proportion of such net proceeds of sale, upon due apportionment of and concerning such net proceeds.

And the said party of the first part, for itself, its successors and assigns, doth hereby covenant, grant and agree to and with the said party of the second part, and its successors in the trust, and to and with the respective persons and corporations who or which shall at any time become holders of the said bonds hereby secured, or any of them, that the said party of the first part, its successors and
204 assigns, shall and will at any time and from time to time hereafter, upon request, make, do, execute and deliver all such further and other acts, deeds and things as shall be reasonably advised, devised or required to effectuate the intention of these presents, and to assure and confirm to the said party of the second part, or its successors, all and singular the property and estate, real and personal, hereinbefore described, and hereby intended to be granted, and so as to render the same, and especially such portions thereof as shall be hereafter acquired by the said party of the first part, or its successors, available for the security and satisfaction of the said bonds, according to the intent and purpose herein expressed.

And it is hereby further provided, covenanted, declared and agreed that the party of the second part and its successors in the trust hereby created are, from time to time, upon the request of the party of the first part, its successors or assigns, to authenticate and certify as issued hereunder and to deliver to the party of the first part, its successors or assigns, bonds of said party of the first part or its successors of the general form and tenor above set forth, to amounts which shall aggregate thirty thousand dollars for each mile of said main line of railway of the party of the first part from Memphis, in the State of Tennessee, to New Orleans, in the State of Louisiana, and thereafter, to amounts which shall aggregate twenty

thousand dollars for each mile of constructed railway, not included in such main line, owned by the party of the first part, or its successors, and mortgaged hereby, or by indenture of mortgage or deed of trust supplemental hereto constituting a first mortgage thereon, until the length of such constructed railways, including such main line, shall amount in the aggregate to eight hundred miles; and that the certificate of the president of said party of the first part or its successors to the facts entitling the party of the first part or its successors to receive such bonds under the foregoing clause hereof, shall be sufficient evidence of such facts and shall fully protect the said party of the second part or its successors in respect to the authentication, certification and delivery of said bonds; but
205 it is expressly provided, declared, covenanted and agreed that the said party of the second part and its successors in the trust created hereby shall not, in any event, authenticate or certify, as issued hereunder, bonds in excess of thirty thousand dollars for each mile of such main line of railway, and twenty thousand dollars for each mile of constructed railway so owned and mortgaged but not included in such main line. Provided, however, that nothing herein contained shall prevent the party of the second part and its successors from authenticating, certifying and delivering to said party of the first part, its successors or assigns, bonds in excess of such respective limits of thirty thousand dollars per mile of main line and twenty thousand dollars per mile of other constructed railway (but not in any case exceeding in the aggregate the amount at their par or face value of twenty million five hundred and fifty thousand dollars), in case the proceeds of the sale of such bonds issued in excess of such respective limits shall simultaneously with the delivery of such bonds to the party of the first part, its successors or assigns, be deposited with the trustee or trustees hereunder, to be delivered to the party of the first part, its successors or assigns, only from time to time, as and when, under the foregoing provisions hereof, it or they would have become entitled to receive the bonds represented by such deposited proceeds, and until such delivery of such proceeds to said party of the first part, its successors or assigns, the same shall be held by the said trustee or trustees, as further collateral security to all the bonds outstanding hereunder.

And the said party of the first part doth hereby covenant, grant and agree to and with the said party of the second part and its successors in the trust, and to and with the respective persons and corporations who or which shall at any time become holders of the said bonds hereby secured, or any of them, that from and after the first day of July, 1894, the sum of twenty-five thousand dollars shall be set apart annually as a sinking fund for the redemption and payment of the bonds to be secured hereby; that if, and so long as the bonds secured hereby can be purchased at or below
206 par, such sinking fund shall be invested in such bonds, which are to be purchased by the board of directors of said party of the first part, or its successors, from time to time, at its discretion, at the market price of such bonds; but in case such bonds cannot be purchased at or below par, then, and in that event, said

board of directors are, from time to time, to invest said sinking fund, and the earnings and accruals thereof, either in such bonds at the market price thereof at the time of purchase or in such other securities or in such other manner as to the board of directors may seem expedient, with full liberty to change the investments from time to time at its discretion, and in making such investments the said board of directors is not to be limited to the subjects of investment permitted to trustees, but is to be at liberty to invest the same according to its own judgment, free from any such limitation whatsoever; but the said sinking fund and the earnings and accruals therefrom are to be irrevocably pledged to the redemption and payment of the bonds to be issued hereunder, except that any and all bonds secured hereby, and all interest warrants appertaining thereto, which may be purchased with said sinking fund, or the earnings or accruals thereof, shall forthwith on the purchase thereof be cancelled and destroyed.

And it is hereby further provided, declared and agreed, that any vacancy in the office of trustee hereunder may be permanently filled by the appointment of a new trustee or new trustees, by an instrument or concurrent instruments in writing, executed under the hands and seals of the holders of a majority in interest of the then outstanding bonds secured hereby, or their attorneys-in-fact thereunto authorized, but that the board of directors of the party of the first part or its successors may make a temporary appointment to fill such vacancy until a permanent appointment shall be made in the manner above prescribed.

And it is hereby covenanted and agreed, that any new trustee or new trustees, appointed as aforesaid, whether by a permanent or temporary appointment, shall immediately upon its, his or their appointment, and without any further act, deed or conveyance, become and be vested with all of the estates, trusts, rights, powers and
207 duties of the trustee or trustees in whose place it, he or they shall have been appointed; but, nevertheless, the respective parties hereto, and their respective successors and assigns, shall and will, upon request, make, execute and deliver all such releases, conveyances and assurances as shall be appropriate to vest in and confirm and assure to such new trustee or new trustees such estates, trusts, rights, powers and duties, according to the intent above expressed.

And the said party of the second part does hereby accept the trust conferred upon it by these presents, but with the understanding, and it is hereby expressly provided and agreed, that it shall not be liable or accountable for the acts, defaults or neglect of any agent or agents who may, in good faith and with reasonable discretion, be appointed under and by virtue of or for the purposes of these presents to do any of the matters or things herein provided for, and that no other liability or responsibility shall, under any circumstances, be borne by or attach to it than for the exercise of reasonable diligence only in the performance of the said trusts, when action on its part for that purpose shall become necessary.

In witness whereof, the parties hereto have caused their respective

corporate seals to be hereunto affixed and attested by their respective secretaries, and these presents to be signed by their respective presidents the day and year first above written.

[CORPORATE SEAL.] LOUISVILLE, NEW ORLEANS AND TEXAS RAILWAY COMPANY,
By R. T. WILSON, *President.*

Attest: C. H. BOSHER, *Sec'ty.*

[SEAL OF TRUST CO.] THE METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK,
By THOS. HILLHOUSE, *Pres't.*

Attest: W. J. BRITTIN, *Secretary.*

208 STATE OF NEW YORK, } ss:
City and County of New York, }

Be it remembered, that on this eighteenth day of September, in the year of our Lord one thousand eight hundred and eighty-four, before me, William Shillaber, a duly appointed notary public in and for the city and county of New York, State of New York, and commissioner for the State of Tennessee, in and for the State of New York, residing in the said city and county of New York, personally appeared Richard T. Wilson, president of the Louisville, New Orleans and Texas Railway Company, and Charles H. Bosher, secretary of the same company, to me respectively personally known, and known to me to be such officers of the said company, who being by me severally duly sworn, did depose and say: That he, said Richard T. Wilson, resides in the city of New York in the State of New York, and that he, said Charles H. Bosher, resides in the city of Brooklyn, in the State of New York; that he, said Richard T. Wilson, is the president, and he, said Charles H. Bosher, is the secretary, of the said company; that they know the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal, and that it was so affixed thereto by order of the board of directors of the said company, and that they, the said Richard T. Wilson and Charles H. Bosher, signed their names thereto by the like order as president and secretary of said company respectively.

In witness whereof, I have hereunto set my and affixed my official seal, this 18th day of September, one thousand eight hundred and eighty-four.

WILLIAM SHILLABER, 271, [NOTARIAL SEAL.]
Notary Public and Commissioner for Tennessee in New York.

[Commissioner's Seal, Tenn.]

209 STATE OF NEW YORK, } ss:
City and County of New York, }

Be it remembered, that on this eighteenth day of September, in the year of our Lord one thousand eight hundred and eighty-four

before me, William Shillaber, a duly appointed notary public in and for the city and county of New York, State of New York, and commissioner for the State of Tennessee, in and for the State of New York, residing in said city and county of New York, personally appeared Thomas Hillhouse, president of the Metropolitan Trust Company of the City of New York, and Walter J. Brittin, secretary of the same company, to me respectively personally known and known to me to be such officers of the said company, who being by me severally duly sworn, did depose and say: That he, said Thomas Hillhouse, resides in the city of New York, in the State of New York; and that he, said Walter J. Brittin, resides in Jersey City, in the State of New Jersey; that he, said Thomas Hillhouse, is the president, and he, said Walter J. Brittin, is the secretary, of the said company; that they know the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal, and that it was so affixed thereto by authority of the trustees of the said company, and that they, the said Thomas Hillhouse and Walter J. Brittin, signed their names thereto by the like authority as president and secretary of said company respectively.

In witness whereof, I have hereunto set my hand and affixed my official seal, this 18th day of September, one thousand eight hundred and eighty-four.

[NOTARIAL SEAL.] WILLIAM SHILLABER, 271,
Notary Public and Commissioner for Tennessee in New York.

[Commissioner's Seal, Tenn.]

210 STATE OF NEW YORK, }
City and County of New York, } ss:

Be it remembered, that on this eighteenth day of September, in the year of our Lord one thousand eight hundred and eighty-four, before me, William Shillaber, a duly appointed notary public in and for the city and county of New York, State of New York, and commissioner for the State of Mississippi, in and for the State of New York, residing in said city and county of New York, personally appeared Richard T. Wilson, president of the Louisville, New Orleans and Texas Railway Company, and Charles H. Bosher, secretary of the same company, to me respectively personally known, and known to me to be such officers of the said company, who being by me severally duly sworn, did depose and say: That he, said Richard T. Wilson, resides in the city of New York, in the State of New York, and that he, said Charles H. Bosher, resides in the city of Brooklyn, in the State of New York; that he, said Richard T. Wilson, is the president, and he, said Charles H. Bosher, is the secretary of the said company; that they know the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal, and that it was so affixed thereto by order of the board of directors of the said company, and that they, the said Richard T. Wilson and Charles H. Bosher, signed their names thereto by the like order, as president and secretary of said company, respectively.

In witness whereof, I have hereunto set my hand and affixed my official seal, this 18th day of September, one thousand eight hundred and eighty-four.

WILLIAM SHILLABER, 271, [NOTARIAL SEAL.]
Notary Public and Commissioner for Mississippi in New York.

[Commissioner's Seal, Miss.]

211 STATE OF NEW YORK, } ss:
City and County of New York, }

Be it remembered, that on this eighteenth day of September, in the year of our Lord one thousand eight hundred and eighty-four, before me, William Shillaber, a duly appointed notary public in and for the city and county of New York, State of New York, and commissioner for the State of Mississippi, in and for the State of New York, residing in said city and county of New York, personally appeared Thomas Hillhouse, president of the Metropolitan Trust Company of the City of New York, and Walter J. Brittin, secretary of the same company, to me respectively personally known and known to me to be such officers of the said company, who being by me severally duly sworn, did depose and say: That he, said Thomas Hillhouse, resides in the city of New York, in the State of New York; and that he, said Walter J. Brittin, resides in Jersey City, in the State of New Jersey; that he, said Thomas Hillhouse, is the president, and he, said Walter J. Brittin, is the secretary of the said company; that they know the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal, and that it was so affixed thereto by authority of the trustees of the said company, and that they, the said Thomas Hillhouse and Walter J. Brittin, signed their names thereto by the like authority as president and secretary of said company respectively.

In witness whereof, I have hereunto set my hand and affixed my official seal, this 18th day of September, one thousand eight hundred and eighty-four.

[NOTARIAL SEAL.] WILLIAM SHILLABER, 271,
Notary Public and Commissioner for Mississippi in New York.

[Commissioner's Seal, Miss.]

212 STATE OF NEW YORK, } ss:
City and County of New York, }

Be it remembered, that on this eighteenth day of September, in the year of our Lord one thousand eight hundred and eighty-four, before me, William Shillaber, a duly appointed notary public in and for the city and county of New York, State of New York, and commissioner for the State of Louisiana, in and for the State of New York, residing in said city and county of New York, personally appeared Richard Thornton Wilson, president of the Louisville, New Orleans and Texas Railway Company, and Charles H. Bosher, secretary of the same company, to me respectively personally known and known to me to be such officers of the said company, and to be

the same persons described in and who executed the foregoing instrument in my presence and in that of the two witnesses whose names are thereto subscribed as such, who being by me severally duly sworn, did depose and saw: That he, said Richard Thornton Wilson, resides in the city of New York, in the State of New York, and that he, said Charles H. Bosher, resides in the city of Brooklyn, in the State of New York; that he, said Richard Thornton Wilson, is the president, and he, said Charles H. Bosher, is the secretary of the said company; that they know the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal, and that it was so affixed thereto by order of the board of directors of the said company, and that they, the said Richard Thornton Wilson and Charles H. Bosher, signed their names thereto by the like order as president and secretary of said company respectively, and thereupon acknowledged that they had signed, sealed and delivered such instrument as the voluntary act and deed of said company, and as their own voluntary act and deed, for the considerations, uses and purposes therein expressed.

In witness whereof, I have hereunto set my hand and
213 affixed my official seal, this 18th day of September, one thousand eight hundred and eighty-four.

R. T. WILSON.
C. H. BOSHER.

CHARLES H. TWEED,
J. F. C. GROW, *Witnesses.*

[Commissioner's Seal (La.).]

[NOTARIAL SEAL.] WILLIAM SHILLABER, 271,
Notary Public and Commissioner for Louisiana in New York.

STATE OF NEW YORK, }
City and County of New York, } ss.:

Be it remembered, that on this eighteenth day of September, in the year of our Lord one thousand eight hundred and eighty-four, before me, William Shillaber, a duly appointed notary public in and for the city and county of New York, State of New York, and commissioner for the State of Louisiana, in and for the State of New York, residing in said city and county of New York, personally appeared Thomas Hillhouse, president of the Metropolitan Trust Company of the City of New York, to me personally known, and known to me to be the president of the said company, and to be the same person described in and who executed the foregoing instrument in my presence and in that of the two witnesses whose names are thereto subscribed as such, who being by me duly sworn, did depose and say: That he resides in the city of New York, in the State of New York, and is the president of the said company; that he knows the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal, and that it was so affixed thereto by authority of the trustees of the said company, and that

he signed his name thereto by the like authority as president
214 of said company, and the said Hillhouse thereupon acknowledged that he had signed, sealed and delivered the said instrument as the voluntary act and deed of said company, and as his own voluntary act and deed for the considerations, uses and purposes therein expressed.

In witness whereof, I have hereunto set my hand and affixed my official seal, this 18th day of September, one thousand eight hundred and eighty-four.

THOS. HILLHOUSE.

W. J. BRITTIN,
JOHN TELFORD, *Witnesses.*

WILLIAM SHILLABER, 271, [NOTARIAL SEAL.]
Notary Public and Commissioner
for Louisiana in New York.

[Commissioner's Seal (La.).]

215 *Second Mortgage of* 1884.

Deed of trust for income bonds.

This indenture, made the eighteenth day of September, eighteen hundred and eighty-four, between the Louisville, New Orleans and Texas Railway Company, a corporation created and organized under the laws of the States of Tennessee, Mississippi and Louisiana, party of the first part, and Edward H. Pardee of the city of New York in the State of New York, and Albert Crolius of the city of Brooklyn in the State of New York, as trustees, as hereinafter mentioned, parties of the second part.

Whereas, the party of the first part has been formed by the consolidation, under the laws of the States of Tennessee, Mississippi and Louisiana, of the Tennessee Southern Railroad Company, a corporation created and existing under the laws of the State of Tennessee, the New Orleans, Baton Rouge, Vicksburg and Memphis Railroad Company and the Memphis and Vicksburg Railroad Company, corporations created and existing under the laws of the State of Mississippi, and the New Orleans and Mississippi Valley Railroad Company, a corporation created and existing under the laws of the State
of Louisiana, and is the owner of a line of railway extending
216 from Memphis in the State of Tennessee to New Orleans in the State of Louisiana, and is authorized to construct branches thereto.

And whereas, the party of the first part, in accordance with the authority vested in it on that behalf, is about to execute and issue from time to time (but with the limitation hereinafter prescribed in respect to the aggregate amount thereof, which may at any time be outstanding), its income bonds for one thousand dollars each, of the general form and tenor following, to wit:

No. —. $1,000.

Louisville, New Orleans and Texas Railway Company.

The Louisville, New Orleans and Texas Railway Company, for value received, promises to pay to the bearer hereof the sum of one thousand dollars at its agency in the city of New York fifty years after date, and further promises to pay the bearer hereof in the meantime, annually, on the first day of November in each year, at its agency in the city of New York, on presentation of this bond for endorsement of such payment thereon, such interest on such principal sum, (not exceeding, however, six per centum per annum,) as the net earnings and income of said railway company from its railways in each current year ending on the first day of July next preceding the day above fixed for the payment of the annual interest hereon shall suffice to pay upon all the bonds of this issue outstanding on such first day of July, after first paying from the earnings and income of said company from such railways the expenses of operating said railways, and of keeping up and maintaining the same, with their appurtenances, and of all improvements, additions, betterments, renewals and acquisitions, and of providing and keeping up suitable equipment, and the expenses of conducting said company's business and affairs, and maintaining its corporate organization, and after likewise paying from said earnings and
217 income the interest payable from time to time upon such other bonds of said company or its successors as shall be from time to time outstanding, and such amounts as may be prescribed to be paid to or towards sinking funds for the redemption thereof.

And if in any year the amount as ascertained and determined to be applicable to the payment of such annual interest on the bonds of this issue shall not be sufficient for the full payment of interest at the rate of six per centum per annum thereon, the amount of such deficiency, whether partial or total, shall not be accumulative, nor be made up out of any surplus income of subsequent years, but shall be absolutely waived, relinquished and discharged.

This bond is one of a series of bonds of such railway company for one thousand dollars each, numbered consecutively from 1 (one) upwards, issued and to be issued at a rate not exceeding twenty thousand dollars per mile of railroad constructed ready for operation, all of which bonds are equally secured by a certain indenture of mortgage or deed of trust, bearing date the 18th day of September, one thousand eight hundred and eighty-four, executed by the said railway company to Edward H. Pardee and Albert Crolius, as trustees, conveying upon the terms and conditions therein expressed, all such lands of said railway company situated in the counties of De Soto, Tunica, Quitman, Coahoma, Bolivar, Washington, Issaquena, Sharkey, Warren and Tate, in the State of Mississippi, as are not and shall not be required for the use of said railway company or its successors in the construction or operation of its or their railroads or branches.

This bond shall not become obligatory unless the certificate en-

dorsed hereon is signed by the trustees under the indenture of mortgage or deed of trust securing the same.

In witness whereof, the said Louisville, New Orleans and Texas Railway Company has caused its corporate seal to be hereto
218 affixed, and these presents to be attested by the signatures of its president and secretary, the first day of September, in the year of our Lord one thousand eight hundred and eighty-four.

—— ——, *President.*

—— ——, *Secretary.*

And whereas, the said party of the first part desires to secure the due payment of said bonds by this mortgage:

Now, therefore, this indenture witnesseth, that the said party of the first part, in consideration of the premises, and for the purpose of securing the due payment of the aforesaid bonds in accordance with the terms, provisions and conditions thereof, and in further consideration of one dollar to the said party of the first part in hand paid at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, *hath* granted, bargained, sold, assigned, released, conveyed and confirmed, and by these presents, *doth* grant, bargain, sell, assign, release, convey and confirm unto the said Edward H. Pardee and Albert Crolius, trustees as aforesaid, parties of the second part, and their successors or successor in said trust, all such lands of said party of the first part, situated in the counties of De Soto, Tunica, Quitman, Coahoma, Bolivar, Washington, Issaquena, Sharkey, Warren and Tate, in the State of Mississippi, as are not and shall not be required for the use of said party of the first part or its successors in the construction or operation of its or their railroads or branches.

To have and to hold, unto the said parties of the second part and their successors or successor in the said trust, but in trust for, and for the use, benefit, and security of all and singular the persons and corporations who or which shall from time to time be or become lawful owners or holders of any of said income bonds, and
219 for securing the due payment of such bonds respectively, with *pro rata* equality, without preference or priority of any of such bondholders over any of the others.

Provided always, nevertheless, and these presents are upon the express condition that if the said party of the first part, its successors or assigns, do and shall well and truly pay the said income bonds when and as the same shall become due and payable, in accordance with the terms, provisions and conditions thereof, then these presents and the estates, rights and interests thereby granted or conveyed shall cease and determine and become null and void.

And provided further, and it is an express provision and condition of this indenture, that the party of the first part or its successors, notwithstanding the execution of these presents, shall be permitted at any time, and from time to time, by means of its land department or otherwise, to sell and dispose of the lands mortgaged hereby, or

any part thereof, upon such terms as may be satisfactory to it, and to give title thereto free and discharged from this mortgage.

And it is further agreed that it shall be the duty of the party of the first part, or its successors, to apply the gross receipts from such sales or disposition thereof as follows:

First. To the payment of taxes and assessments upon such lands, or which may be imposed in respect thereof.

Second. To the payment of the expenses incurred, or which may be incurred, in the care, custody and management of such lands.

Third. The net proceeds of such sales or disposition thereof, after payment of such amounts, shall be applied to the discharge of the said income bonds issued and secured hereunder on any equitable terms, or shall be held in trust by or under the directions of the trustees or trustee of this mortgage as security for the outstanding income bonds secured hereby.

And provided further, and it is likewise an express condition of this indenture, that until the party of the first part, its successors
220 and assigns, shall have made some default in the payment of the said bonds hereby secured, or of some of such bonds, the said party of the first part, its successors and assigns, shall be entitled to continue in the possession, use and enjoyment of the said mortgaged premises, and in receipt of the income, rents and profits thereof.

And it is hereby further provided, declared, granted and agreed, that the bonds which may be issued from time to time under this mortgage shall not exceed twenty thousand dollars for each mile of railroad at the time constructed ready for operation, and that the said trustees, or their successors or successor in the trust, shall accept a certificate signed by the president of the party of the first part or its successors, as conclusive evidence of the number of miles of road constructed ready for operation, and the said trustees or their successors shall not be required to look beyond the certificate of the president as herein provided, and shall not be responsible in any event for any act done in pursuance of such certificate.

And it is hereby further provided, declared, granted and agreed, that in case default shall be made in the payment of the principal of said bonds hereby secured, or of any of such bonds, when such principal shall be due and payable, then, and in that event, the said parties of the second part, or their successors in the said trust, shall be entitled to, and may, and upon the requisition in writing to that effect of holders of a majority of such income bonds hereby secured, and upon being duly and properly indemnified by such bondholders against expense or loss in the premises, shall, either personally, or by agent or attorney, enter into and upon such part of the said mortgaged premises as shall then remain subject to the lien and operation of this indenture of mortgage, and shall have, hold, and possess the same, with the rights and privileges thereunto appertaining.

And thereupon it shall be lawful for the said parties of the second part hereto, or their successors in the trust, either personally or by

attorney or agent, duly constituted therefor by the said trustees, to sell and dispose of all such part of the said mortgaged prem-
221 ises as shall then remain subject to the lien and operation of this indenture of mortgage, at public auction to the highest bidder, either in the city of New York, in the State of New York, or in the city of Vicksburg, in the State of Mississippi, as the said trustees may in their discretion designate, and at such time as they may appoint therefor; provided, however, and it is hereby declared and agreed, that preparatory to such auction sale as aforesaid, the said trustees shall give public notice of the time and place when and where the same is to be made, and of the property to be sold, by advertisement in a newspaper published in the said city of Vicksburg, and in two newspapers of good circulation published in the city of New York, and that such advertisement shall be published in each of such newspapers at least twice in each week, for the twelve successive weeks next previous to the day fixed for such sale, with the right, however, to the trustees, after such notice shall have been so published, to adjourn the sale so advertised from time to time, in the discretion of the trustees, giving reasonable notice or notices of such adjournment or adjournments, and after so adjourning to make the sale at the time to which it may be finally adjourned. *And* it shall be lawful for the said trustees, and they are expressly authorized and empowered, upon making any such auction sale of such part of such mortgaged premises as above authorized, to make and deliver to the purchaser or purchasers thereof at such sale, upon his or their paying the purchase-money therefor, a good and sufficient deed or deeds of conveyance in the law of the same, which auction sale and the deed or deeds thereupon made as above authorized, it is hereby granted, declared and agreed shall be good and valid in the law, and shall operate to vest in the grantee or grantees in such conveyances such part of such mortgaged premises so sold in fee-simple and absolutely, and such deed or deeds shall operate to foreclose all equity of redemption of the said party of the first part and its successors or assigns, and shall be a perpetual bar, both at law and equity, against the said party of the first part, its successors and assigns, and against any and all persons or corporations, claiming or to claim such part of such mortgaged
222 & 223 premises so sold and conveyed, or any thereof, by, from, through or under the said party of the first part, or its successors or assigns.

And it is further provided, declared and agreed, that from the proceeds of such sale made as aforesaid, the said trustees shall be entitled, in the first place, to deduct and retain or pay for all proper charges or expenses of or incident to such advertisement, foreclosure and sale, and conveyance, including attorney's and counsel's fees, and any and all unreimbursed advances, expenses, charges and liabilities which may have been properly made or incurred by such trustees in taking possession of such part of said mortgaged premises, or managing the same while in their possession, or in arranging for and completing the sale aforesaid, and also all unreimbursed payments which may have been made by the said trustees for taxes or

assessments, and for charges or liens prior to the lien of this indenture, if any such there shall be, as well as the just and reasonable compensation for the services of such trustees in the premises, and the said trustees shall apply the residue of the proceeds of such sale, after the deductions and payments above authorized to be first made thereout, to the payment of the principal of the said income bonds, by this mortgage secured, or intended so to be, or of such of said bonds as may at that time remain outstanding and unpaid, and likewise to the payment of the interest which, according to the provisions, stipulations and conditions of said bonds, shall have accrued up to that time upon the principal of the said bonds hereby secured, and which shall remain unpaid and properly payable, with any interest accrued on such interest after default, without discrimination or preference as between principal and interest, but ratably according to the aggregate amount of such unpaid principal and accrued and unpaid interest, which payments shall be made to the bondholders, without any discrimination or preference between them on account of the time of the actual issuing of the bonds, or the time of maturing of the interest thereon.

And it is further declared and agreed, that the receipt of the
224 trustees who shall make the sale hereinbefore authorized, shall be a sufficient discharge to the purchaser or purchasers at such sale, for his or their purchase-money, and that such purchaser or purchasers, his or their heirs or assigns or personal representatives, shall not, after paying such purchase-money and receiving such trustees' receipt therefor, be obliged to see to the application of such purchase-money upon or for the trusts or purposes of these presents, or be in anywise answerable for any loss, misapplication, or non-application of such purchase-money by the trustees.

And it is hereby further provided, declared and agreed, that the trustees under this indenture, or their successors, upon payment to them of their reasonable claims or charges for services rendered in the trust up to that time, may at any time be removed from the trust by instrument in writing, or concurrent instruments in writing, under the hands and seals of the holders of a majority in interest of the then outstanding bonds secured hereby, or their attorneys-in-fact thereunto authorized.

And it is hereby further provided, declared and agreed, that any vacancy in the office of trustee hereunder may be permanently filled by the appointment of a new trustee or new trustees, by an instrument or concurrent instruments in writing, executed under the hands and seals of the holders of a majority in interest of the then outstanding bonds secured hereby, or their attorneys-in-fact thereunto authorized, but that the board of directors of the party of the first part or its successors may make a temporary appointment to fill such vacancy until a permanent appointment shall be made in the manner above prescribed.

And it is hereby covenanted and agreed, that any new trustee or new trustees, appointed as aforesaid, whether by a permanent or temporary appointment, shall immediately upon his, its or their appointment, and without any further act, deed or conveyance, become and

be vested with all of the estate, trust, rights, powers and duties of the trustee or trustees in whose place he, it or they shall have been appointed; but, nevertheless, the respective parties hereto, and their respective successors and assigns, shall and will, upon request,
225 make, execute and deliver all such releases, conveyances and assurances as shall be appropriate to vest in and confirm and assure to such new trustee or new trustees such estate, trust, rights, powers and duties, according to the intent above expressed.

And it is hereby further provided, declared and agreed, that the trustees hereunder shall be entitled to receive reasonable compensation for all services performed, and the repayment of all necessary or proper disbursements made, by them in and about the execution of the trusts hereby created, which compensation, if there shall have been an entry by the trustees themselves, or through a receiver or receivers, upon the mortgaged premises, or a sale made of such premises in enforcement of this mortgage, shall be payable out of such mortgaged premises and the proceeds thereof.

The trustees shall not be required to take any steps in the execution of this trust which may subject them to liability or expense unless the holders of the bonds secured hereby, or some of them, shall, from time to time, as required by the trustees, give sufficient security to indemnify them against such liability or expense. The said trustees shall be at liberty to appoint counsel learned in the law in all suitable cases, and the trustees shall not be liable for any default or neglect of any cotrustee, or of any agent by them appointed, when such agent shall have been selected with reasonable discretion, and shall only be required to exercise good faith and ordinary diligence in the performance of their duties under this indenture. It is further agreed that the trustees may at any time resign and discharge themselves from their trust upon giving to the party of the first part, or its successors, ninety days' notice of their purpose so to do, unless a shorter notice may be accepted by the party of the first part or its successors therefor.

And the said party of the first part, for the considerations aforesaid, doth hereby covenant and agree to and with the said parties of the second part and their successors, as trustees, and likewise to and with the holders from time to time of the several bonds
226 issued under and secured by this indenture, that the said party of the first part, its successors and assigns, shall and will from time to time, and at all times hereafter upon reasonable request, make, do, execute, acknowledge and deliver all such further acts, deeds, conveyances and assurances in the law, for the better and more effectually assuring, conveying and confirming unto the said trustees and their successors in the trust hereby created, upon the trusts and for the uses and purposes herein expressed or intended, all and singular, the premises hereby mortgaged or conveyed in trust, or agreed or purporting or intended so to be, as by such trustees or bondholders, under the advice of counsel, shall be reasonably advised, devised or required.

And the said parties of the second part do hereby accept the trusts

hereby created, upon the terms and conditions hereinbefore expressed.

In witness whereof, the said party of the first part hath hereto affixed its corporate seal, and caused the same to be attested by its president and secretary; and the said parties of the second part respectively have hereunto set their hands and seals the day and year first above written.

[Corporate Seal.]

LOUISVILLE, NEW ORLEANS AND TEXAS RAILWAY COMPANY,
By R. T. WILSON, *President.*

Attest: C. H. BOSHER, *Sec'ty.*

E. H. PARDEE. [SEAL.]
ALBERT CROLIUS. [SEAL.]

227 STATE OF NEW YORK, } ss:
City and County of New York, }

Be it remembered, that on this eighteenth day of September, in the year of our Lord one thousand eight hundred and eighty-four, before me, William Shillaber, a duly appointed notary public in and for the city and county of New York, State of New York, and commissioner for the State of Mississippi, in and for the State of New York, residing in said city and county of New York, personally appeared Richard T. Wilson, president of the Louisville, New Orleans and Texas Railway Company, and Charles H. Bosher, secretary of the same company, to me respectively personally known and known to me to be such officers of the said company, who being by me severally duly sworn, did depose and say: That he, said Richard T. Wilson, resides in the city of New York, in the State of New York, and that he, said Charles H. Bosher, resides in the city of Brooklyn, in the State of New York; that he, said Richard T. Wilson, is the president, and he, said Charles H. Bosher, is the secretary of the said company; that they know the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal, and that it was so affixed thereto by order of the board of directors of the said company, and that they, the said Richard T. Wilson and Charles H. Bosher, signed their names thereto by the like order as president and secretary of said company respectively.

In witness whereof, I have hereunto set my hand and affixed my official seal, this 18th day of September, one thousand eight hundred and eighty-four.

[Notarial Seal.]

WILLIAM SHILLABER, 271,
Notary Public and Commissioner for Mississippi in New York.

[Commissioner's Seal.]

228 STATE OF NEW YORK, }
City and County of New York, } ss:

Be it remembered, that on this eighteenth day of September, in the year of our Lord one thousand eight hundred and eighty-four, before me, William Shillaber, a duly appointed notary public in and for the city and county of New York, State of New York, and commissioner for the State of Mississippi, in and for the State of New York, residing in said city and county of New York, personally appeared the within-named Edward H. Pardee and Albert Crolius, to me respectively personally known and known to me to be the persons described in, and who executed the foregoing instrument, who respectively acknowledged that they signed and delivered the said instrument on the day and year therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal, this 18th day of September, one thousand eight hundred and eighty-four.

WILLIAM SHILLABER, 271, [NOTARIAL SEAL.]
Notary Public and Commissioner for Mississippi in New York.

[Commissioner's Seal.]

229 *Mortgage of* 1885.

Deed of trust for income bonds.

This indenture, made the twenty-fifth day of August, one thousand eight hundred and eighty-five, between the Louisville, New Orleans and Texas Railway Company, a corporation created and organized under the laws of the States of Tennessee, Mississippi and Louisiana, party of the first part, and Edward H. Pardee, of the city of New York, in the State of New York, and Albert Crolius, of the city of Brooklyn, in the State of New York, as trustees, as hereinafter mentioned, parties of the second part, witnesseth:

Whereas, the party of the first part did heretofore, to wit, on the 18th day of September, 1884, execute a certain deed of trust, conveying to the parties of the second part certain property therein described, in trust to secure certain bonds of the party of the first part therein stated, which deed was duly thereafter recorded in the counties of De Soto, Tunica, Quitman, Coahoma, Bolivar, Washington, Issaquena, Sharkey, Warren and Tate, in the State of Mississippi, being the only instrument executed between said parties; and

Whereas, the holders and owners of said income bonds have requested the parties hereto to alter and supplement the said deed of trust and its provisions, in the manner as affected by these presents, and each and every of said income bonds have been produced and submitted, to be, cotemporaneously with the execution hereof,
230 indorsed with a certificate signed by the parties of the second part, as trustees as aforesaid, in the words and figures following, viz:

We hereby further certify that this bond is further secured by a mortgage, executed to us as trustees, on the 25th day of August,

1885, to which reference is hereby made for the contents and effect thereof; and

Whereas, the said Louisville, New Orleans and Texas Railway Company was duly authorized to execute this instrument, by resolution adopted by its stockholders at a meeting thereof held on the 25th day of August, 1885, at Memphis, in accordance with the law;

Now, therefore, this indenture witnesseth: that the said party of the first part, in consideration of the premises, and for the purpose of securing the due payment of the aforesaid bonds, in accordance with the terms now agreed upon as hereinbefore stated, and in further consideration of one dollar to the said party of the first part in hand paid at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, assigned, released, conveyed and confirmed, and by these presents doth grant, bargain, sell, assign, release, convey and confirm unto the said Edward H. Pardee and Albert Crolius, trustees as aforesaid, parties of the second part, and their successors or successor in said trust, all such lands of said party of the first part situated in the counties of De Soto, Tunica, Quitman, Coahoma, Bolivar, Washington, Issaquena, Sharkey, Warren and Tate, in the State of Mississippi, as are not and shall not be required for the use of said party of the first part, or its successors, in the construction or operation of its or their railroads or branches, together with the rents, issues and profits thereof; and also (subject to the lien of the first mortgage from the party of the first part to the Metropolitan Trust Company of the City of New York, dated September 18, 1884) all
231 the rents, issues, tolls, incomes, earnings and profits of its railways or railway lines, which the said party of the first part now possesses, or is entitled to, or may become possessed of or entitled to.

To have and to hold, unto the said parties of the second part, and their successors or successor, in the said trust, but in trust for, and for the use, benefit and security of, all and singular the persons and corporations who or which shall, from time to time, be or become lawful owners or holders of any of said income bonds, and for securing the due payment of such bonds respectively, with *pro rata* equality, without preference or priority of any of such bondholders over any of the others.

And the party of the first part doth declare and covenant that the lands herein conveyed are free from all incumbrance whatsoever, except the above-mentioned mortgage or deed of trust between the parties hereto, dated September 18, 1884, and that it has not caused or suffered to be placed thereon any other lien or incumbrance prior or paramount to the lien of this mortgage.

Provided always, nevertheless, and these presents are upon the express condition, that if the said party of the first part, its successors or assigns, do and shall well and truly pay the principal and interest of said income bonds when and as the same shall become due and payable, in accordance with the terms, provisions and conditions thereof, then these presents and the estates, rights, and in-

terests thereby granted or conveyed shall cease and determine, and become null and void.

And provided further, and it is an express provision and condition of this indenture, that the party of the first part, or its successors, notwithstanding the execution of these presents, shall be permitted at any time, and from time to time, by means of its land department, or otherwise, to lease, sell and dispose of the lands mortgaged hereby, or any part thereof, upon such terms as
232 may be satisfactory to it, and in order that it may be enabled to give title thereto free and discharged from this mortgage, it is an express provision and condition of this indenture, that the trustees hereunder shall, at all times, upon payment to them of the purchase-money of such sales, or the transfer to them of the evidence of indebtedness given therefor by the purchaser, together with such security, if any, as may be taken therefor, execute full releases of the lien hereof, either by indorsement on the deeds to such purchasers, or by separate deeds or releases, as may be required of them.

And it is further agreed that it shall be the duty of the parties of the second part, or their successors, to apply the gross receipts from such sales or disposition thereof as follows:

First. To the payment of taxes and assessments which may hereafter accrue upon such lands, or which may be imposed in respect thereof.

Second. To the payment of the expenses which may hereafter be incurred in the care, custody, management, improvement, and in the cultivating, leasing and selling of such lands. The application of the money to these purposes shall be made from time to time, pursuant to and in accordance with the direction of the railroad company; and the said trustees shall at all times apply any moneys or evidences of indebtedness held by them as purchase-money of such lands to the purposes hereinabove referred to, on the requisition of said company through its proper officers.

Third. The net proceeds of such sales or disposition thereof, after payment of such amounts, shall be applied to the discharge of the said income bonds issued and secured hereunder in the following manner, viz: Whenever, and as often as, the trustees shall
233 accumulate in their hands as much as $25,000, which the railroad company shall not require for any of the purposes mentioned in either of the two paragraphs immediately preceding, and shall, through its officers, declare to be applicable to said income bonds, the said trustees shall advertise for sealed offers thereof in some daily paper, published in the city of New York, and in one published in the city of Vicksburg, Mississippi, and in such others as may be deemed expedient, for thirty days, specifying the amount of money subject to investment in said bonds, inviting offers, and stating the time and place of the opening of the proposals. At the appointed time such proposals only shall be received or opened as shall be accompanied by, and have filed with them, before the opening of any of the bids, the bonds offered in the sealed bid, and the bid, when opened, shall be

deemed and treated as offering such bonds only as were so filed therewith before the opening of the bids. All such sealed offers as are received and accepted as such shall be registered before the opening of any bids, and none of them, or the bonds therewith, shall be thereafter withdrawn from the competition. The opening of the bids shall be done by the trustees in the presence of all bidders, or their representatives, who may be present, who shall have the right to inspect the same. The bids shall be registered as they are opened, and a record of the bidder, the serial number of bonds offered, and the price for which they are offered, shall be made and kept, subject to inspection of income bondholders. In case two or more of the lowest offers are at same rate, their bonds shall be taken in equal numbers, and if in any case there shall be an insufficient amount of money remaining to take all of the bonds offered in a successful bid, then such of them only shall be taken as the fund applicable thereto shall be sufficient to purchase, and the remainder returned to the bidder. Their bonds shall be immediately returned to unsuccessful bidders, and those taken shall be registered on a book kept for the purpose, and a record made, stating the
234 name of the seller and the serial number of the bond, and all such bonds shall be immediately cancelled and burned in the presence of the bondholders, or their representatives, who may be present.

And provided further, and it is likewise an express condition of this indenture, that until the party of the first part, its successors and assigns, shall have made some default in the payment of the said bonds hereby secured, or of some of such bonds, the said party of the first part, its successors and assigns, shall be entitled to continue in the possession, use and enjoyment of the said mortgaged premises, and in receipt of the income, rents and profits thereof.

But it is an express condition and agreement that the rents, issues and profits of the said lands shall be applied from time to time as they shall be received by the company to such payments as are authorized hereinbefore to be made out of the proceeds of the sales of said lands.

And it is hereby further provided, declared, granted and agreed, that the bonds which have been, or are to be, issued under the mortgage hereinabove referred to as having been executed on September 18, 1884, are serial numbers from one to ten thousand, inclusive, and that no more shall be issued thereunder, and none other shall participate in the benefits or security hereof.

And it is hereby further provided, declared, granted and agreed, that in case default shall be made in the payment of the principal of said bonds hereby secured, or of any of such bonds, when such principal shall be due and payable, then, and in that event, the said parties of the second part, or their successors in the said trust, shall be entitled to, and may, and upon the requisition in writing to that effect of holders of a majority of such income bonds
235 hereby secured, and upon being duly and properly indemnified by such bondholders against expense or loss in the premises, shall, either personally, or by agent or attorney, enter

into and upon such part of the said mortgaged premises as shall then remain subject to the lien and operation of this indenture of mortgage, and shall have, hold and possess the same, with the rights and privileges thereunto appertaining.

And thereupon it shall be lawful for the said parties of the second part hereto, or their successors in the trust, either personally or by attorney or agent, duly constituted therefor by the said trustees, to sell and dispose of all such part of the said mortgaged premises as shall then remain subject to the lien and operation of this indenture of mortgage, at public auction to the highest bidder, either in the city of New York in the State of New York, or in the city of Vicksburg, in the State of Mississippi, as the said trustees may in their discretion designate, and at such time as they may appoint therefor; provided, however, and it is hereby declared and agreed, that, preparatory to such auction sale as aforesaid, the said trustees shall give public notice of the time and place, when and where, the same is to be made, and of the property to be sold, by advertisement in a newspaper published in the said city of Vicksburg, and in two newspapers of good circulation published in the city of New York, and that such advertisements shall be published in each of such newspapers at least twice in each week for the twelve successive weeks next previous to the day fixed for such sale, with the right, however, to the trustees, after such notice shall have been so published, to adjourn the sale so advertised, from time to time, in the discretion of the trustees, giving reasonable notice or notices of such adjournment or adjournments, and, after so adjourning, to make the sale at the time to which it may be finally adjourned. And it shall be lawful for the said trustees, and they are expressly authorized and empowered upon making any such auction sale of such part of such mortgaged premises as above authorized, to
236 make and deliver to the purchaser or purchasers thereof at such sale, upon his or their paying the purchase-money therefor, a good and sufficient deed or deeds of conveyance in the law of the same, which auction sale and the deed or deeds thereupon made as above authorized, it is hereby granted, declared and agreed, shall be good and valid in the law, and shall operate to vest in the grantee or grantees in such conveyances such part of such mortgaged premises so sold in fee-simple and absolutely; and such deed or deeds shall operate to foreclose all equity of redemption of the said party of the first part and its successors or assigns, and shall be a perpetual bar both at law and equity, against the said party of the first part, its successors and assigns, and against any and all persons or corporations claiming, or to claim, such part of such mortgaged premises so sold and conveyed, or any thereof, by, from, through, or under the said party of the first part, or its successors or assigns.

And it is further provided, declared and agreed, that, from the proceeds of such sale made as aforesaid, the said trustees shall be entitled, in the first place, to deduct and retain or pay for all proper charges or expenses of, or incident to, such advertisement, foreclosure, and sale, and conveyance, including attorney's and counsel's

fees, and any and all unreimbursed advances, expenses, charges, and liabilities which may have been properly made or incurred by such trustees in taking possession of such part of said mortgaged premises, or managing the same while in their possession, or in arranging for and completing the sale aforesaid; and also all unreimbursed payments which may have been made by the said trustees for taxes or assessments, and for charges or liens prior to the lien of this indenture, if any such there shall be, as well as the just and reasonable compensation for the services of such trustees in the premises, and the said trustees shall apply the residue of the proceeds of such sale, after the deductions and payments above authorized to
237 be first made thereout, to the payment of the principal of the said income bonds by this mortgage secured, or intended so to be, or of such of said bonds as may at that time remain outstanding and unpaid; and likewise to the payment of the interest which, according to the provisions, stipulations and conditions of said bonds, shall have accrued up to that time upon the principal of the said bonds hereby secured, and which shall remain unpaid and properly payable, with any interest accrued on such interest after default, without discrimination or preference as between principal and interest, but ratably according to the aggregate amount of such unpaid principal and accrued and unpaid interest, which payments shall be made to the bondholders, without any discrimination or preference between them on account of the time of the actual issuing of the bonds, or the time of maturing of the interest thereon.

And it is further declared and agreed, that the receipt of the trustees who shall make the sale hereinbefore authorized, shall be a sufficient discharge to the purchaser or purchasers at such sale for his or their purchase-money, and that such purchaser or purchasers, his or their heirs or assigns, or personal representatives, shall not, after paying such purchase-money and receiving such trustees' receipt therefor, be obliged to see to the application of such purchase-money upon or for the trusts or purposes of these presents, or be in anywise answerable for any loss, misapplication, or non-application of such purchase-money by the trustees.

And it is hereby further provided, declared and agreed, that the trustees under this indenture, or their successors, upon payment to them of their reasonable claims of charges for services rendered in the trust up to that time, may at any time be removed from the trust by instrument in writing, or concurrent instruments in writing, under the hands and seals of the holders of a majority in interest of the then outstanding bonds secured hereby, or their attorneys-in-fact thereunto authorized.

238 And it is hereby further provided, declared and agreed, that any vacancy in the office of trustee hereunder may be permanently filled by the appointment of a new trustee or new trustees, by an instrument or concurrent instruments in writing, executed under the hands and seals of the holders of a majority in interest of the then outstanding bonds secured hereby, or their attorneys-in-fact thereunto authorized, but that the board of directors of the party of the first part or its successors may make a tem-

porary appointment to fill such vacancy until a permanent appointment shall be made in the manner above prescribed.

And it is hereby covenanted and agreed, that any new trustee or new trustees, appointed as aforesaid, whether by a permanent or temporary appointment, shall immediately upon his, its or their appointment, and without any further act, deed or conveyance, become and be vested with all of the estate, trust, rights, powers and duties of the trustee or trustees in whose place he, it or they shall have been appointed; but, nevertheless, the respective parties hereto, and their respective successors and assigns shall and will, upon request, make, execute and deliver all such releases, conveyances and assurances as shall be appropriate to vest in and confirm and assure to such new trustee or new trustees such estate, trust, rights, powers and duties, according to the intent above expressed.

And it is hereby further provided, declared and agreed, that the trustees hereunder shall at once execute a good and sufficient bond, with sufficient surety, in the penalty of $50,000, to secure the faithful performance of the trusts herein assumed, payable to the party of the first part for the benefit of itself and the holders of the bonds herein secured; and shall be entitled to receive reasonable compensation for all services performed, and the repayment of all necessary or proper disbursements made, by them in and about
239 the execution of the trusts hereby created, which compensation, if there shall have been an entry by the trustees themselves, or through a receiver or receivers, upon the mortgaged premises, or a sale made of such premises in enforcement of this mortgage, shall be payable out of such mortgaged premises and the proceeds thereof.

The trustees shall not be required to take any steps in the execution of this trust which may subject them to liability or expense unless the holders of the bonds secured hereby, or some of them, shall, from time to time, as required by the trustees, give sufficient security to indemnify them against such liability or expense. The said trustees shall be at liberty to appoint counsel learned in the law in all suitable cases, and the trustees shall not be liable for any default or neglect of any cotrustee, or of any agent by them appointed, when such agent shall have been selected with reasonable discretion, and shall only be required to exercise good faith and ordinary diligence in the performance of their duties under this indenture. It is further agreed that the trustees may at any time resign and discharge themselves from their trust upon giving to the party of the first part, or its successors, ninety days' notice of their purpose so to do, unless a shorter notice may be accepted by the party of the first part or its successors therefor.

And the said party of the first part, for the considerations aforesaid, doth hereby covenant and agree to and with the said parties of the second part and their successors, as trustees, and likewise to and with the holders from time to time of the several bonds issued under and secured by this indenture, that the said party of the first part, its successors and assigns, shall and will from time to time, and at all times hereafter, upon reasonable request, make, do, exe-

cute, acknowledge and deliver all such further acts, deeds, conveyances and assurances in the law, for the better and more effectually assuring, conveying and confirming unto the said trustees and their successors in the trust hereby created, upon the trusts and
240 for the uses and purposes herein expressed or intended, all and singular the premises hereby mortgaged or conveyed in trust, or agreed or purporting or intended so to be, as by such trustees or bondholders, under the advice of counsel, shall be reasonably advised, devised or required.

And the said parties of the second part do hereby accept the trusts hereby created, upon the terms and conditions hereinbefore expressed.

In witness whereof the said party of the first part hath hereto affixed its corporate seal, and caused the same to be attested by its president and secretary; and the said parties of the second part respectively have hereunto set their hands and seals the day and year first above written.

[CORPORATE SEAL.] LOUISVILLE, NEW ORLEANS AND TEXAS RAILWAY COMPANY,
By R. T. WILSON, *Pres't.*
E. H. PARDEE. [L. S.]
ALBERT CROLIUS. [L. S.]

Attest: C. H. BOSHER, *Sec't'y.*

241 STATE OF NEW YORK, }
City and County of New York, } *ss:*

Be it remembered, that on this twenty-fifth day of August, in the year of our Lord one thousand eight hundred and eighty-five, before me, William Shillaber, a duly appointed notary public, in and for the city and county of New York, State of New York, and commissioner for the State of Mississippi in and for the State of New York, residing in said city and county of New York, personally appeared the within-named Richard T. Wilson, president of the Louisville, New Orleans and Texas Railway Company, and Charles H. Bosher, secretary of the same company, to me respectively personally known, and known to me to be such officers of the said company, who acknowledged that in pursuance of authority in them vested by the board of directors of said company, and as such president and secretary they signed and delivered the foregoing instrument, and affixed thereto the corporate seal of said company, on the day and year therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal this twenty-fifth day of August, one thousand eight hundred and eighty-five.

[NOTARIAL SEAL.] WILLIAM SHILLABER,
Notary Public, City and County of New York,
Commissioner for the State of Mississippi in New York.

[Commissioner's Seal.]

242 STATE OF NEW YORK, }
City and County of New York, } *ss:*

Be it remembered, that on this twenty-fifth day of August, in the year of our Lord one thousand eight hundred and eighty-five, before me, William Shillaber, a duly appointed notary public in and for the city and county of New York, and State of New York, and commissioner for the State of Mississippi in and for the State of New York, residing in said city and county of New York, personally appeared the within-named Edward H. Pardee and Albert Crolius, to me respectively personally known, and known to me to be two of the persons who executed the foregoing instrument, and acknowledged to me that they signed and delivered the foregoing instrument on the day and year therein mentioned, for the purposes therein expressed.

In witness whereof, I have hereunto set my hand and affixed my official seal this twenty-fifth day of August, one thousand eight hundred and eighty-five.

[NOTARIAL SEAL.] WILLIAM SHILLABER,
Notary Public, City and County of New York,
Commissioner for the State of Mississippi in New York.

[Commissioner's Seal.]

243 *First Mortgage, August* 25, 1886.

An indenture made and entered into this twenty-fifth day of August, 1886, by and between the Louisville, New Orleans and Texas Railway Company, a corporation created, organized, and existing under the laws of the States of Tennessee, Mississippi, and Louisiana, party of the first part, and the Union Trust Company of New York, a corporation created, organized, and existing under the laws of the State of New York, party of the second part.

Whereas, heretofore and under date of the 18th day of September, 1884, the party of the first part executed a certain indenture of mortgage or deed of trust to secure the payment of an issue of first-mortgage five per cent. bonds of the said party of the first part or its successors, bearing date September 1, 1884, and payable fifty years after the date thereof, and to be issued at and after the respective rates therein prescribed, which said indenture of mortgage or deed of trust has been duly recorded in the proper counties and still remains in full force and effect.

And whereas, the said party of the first part has executed or is about to execute an indenture of mortgage or deed of trust to secure an issue of first-mortgage four per cent. gold bonds, bearing date the first day of September, 1886, and payable on the first day of September, 1934, of which said first-mortgage four per cent. gold bonds, bonds to the amount at their par or face value of ten million dollars, are to be issued forthwith, and bonds are to be hereafter issued at and after the rate of twenty thousand dollars per mile of road

hereafter constructed or acquired as prescribed in the mortgage securing such bonds.

And whereas, the said party of the first part has executed
244 or is about to execute a further indenture of mortgage or deed of trust securing an issue of second-mortgage bonds bearing date the first day of September, 1886, and payable on the first day of September, 1934, of which bonds to the amount of their par or face value of seven million eight hundred and ninety-nine thousand dollars are to be forthwith issued, and bonds are to be hereafter issued as therein prescribed.

And whereas, it is contemplated that such first-mortgage four per cent. gold bonds and such second-mortgage bonds shall be issued against deposit with the party of the second part under this trust of first-mortgage five per cent. bonds of said party of the first part or its successors, issued under and secured by the said indenture, bearing date September 18, 1884, hereinbefore mentioned.

Now, therefore, this indenture witnesseth, that in consideration of the premises and the mutual undertakings, covenants and agreements hereinafter contained, and of one dollar by each of the parties to these presents to the other in hand paid, the receipt whereof is hereby acknowledged, the parties have undertaken, covenanted and agreed and do hereby undertake, covenant and agree to and with each other as follows:

First. The said party of the second part will receive all such first-mortgage five per cent. bonds of the party of the first part or its successors issued under and secured by the said indenture of mortgage or deed of trust, dated September 18, 1884, as may be tendered to it for deposit under this trust.

Second. Upon the deposit with said party of the second part or its successors in this trust of any of such first-mortgage five per cent. bonds there shall be forthwith conspicuously stamped across the face of such bonds the words and figures following: "This bond is "deposited with the Union Trust Company of New York or its suc- "cessors, under and in pursuance of the indenture between the
"Louisville, New Orleans and Texas Railway Company and
245 "said trust company dated ——, 1886, and subject to all the "terms, provisions and conditions of the said indenture."

Third. All of the said first-mortgage five per cent. bonds of the said party of the first part, or its successors, which shall be deposited with said party of the second part, or its successors in this trust, under and in pursuance of this indenture, shall be held by said party of the second part, or its successors in this trust, with all the rights and privileges in anywise belonging or appertaining to such bonds or to the holders thereof, whether in respect to the security afforded by the indenture of mortgage or deed of trust securing the same, or otherwise howsoever, as a trust fund for the benefit and security, in the first instance, of all persons and corporations who or which may be or become the holders of the first-mortgage four per cent. gold bonds of the party of the first part, or its successors, hereinbefore referred to, without any preference, priority or advantage in favor of any of the holders of such first-mortgage four per cent.

gold bonds, over any of the others thereof, and as a security for the payment of the principal and interest of all such first-mortgage four per cent. gold bonds, which may at any time be outstanding, and in the second instance, and when the whole of such first-mortgage four per cent. gold bonds shall have been fully paid and discharged, principal and interest, but not otherwise, for the benefit and security of all persons and corporations who or which may be or become the holders of any of the said second-mortgage bonds of said party of the first part, or its successors, without any preference, priority or advantage in favor of any of the holders of such second-mortgage bonds over any of the others thereof, and as a security for the payment of the principal and interest of all such second-mortgage bonds, which may at any time be outstanding.

Fourth. Notwithstanding such deposit of such first-mortgage five per cent. bonds of the party of the first part, or its successors,
246 the same shall remain in all respects in full force and effect as outstanding obligations of said party of the first part or its successors, and the liens appertaining thereto under the mortgage by which the same are secured shall continue and be maintained until payment shall have been made by the party of the first part or its successors, of the entire principal and interest of such first-mortgage four per cent. gold bonds, and such second-mortgage bonds, as may be issued under the indentures of mortgage or deeds of trust in that regard hereinbefore mentioned respectively; and if by reason of any proceedings which shall be taken by the holders of any of the first-mortgage five per cent. bonds of the party of the first part or its successors, which shall not have been deposited with the party of the second part, or its successors hereunder, or by any other person or party, the mortgage securing such first-mortgage five per cent. bonds shall be foreclosed, or if any sale shall be made of the property covered by such mortgage, or any part thereof, which shall in anywise cut off the lien of such mortgage, the said party of the second part, or its successors in this trust, shall be entitled to and shall exercise all the rights, privileges and powers which any other holder of such deposited five per cent. bonds would be entitled to exercise, subject only in respect to the manner of exercising and enforcing the same in any such case to the directions of the holders of a majority of such outstanding first-mortgage four per cent. gold bonds.

Fifth. When the principal and interest of all such first-mortgage four per cent. gold bonds and such second-mortgage bonds as shall have been issued under the indentures of mortgage or deeds of trust, securing the same respectively as hereinbefore provided, and such costs, charges and expenses as shall have been in anywise incurred in or about the execution of the trust hereby created, shall have been fully paid and satisfied, then the said deposited first-mortgage five per cent. bonds shall be deemed to have been also paid and satisfied, and such deposited bonds shall thereupon be de-
247 livered up to the said party of the first part, its successors or assigns, for cancellation.

Sixth. Upon the payment by the said party of the first part, or

its successors or assigns, of any amounts for or on account of the interest on such first-mortgage four per cent. gold bonds or on such second mortgage bonds, the amount which shall have been so paid for or on account of such interest, in gold coin of the United States in respect of such first-mortgage bonds, or in currency of the United States in respect of such second-mortgage bonds, shall be deemed to have been also paid in currency on account of the interest obligations of said party of the first part upon such deposited first-mortgage five per cent. bonds, the amount of such payments being deemed to be applied on account of the interest instalments upon such deposited first-mortgage five per cent. bonds, in the order of their maturity, but *pro rata* as to each instalment. Any payments in gold on account of the principal of said first-mortgage four per cent. gold bonds shall be deemed to have been also made in currency *pro rata* on account of the principal of such deposited first-mortgage five per cent. bonds; and when the said first-mortgage four per cent. gold bonds shall have been paid in full, principal and interest, then any payments made on account of the principal of such second-mortgage bonds shall be deemed to have been also made *pro rata* on account of the principal of such deposited bonds; and to the extent above prescribed the interest obligations and obligations for principal upon such deposited first-mortgage five per cent. bonds shall from time to time be deemed and taken to have been paid, discharged and satisfied; it being expressly understood and agreed that in treating such payments on account of the principal or interest of such new bonds as having been also made on account of principal or interest on such deposited bonds, no allowance shall be made for any difference in value between gold and currency, and the amounts which shall be deemed to have been paid upon or on account of such deposited
248 bonds or the interest thereon shall, notwithstanding any excess of value of such gold coin over such currency, be estimated in like manner in all respects as if one dollar in gold were the equivalent of one dollar in currency; but the remainder of such interest obligations and obligations for principal shall be deemed to be still due, owing and unpaid from said party of the first part or its successors, and the said party of the second part and its successors in this trust shall be entitled in respect thereto to all benefits, advantages and security afforded by the indenture of mortgage or deed of trust securing such first-mortgage five per cent. bonds, or otherwise appertaining or applicable to such first-mortgage five per cent. bonds or the interest obligations thereon, until the whole amount of such first-mortgage four per cent. gold bonds and such second-mortgage bonds shall have been paid in full, principal and interest.

Seventh. The said party of the second part shall not, nor shall any of its successors in this trust, take any proceedings for or in respect of any default in the payment of any interest obligations upon such deposited first-mortgage five per cent. bonds, unless or until the said party of the first part, and its successors and assigns, shall have made default for six months in respect to payments fall-

ing due on account of interest on, or principal of, such first-mortgage four per cent. gold bonds, or such second-mortgage bonds.

Eighth. If default shall be made in the payment of the principal or interest moneys mentioned in the said first-mortgage four per cent. gold bonds, or any or either of them, or any part thereof, according to the tenor and effect of the said bonds or the coupons appertaining thereto, and such default shall continue for the period of six months, then and in that event the said party of the second part, and its successors in this trust, is and are hereby authorized, empowered and directed, at the request of the holders of one-third in amount of the said first-mortgage four per cent. gold bonds
249 then outstanding, to do and cause to be done all such acts and things, and to take and cause to be taken all such steps and proceedings, as the said party of the second part, or its successors, shall be entitled to do or take, or cause to be done or taken, either by itself or themselves, or by or through the trustees or trustee of the indenture of mortgage or deed of trust securing such first-mortgage five per cent. bonds for or in respect of any then existing default upon such deposited first-mortgage five per cent. bonds, or the interest obligations thereon, and to do all such acts and take all such steps and proceedings as the said party of the second part, or its successors, by virtue of its or their holding of such deposited first-mortgage five per cent. bonds, and by virtue of the then matured or maturing interest obligations thereon, shall be in anywise authorized or empowered to do or take, either under the mortgage securing such first-mortgage five per cent. bonds, or otherwise howsoever.

And the said party of the second part and its successors are authorized, empowered and directed to do the like acts and take the like steps and proceedings upon the request of the holders of one-third in amount of such second-mortgage bonds then outstanding, if at the maturity of such second-mortgage bonds default shall be made in the payment of the principal of, or any obligations for interest on, the said second-mortgage bonds, or either or any of them or any part thereof.

Ninth. Any and all moneys, choses in action, or other things of value which the said party of the second part or its successors in this trust, may, at any time receive for or on account of any interest obligations on, or obligations for principal of, any of such deposited first-mortgage five per cent. bonds, whether by or through any entry into possession of the mortgaged premises, or any part thereof, under the mortgage securing such last-mentioned bonds, or any receivership of such mortgaged premises, or any part thereof, or by or through any foreclosure proceedings under said mortgage, or otherwise howsoever, shall be applied, in the first instance,
250 to or towards the *pro rata* payment of any interest obligations on, or obligations for principal of, such first-mortgage four per cent. bonds which may then be unpaid; and, in the second instance, (after such first-mortgage four per cent. gold bonds shall have been fully paid and satisfied) to or towards the *pro rata* payment of any interest obligations on, or obligations for principal of,

such second-mortgage bonds which may then remain unpaid; and so from time to time until the whole of the interest and principal of all such first-mortgage four per cent. gold bonds, and such second-mortgage bonds which may be at any time outstanding shall have been fully paid, discharged and satisfied.

Tenth. In case of the resignation or insolvency of the party of the second part or its successor or successors or its or their incapacity or inability to act in the execution of this trust, the holders of a majority in interest of such outstanding first-mortgage four per cent. gold bonds, may select or designate one or more competent persons, or a corporation, to execute said trust, and the person or persons or corporation so selected shall be thereupon entitled to receive and hold all such deposited first-mortgage five per cent. bonds subject to the trusts herein stated and declared, and shall have all the rights and privileges and be subject to all the duties expressed in this indenture. In case of failure of the bondholders to fill such vacancy in the manner above prescribed, the president for the time being of the party of the first part shall make a temporary appointment for such vacancy which shall continue until the holders of a majority in interest of said outstanding first-mortgage four per cent. gold bonds shall have designated a new trustee or trustees to act hereunder. When the holders of a majority in interest of the said outstanding first-mortgage four per cent. bonds shall, by an instrument in writing, or concurrent instruments in writing, executed by themselves or their attorneys-in-fact, designate a new trustee or new trustees under this indenture, the estates, powers, rights and privileges of any trustee hereunder under any such temporary appointment shall immediately cease and determine and be
251 transferred to and vest in the new trustee or new trustees so designated, and thereafter such new trustee or new trustees shall hold estates, rights, powers and privileges with like effect as if he, it or they had been designated as the party of the second part hereunder.

Eleventh. Upon the request in writing of the holders of three-fourths of all the said first-mortgage four per cent. gold bonds at the time outstanding and of a majority of all the said second-mortgage bonds at the time outstanding, all or any part of the said first-mortgage five per cent. bonds deposited hereunder shall be cancelled and redelivered to the party of the first part its successors or assigns, fully discharged from the liens and trusts in this indenture expressed.

Twelfth. Any and all costs, charges and expenses incurred in or in respect of or in connection with the execution of this trust by or on behalf of the said party of the second part or its successors in this trust, or for which the said party of the second part or its successors shall be or become in anywise liable or responsible, shall be borne and defrayed by the said party of the first part, and said party of the first part undertakes, covenants and agrees for itself and its successors and assigns, that it and they will, upon demand, pay any and all such costs, charges and expenses, including therein just and reasonable compensation to said party of the second part or its suc-

cessors for such services as it or they may be called upon to render in or about or in respect of the trust hereby created.

Thirteenth. The party of the second part hereby accepts the trusts created and declared by this indenture, but with the understanding, and it is hereby expressly provided and agreed that it shall not be liable or accountable for the acts, defaults or neglect of any agent or agents who may, in good faith and with reasonable discretion, be appointed under and by virtue of or for the purposes of these
252 presents to do any of the matters or things herein provided for, and that no other liability or responsibility shall under any circumstances be borne by or attach to it than for the exercise of reasonable diligence only in the performance of the said trusts when action on its part for that purpose shall become necessary.

In witness whereof, the parties hereto have caused their respective corporate seals to be hereunto affixed and attested by their respective presidents and secretaries the day and year first above written.

LOUISVILLE, NEW ORLEANS & TEXAS RAILWAY COMPANY,
By R. T. WILSON, *President.*

[Corporate Seal.]

Attest: C. H. BOSHER, *Secretary.*

UNION TRUST COMPANY OF NEW YORK,
By EDW'D KING, *President.*

[Corporate Seal.]

Attest: JAS. H. OGILVIE, *Sec'y P. T.*

253 STATE OF NEW YORK, }
City and County of New York, } ss:

Be it remembered, that on this twenty-fifth day of August, in the year of our Lord one thousand eight hundred and eighty-six, before me, William Shillaber, a duly appointed notary public in and for the city and county of New York, State of New York, residing in said city and county of New York, personally appeared Richard T. Wilson, president of the Louisville, New Orleans and Texas Railway Company, and Charles H. Bosher, secretary of the same company, to me respectively personally known, and known to me to be such officers of the said company, who being by me severally duly sworn, did depose and say: That he, said Richard T. Wilson, resides in the city of New York, in the State of New York, and that he, said Charles H. Bosher, resides in the city of New York, in the State of New York; that he, said Richard T. Wilson, is the president, and he, said Charles H. Bosher, is the secretary of the said company; that they know the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal, and that it was so affixed thereto by order of the board of directors of the said company, and that they, the said Richard T. Wilson and Charles H. Bosher, signed their names

thereto by the like order, as president and secretary of said company, respectively.

In witness whereof, I have hereunto set my hand and affixed my official seal, this 25th day of August, one thousand eight hundred and eighty-six.

[NOTARIAL SEAL.] WILLIAM SHILLABER,
Notary Public, City and County of New York.

254 STATE OF NEW YORK, } ss:
City and County of New York, }

Be it remembered, that on this twenty-fifth day of August, in the year of our Lord one thousand eight hundred and eighty-six, before me, William Shillaber, a duly appointed notary public in and for the city and county of New York, State of New York, residing in said city and county of New York, personally appeared Edward King, president of the Union Trust Company of New York, and James H. Ogilvie, secretary *pro tem.* of the same company, to me respectively personally known, and known to me to be such officers of the said company, who being by me severally duly sworn, did depose and say: That he, said Edward King, resides in the city of New York, in the State of New York; and that he, said James H. Ogilvie, resides in said city of New York, in the State of New York; that he, said Edward King, is the president, and he, said James H. Ogilvie, is the secretary *pro tem.* of the said company; that they know the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal, and that it was so affixed thereto by authority of the board of trustees of the said company, and that they, the said Edward King and James H. Ogilvie, signed their names thereto by the like authority as president and secretary *pro tem.* of said company, respectively.

In witness whereof I have hereunto set my hand and affixed my official seal, this 25th day of August, one thousand eight hundred and eighty-six.

[NOTARIAL SEAL.] WILLIAM SHILLABER,
Notary Public, City and Coun-y of New York.

255 *Second Mortgage, August* 25, 1886.

An indenture made the twenty-fifth day of August, in the year of our Lord one thousand eight hundred and eighty-six, by and between the Louisville, New Orleans and Texas Railway Company, a corporation created, organized, and existing under the laws of the States of Tennessee, Mississippi, and Louisiana, party of the first part, and the Union Trust Company of New York, a corporation created, organized, and existing under the laws of the State of New York, party of the second part.

Whereas, the party of the first part has been formed by the consolidation under the laws of the States of Tennessee, Mississippi,

and Louisiana, of the Tennessee Southern Railroad Company, a corporation created and existing under the laws of the State of Tennessee, the New Orleans, Baton Rouge, Vicksburg and Memphis Railroad Company, and the Memphis and Vicksburg Railroad Company, corporations created and existing under the laws of the State of Mississippi, and the New Orleans and Mississippi Valley Railroad Company, a corporation created and existing under the laws of the State of Louisiana, and is the owner of a line of railway extending from Memphis, in the State of Tennessee, to New Orleans, in the State of Louisiana, and is authorized to construct branches thereto.

And whereas, the party of the first part and its successors are about to execute and issue, from time to time, (but with the limitations hereinafter prescribed in respect to the aggregate amount thereof which may at any time be outstanding, which amount is not in any case to exceed, at the par or face value of such
256 bonds, the sum of sixteen million nine hundred thousand dollars), first-mortgage bonds for one thousand dollars each of the general form and tenor following, to wit:

UNITED STATES OF AMERICA.

Louisville, New Orleans and Texas Railway Company.

No. —. *First-mortgage Gold Bond.* No. —.

The Louisville, New Orleans and Texas Railway Company, for value received, promises to pay to the bearer hereof, or, if registered, to the registered holder hereof, the sum of one thousand dollars on the first day of September, 1934, and, on presentation and surrender at or after maturity of the respective interest warrants hereunto annexed, to pay to the person presenting the same, or, if this bond is registered and the interest warrants appertaining thereto canceled, to pay to the registered holder hereof, interest on such principal sum at the rate of four per centum per annum, semi-annually, on or after the first day of March and September in each year, such payments of principal and interest to be made at the office or agency of said company in the city of New York, in United States gold coin.

This is one of the first-mortgage bonds of said railway company, secured by a deed of trust to the Union Trust Company of New York, trustee, dated August 25, 1886.

None of said bonds are to be in anywise binding or obligatory unless authenticated by a certificate endorsed thereon, signed by said trustee or its successor or successors in said trust.

This bond may at any time, upon production thereof to said railway company and proper endorsement being made thereon, and either with or without the surrender to said railway company for cancellation of all unpaid interest warrants appertaining thereto, be registered upon the books of the company in the name of the

holder thereof, and thereupon its transferability by delivery
257 will cease, and thereafter it can be transferred only by the registered holder or his attorney by transfer duly made upon said books.

In witness whereof, the said railway company has caused these presents to be signed by its president, and its corporate seal to be affixed thereto and attested by its secretary, this first day of September, one thousand eight hundred and eighty-six.

LOUISVILLE, NEW ORLEANS AND TEXAS RAILWAY COMPANY,

By —— ——, *President.*

[SEAL.]

Attest: —— ——, *Secretary.*

And whereas, the general form of the several interest warrants to be annexed to such bonds (each of which interest warrants is to bear the engraved signature of the treasurer of the railway company) is to be as follows, viz:

(*Form of Interest Warrant.*)

Interest warrant for twenty dollars gold, being semi-annual interest maturing on the first day of —— upon the Louisville, New Orleans and Texas Railway Company's first-mortgage bond No. —.

820. —— ——, *Treasurer.*

And whereas, all of the said bonds are to be equally secured by mortgage and hypothecation of the railways and railway
258 lines of the party of the first part, and its successors constructed and to be constructed or acquired until the length of such railways shall amount, in the aggregate, to eight hundred miles, and of all their appurtenances, and the franchises, relating or pertaining thereto.

Now therefore this indenture witnesseth, that the party of the first part, in consideration of the premises, and of one dollar to it paid by the party of the second part, the receipt whereof is hereby acknowledged, and for the purpose of securing the payment of such bonds, with the interest to accrue thereon, according to the true intent and meaning thereof, hath granted, bargained, sold, aliened, remised, released, conveyed and confirmed, and by these presents doth grant, bargain, sell, alien, remise, release, convey and confirm unto the said party of the second part, and its successors and assigns forever, all the railways and railway lines of the party of the first part, and its successors, whether constructed or to be constructed or acquired, until the length of such railways shall amount in the aggregate to eight hundred miles, and all their appurtenances, including therein all lands and rights of way, superstructure, rails, tracks, side tracks or sidings, bridges, buildings, fences, depots, station-houses, shops, warehouses, car-houses, engine-houses, machine shops, repair shops, buildings, erections and structures necessary to the operation of said railways or said railway lines, and all and singular the rolling stock, equipment and machinery appertaining

thereto, whether now owned or hereafter to be acquired; and also, all the rents, issues, tolls, incomes, earnings and profits of such railways and railway lines; and also, all the rights, privileges, immunities and franchises relating or pertaining to such railways or railway lines which the said party of the first part now possesses, owns or is entitled unto, or it or its successors may hereafter become possessed of or entitled unto; and also, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, and its
259 successors, of, in and to the premises, and every part and parcel thereof, with the appurtenances.

To have and to hold, all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, and its successors and assigns forever, in trust, nevertheless, for the security and benefit of all and every the persons or bodies corporate who or which shall be or at any time become the holder or holders of any such bonds, or the interest warrants appertaining thereto, without preference to the holder of any of the said bonds or interest warrants over any of the others, by reason of priority in the date thereof or the time of the issuing or negotiating of the same.

Provided always, and these presents are upon the express condition, that if the party of the first part, or its successors or assigns, shall well and truly pay or cause to be paid to the holders of the said bonds and interest warrants, when and as the same shall become due and payable, the principal and interest moneys secured hereby, according to the terms, provisions and conditions, tenor and effect of the said bonds, then these presents and the estate hereby granted shall cease, determine and be null and void.

And it is covenanted and agreed by and between the parties hereto, that until default shall be made by the said party of the first part, its successors and assigns, in the payment of the principal or interest of the said bonds, or some of them, or some part thereof, the said party of the first part, its successors and assigns, shall be suffered and permitted to possess and enjoy the said premises, with their appurtenances, and all and singular the rights and franchises hereinbefore described, and to receive, take and use the tolls, income, earnings and profits thereof, and the trustee or trustees hereunder shall have full power, in its or their discretion, upon written request of the party of the first part, its successors or assigns, to convey, by way of release or otherwise, and fully release from the lien of this mortgage, any lands or other property of any description
260 which in its or their judgment shall not be necessary for, or for use in connection with, said railways, and to consent to such changes in the location of tracks, depots and other buildings as in its or their judgment may be expedient, and to make and deliver the releases and conveyances necessary to carry the same into effect, but any lands or other property which may be acquired for permanent use in substitution for any so released or conveyed shall thereupon become subject to the lien of this mortgage, and upon request of the trustee or trustees hereunder shall be conveyed to it

or them by the party of the first part, its successors or assigns, upon the trusts of these presents.

But if default shall be made in the payment of the principal or interest moneys mentioned in the said bonds, or any or either of them, or any part thereof, according to the tenor and effect of said bonds, or either of them, and if such default shall continue for the period of six months, then, and in that case, the party of the second part, or its successors in the trust, are hereby authorized and empowered, at the request of the holders of one-fourth part of the said bonds then outstanding in respect of which such default shall have been made, to enter into and upon, and take and hold possession of, all and singular the premises, estates, franchises, rights, privileges and property hereby granted and conveyed, or intended so to be, and in person, or by one or more agents, to operate the said railways, to make from time to time all such repairs and replacements as it or they may deem judicious, and all such useful alterations, additions and improvements as the income coming into its or their hands shall be adequate to pay for, and to take, collect and receive all fares, freights, tolls, earnings, issues, profits and income of said railways, and apply such fares, freights, tolls, earnings, issues, profits and income to the proper expenses of holding, operating and managing the said railways and other premises, and conducting the business thereof, to the payment of and for all taxes and assessments which shall be levied or assessed thereon, and all necessary and proper repairs, replacements, alterations, additions and improvements
261 upon said property, and all expenses, costs, charges and counsel fees in the premises of said party of the second part, or its successors in the trust, and a reasonable compensation for its or their services, and next to the payment of the interest and principal of the said bonds, according to the tenor and effect thereof, as the same may be or become due and payable, and in case the principal moneys secured by such bonds shall not have become due, the moneys applicable to the payment of interest shall be applied upon the interest warrants remaining in default, in the order of their maturity; in case the said principal moneys shall have become due, the moneys applicable to the payment of the principal and interest on such bonds shall be applied to such principal and interest *pro rata* without any preference or priority whatsoever.

And further, if default shall be made in the payment of the principal or interest moneys mentioned in the said bonds, or any or either of them, or any part thereof, and if such default shall continue for the period of six months, then, and in that case, at the request of the holders of one-fourth part of the said bonds then outstanding in respect of which such default shall have been made, the said party of the second part, or its successors in the said trust, may, and it and they are hereby authorized and empowered to, cause the whole of the said premises, estates, franchises, rights, privileges and property hereby granted and conveyed, or intended so to be, with their appurtenances, and all benefit and equity of redemption of the said party of the first part, and its successors and assigns therein or thereto, to be sold at public auction in the city of

New York, in the State of New York, or the city of Memphis, in the State of Tennessee, giving at least three months' previous notice of the time and place of such sale, by publishing the same at least once in each week during such period of three months, in two newspapers published in said city of New York and two newspapers published in said city of Memphis, and giving such other notice of such sale as may be required by law, if any other notice be so required.

And it shall be lawful for the said party of the second part
262 or its successors making such sale, and it and they are hereby authorized and empowered as the attorney or attorneys of the party of the first part, and its successors, by these presents duly constituted and appointed for that purpose, to make, execute and deliver to the purchaser or purchasers on such sale, all such deeds and conveyances as shall be necessary or proper to convey and assure to, and vest in, him or them, the said premises, estates, franchises, rights, privileges and property, and every part and parcel thereof, and all of the estate, right, title and interest of the said party of the first part, and its successors and assigns therein or thereto; and such sale, and the deeds and conveyances so to be thereupon executed, shall be valid and effectual forever, and shall be a perpetual bar, both in law and equity, against the said party of the first part and its successors and assigns, and against all persons claiming or to claim by, from or under it or them, or any of them.

And it is further declared and agreed, that the receipt of the trustee or trustees who shall make the sale hereinbefore authorized shall be a sufficient discharge to the purchaser or purchasers at such sale for his or their purchase-money, and that such purchaser or purchasers, his or their heirs or assigns or personal representatives, shall not, after paying such purchase-money and receiving such receipt of such trustee or trustees therefor, be obliged to see to the application of such purchase-money upon or for the trusts or purposes of these presents, or be in anywise answerable for any loss, misapplication or non-application of such purchase-money by the trustee or trustees.

And it is hereby declared and agreed, that the said party of the second part, or its successors in the said trust, shall out of the proceeds of such sale, or of any sale which shall, under judicial proceedings or otherwise, be made of the said premises in enforcement of the security afforded by these presents, in the first place, pay and retain the costs and expenses attending such sale, and all counsel fees and other expenses incurred by it or them in reference to the same, and a reasonable compensation for its or their own services in the premises; and also any balance which may be due
263 to it or them on account of any disbursements or expenses paid or incurred in or about the care and management of the said premises subsequent to the taking possession thereof by it or them, including the reasonable compensation of any agent or agents who may be employed in or about such care and management, and shall apply the residue of the proceeds of such sale, or so much

hereof as may be necessary to the payment of the whole amount of principal and interest which shall then be owing and unpaid upon the bonds secured hereby, or any of them, whether the said principal, by the tenor of the said bonds, be then due or yet to become due. And in case of a deficiency of such proceeds to pay in full the whole amount of principal and interest owing or unpaid upon the said bonds, they shall be paid ratably in proportion to the amounts owing and unpaid upon them respectively, and without discrimination as between principal and interest, and without preference of the holder of any one bond or interest warrant over any of the others; and any surplus which may remain after the full payment of the principal and interest of all of the said bonds shall be paid over to the said party of the first part, or its successors or assigns, upon lawful demand being made therefor.

And it is hereby further provided, declared, granted and agreed, that upon the happening of such event or events as is or are hereinbefore declared agreed or provided to authorize the said party of the second part, or its successors, to sell the said premises, estates, franchises, rights, privileges and property, or to take the requisite proceedings to that end, the said party of the second part, or its successors, shall be entitled, in its or their discretion, instead of taking proceedings for and making sale of said premises, estates, franchises, rights, privileges, and property, under and in virtue of the power of sale hereinbefore contained, to proceed by bill in equity, or other appropriate proceedings, in any court or courts of competent jurisdiction, to foreclose this mortgage or enforce the rights, liens and securities of the trustee or trustees and the bondholders thereunder; and thereupon said trustee or trustees shall be entitled to have the said premises, estates, franchises, rights, privileges and property hereby granted or conveyed or intended so to be, sold by judicial sale under the order or decree of such court or courts, for or towards the satisfaction of the principal and interest due or owing upon the then outstanding bonds, issued under or entitled to the benefit of the security of this mortgage, and for the enforcement of the rights, liens and securities of the trustee or trustees and the bondholders; and in case of such judicial sale, the net proceeds thereof shall be applicable and distributable in like manner as hereinbefore provided in respect of the net proceeds of sale of such mortgaged premises and properties, rights and franchises, under and in virtue of the power of sale hereinbefore contained; and all the stipulations and provisions in this indenture contained with reference to or consequent upon a sale of such mortgaged premises and properties, rights, immunities and franchises, when or if sold under said power of sale, shall be applicable and applied as far and as nearly as may be, in case of such judicial sale being made under the order or decree of the court.

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And it is hereby further provided, declared and agreed that in case of such sale as is hereinbefore authorized being made by the party of the second part or its successors in said trust, or in case of any judicial sale being made of the said premises, properties, rights and franchises hereby mortgaged, or any part thereof in enforce-

ment of the mortgage lien hereby created, the purchaser or purchasers at such sale shall be entitled, in making settlement for and payment of the purchase-money bidden at such sale, to turn in or use towards the payment of such purchase-money the bonds held by such purchaser or purchasers, to or towards the payment whereof the net proceeds of such sale shall be legally applicable, reckoning such bonds, or the amount so turned in or used of the same for such purpose, at such sum as would be payable out of the net proceeds of such sale to such purchaser or purchasers, as holder or holders of such bonds, for his or their just share or proportion of such
265 net proceeds of sale, upon due apportionment of and concerning such net proceeds.

And the said party of the first part, for itself, its successors and assigns, doth hereby covenant, grant and agree to and with the said party of the second part, and its successors in the trust, and to and with the respective persons and corporations who or which shall at any time become holders of the said bonds hereby secured, or any of them, that the said party of the first part, its successors and assigns, shall and will at any time and from time to time hereafter, upon request, make, do, execute and deliver all such further and other acts, deeds and things as shall be reasonably advised, devised or required to effectuate the intention of these presents, and to assure and confirm to the said party of the second part, or its successors, all and singular the property and estate, real and personal, hereinbefore described, and hereby intended to be granted, and so as to render the same, and especially such portions thereof as shall be hereafter acquired by the said party of the first part, or its successors, available for the security and satisfaction of the said bonds, according to the intent and purpose herein expressed.

And it is hereby further provided, covenanted, declared and agreed that the party of the second part and its successors in the trust hereby created are forthwith, upon the request of the party of the first part, its successors or assigns, to authenticate and certify as issued hereunder and to deliver to the party of the first part, its successors or assigns, bonds of said party of the first part or its successors of the general form and tenor above set forth, to the amount of ten million dollars, and thereafter from time to time to authenticate and certify as issued hereunder and to deliver to the party of the first part, its successors or assigns, such bonds, to amounts which shall aggregate twenty thousand dollars for each mile of constructed railway (not included in the main line of railway of the party of the first part from Memphis to New Orleans), which may be certified to the party of the second part or its successors in this trust, as hereinafter provided, to be then owned by the party of the first
266 part, or its successors, and mortgaged hereby, or by indenture of mortgage or deed of trust supplemental hereto constituting a first mortgage thereon, until the length of such railways, including such main line, shall amount in the aggregate to eight hundred miles; and that the certificate of the president of said party of the first part or its successors to the facts entitling the party of the first part or its successors to receive such bonds under the foregoing

clause hereof, shall be sufficient evidence of such facts and shall fully protect the said party of the second part or its successors in respect to the authentication, certification and delivery of said bonds; but it is expressly provided, declared, covenanted and agreed that the said party of the second part and its successors in the trust created hereby shall not, in any event in addition to the bonds to the amount of ten million dollars to be forthwith issued hereunder in respect of main line, authenticate or certify, as issued hereunder, bonds in excess of twenty thousand dollars for each mile of railway so certified to be constructed, owned and mortgaged but not to be included in such main line. Provided, however, that nothing herein contained shall prevent the party of the second part and its successors from authenticating, certifying and delivering to said party of the first part, its successors or assigns, bonds in excess of the limits above prescribed (but not in any case exceeding in the aggregate the amount at their par or face value of sixteen million nine hundred thousand dollars), in case the proceeds of the sale of such bonds issued in excess of such limits shall simultaneously with the delivery of such bonds to the party of the first part, its successors or assigns, be deposited with the trustee or trustees hereunder, to be delivered to the party of the first part, its successors or assigns, only from time to time, as and when, under the foregoing provisions hereof, it or they would have become entitled to receive the bonds represented by such deposited proceeds, and until such delivery of such proceeds to said party of the first part, its successors or assigns, the same shall be held by the said trustee or trustees, as further collateral security to all the bonds outstanding here-
267 under.

And it is hereby further provided, declared and agreed, that any vacancy in the office of trustee hereunder may be permanently filled by the appointment of a new trustee or new trustees, by an instrument or concurrent instruments in writing, executed under the hands and seals of the holders of a majority in interest of the then outstanding bonds secured hereby, or their attorneys-in-fact thereunto authorized, but that the board of directors of the party of the first part or its successors may make a temporary appointment to fill such vacancy until a permanent appointment shall be made in the manner above prescribed.

And it is hereby covenanted and agreed, that any new trustee or new trustees, appointed as aforesaid, whether by a permanent or temporary appointment, shall immediately upon its, his or their appointment, and without any further act, deed or conveyance, become and be vested with all of the estates, trusts, rights, powers and duties of the trustee or trustees in whose place it, he or they shall have been appointed; but, nevertheless, the respective parties hereto, and their respective successors and assigns, shall and will, upon request, make, execute and deliver all such releases, conveyances and assurances as shall be appropriate to vest in and confirm and assure to such new trustee or new trustees such estates, trusts, rights, powers and duties, according to the intent above expressed.

And the said party of the second part does hereby accept the trust

conferred upon it by these presents, but with the understanding, and it is hereby expressly provided and agreed, that it shall not be liable or accountable for the acts, defaults or neglect of any agent or agents who may, in good faith and with reasonable discretion, be appointed under and by virtue of or for the purposes of these presents to do any of the matters or things herein provided for, and that no other liability or responsibility shall, under any circumstances, be borne by or attach to it than for the exercise of reasonable diligence only in the performance of the said trusts,
268 when action on its part for that purpose shall become necessary. The party of the second part is to be entitled to compensation for services in the execution of this trust.

In witness whereof, the parties hereto have caused their respective corporate seals to be hereunto affixed and attested by their respective secretaries, and these presents to be signed by their respective presidents the day and year first above written.

LOUISVILLE, NEW ORLEANS AND TEXAS RAILWAY COMPANY,
By R. T. WILSON, *President.*

[Corporate Seal.]

Attest: C. H. BOSHER, *Sec'ty.*

UNION TRUST COMPANY OF NEW YORK,
By EDW'D KING, *Pres't.*

[Corporate Seal.]

Attest: JAS. H. OGILVIE, *Sec'ty P. T.*

269 STATE OF NEW YORK, }
City and County of New York, } ss:

Be it remembered, that on this twenty-fifth day of August, in the year of our Lord one thousand eight hundred and eighty-six, before me, William Shillaber, a duly appointed notary public in and for the city and county of New York, State of New York, and commissioner for the State of Tennessee, in and for the State of New York, residing in said city and county of New York, personally appeared Richard T. Wilson, president of the Louisville, New Orleans and Texas Railway Company, and Charles H. Bosher, secretary of the same company, to me respectively personally known, and known to me to be such officers of the said company, who being by me severally duly sworn, did depose and say: That he, said Richard T. Wilson, resides in the city of New York, in the State of New York, and that he, said Charles H. Bosher, resides in the city of New York, in the State of New York; that he, said Richard T. Wilson, is the president, and he, said Charles H. Bosher, is the secretary, of the said company; that they know the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal, and that it was so affixed thereto by order of the board of directors of the said company, and that they, the said Richard T. Wilson and Charles H. Bosher, signed their names thereto by the like order as president and secretary of said company respectively.

In witness whereof, I have hereunto set my hand and affixed my official seal, this 25th day of August, one thousand eight hundred and eighty-six.

[Notarial Seal.]

WILLIAM SHILLABER,
Notary Public, City and County of New York,
Commissioner for the State of Tennessee.

[Commissioner's Seal.]

270 STATE OF NEW YORK, } ss:
City and County of New York, }

Be it remembered, that on this twenty-fifth day of August, in the year of our Lord one thousand eight hundred and eighty-six, before me, William Shillaber, a duly appointed notary public in and for the city and county of New York, State of New York, and commissioner for the State of Tennessee, in and for the State of New York, residing in said city and county of New York, personally appeared Edward King, president of the Union Trust Company of New York, and James H. Ogilvie, secretary *pro tem.* of the same company, to me respectively personally known and known to me to be such officers of the said company, who being by me severally duly sworn, did depose and say: That he, said Edward King, resides in the city of New York, in the State of New York; and that he, said James H. Ogilvie, resides in said city of New York, in the State of New York; that he, said Edward King, is the president, and he, said James H. Ogilvie, is the secretary *pro tem.* of the said company; that they know the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal, and that it was so affixed thereto by authority of the board of trustees of the said company, and that they, the said Edward King and James H. Ogilvie, signed their names thereto by the like authority as president and secretary *pro tem.* of said company respectively.

In witness whereof, I have hereunto set my hand and affixed my official seal this 25th day of August, one thousand eight hundred and eighty-six.

[Notarial Seal.]

WILLIAM SHILLABER,
Notary Public, City and County of New York,
Commissioner for the State of Mississippi.

[Commissioner's Seal.]

271 STATE OF NEW YORK, } ss:
City and County of New York, }

Be it remembered that on this twenty-fifth day of August, in the year of our Lord one thousand eight hundred and eighty-six, before me, William Shillaber, a duly appointed notary public, in and for the city and county of New York, State of New York, and commissioner for the State of Mississippi in and for the State of New York, residing in said city and county of New York, personally ap-

peared the within-named Richard T. Wilson, president of the Louisville, New Orleans and Texas Railway Company, and Charles H. Bosher, secretary of the same company, to me respectively personally known, and known to me to be such officers of the said company, who acknowledged that in pursuance of authority in them vested by the board of directors of said company, and as such president and secretary they signed and delivered the foregoing instrument and affixed thereto the corporate seal of said company, on the day and year therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal, this 25th day of August, one thousand eight hundred and eighty-six.

[NOTARIAL SEAL.] WILLIAM SHILLABER,
Notary Public, City and County of New York,
Commissioner for the State of Mississippi.

[Commissioner's Seal.]

272 STATE OF NEW YORK, }
City and County of New York, } *ss:*

Be it remembered that on this twenty-fifth day of August, in the year of our Lord one thousand eight hundred and eighty-six, before me, William Shillaber, a duly appointed notary public in and for the city and county of New York, and State of New York, and commissioner for the State of Mississippi in and for the State of New York, residing in said city and county of New York, personally appeared Edward King, president of the Union Trust Company of New York, and James H. Ogilvie, secretary *pro tem.* of the same company, to me respectively personally known, and known to me to be such officers of said company, who acknowledged to me that in pursuance of authority in them vested by the board of trustees of said company, and as such president and secretary *pro tem.* they signed and delivered the foregoing instrument, and affixed thereto the corporate seal of said company, on the day and year therein mentioned, for the purposes therein expressed.

In witness whereof, I have hereunto set my hand and affixed my official seal, this 25th day of August, one thousand eight hundred and eighty-six.

[NOTARIAL SEAL.] WILLIAM SHILLABER,
Notary Public, City and County of New York,
Commissioner for the State of Mississippi.

[Commissioner's Seal.]

273 STATE OF NEW YORK, }
City and County of New York, } *ss:*

Be it remembered, that on this twenty-fifth day of August, in the year of our Lord one thousand eight hundred and eighty-six, before me, William Shillaber, a duly appointed notary public in and for the city and county of New York, State of New York, and commissioner for the State of Louisiana, in and for the State of New York, residing in said city and county of New York, personally appeared

Richard Thornton Wilson, president of the Louisville, New Orleans and Texas Railway Company, and Charles H. Bosher, secretary of the same company, to me respectively personally known and known to me to be such officers of the said company, and to be the same persons described in and who executed the foregoing instrument in my presence and in that of the two witnesses whose names are thereto subscribed as such, who being by me severally duly sworn, did depose and say: That he, said Richard Thornton Wilson, resides in the city of New York, in the State of New York, and that he, said Charles H. Bosher, resides in the city of New York, in the State of New York; that he, said Richard Thornton Wilson, is the president, and he, said Charles H. Bosher, is the secretary of the said company; that they know the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal, and that it was so affixed thereto by order of the board of directors of the said company, and that they, the said Richard Thornton Wilson and Charles H. Bosher, signed their names thereto by the like order as president and secretary of said company respectively, and thereupon acknowledged that they had signed, sealed and delivered such instrument as the voluntary act and deed of said
274 company, and as their own voluntary act and deed, for the considerations, uses and purposes therein expressed.

In witness whereof, I have hereunto set my hand and affixed my official seal this 25th day of August, one thousand eight hundred and eighty-six.

R. T. WILSON.
C. H. BOSHER.

CHARLES H. TWEED,
J. F. C. GROW, *Witnesses.*

[NOTARIAL SEAL.] WILLIAM SHILLABER,
Notary Public, City and County of New York,
Commissioner for the State of Louisiana.

[Commissioner's Seal.]

275 STATE OF NEW YORK, } ss:
City and County of New York, }

Be it remembered, that on this twenty-fifth day of August, in the year of our Lord, one thousand eight hundred and eighty-six, before me, William Shillaber, a duly appointed notary public in and for the city and county of New York, State of New York, and commissioner for the State of Louisiana, in and for the State of New York, residing in said city and county of New York, personally appeared Edward King, president of the Union Trust Company of New York, to me personally known, and known to me to be the president of the said company, and to be the same person described in and who executed the foregoing instrument in my presence and in that of the two witnesses whose names are thereto subscribed as such, who being by me duly sworn, did depose and say: That he resides in the city of New York, in the State of New York, and is the president of the said company; that he knows the corporate seal of said com-

pany; that the seal affixed to the foregoing instrument is such corporate seal, and that it was so affixed thereto by authority of the board of trustees of the said company, and that he signed his name thereto by the like authority as president of said company, and the said King thereupon acknowledged that he had signed, sealed and delivered the said instrument as the voluntary act and deed of said company, and as his own voluntary act and deed for the considerations, uses and purposes therein expressed.

In witness whereof, I have hereunto set my hand and affixed my official seal, this 25th day of August, one thousand eight hundred and eighty-six.

EDW'D KING.

R. C. McGILL,
A. H. ALVORD, *Witnesses.*

[Notarial Seal.]

WILLIAM SHILLABER,
Notary Public, City and County of New York,
Commissioner for the State of Louisiana.

[Commissioner's Seal.]

276 *Mortgage, August* 26, 1886.

An indenture made the twenty-sixth day of August, in the year of our Lord one thousand eight hundred and eighty-six, by and between the Louisville, New Orleans and Texas Railway Company, a corporation created, organized, and existing under the laws of the States of Tennessee, Mississippi, and Louisiana, party of the first part, and the Union Trust Company of New York, a corporation created, organized, and existing under the laws of the State of New York, party of the second part.

Whereas, the party of the first part has been formed by the consolidation, under the laws of the States of Tennessee, Mississippi and Louisiana, of the Tennessee Southern Railroad Company, a corporation created and existing under the laws of the State of Tennessee, the New Orleans, Baton Rouge, Vicksburg and Memphis Railroad Company, and the Memphis and Vicksburg Railroad Company, corporations created and existing under the laws of the State of Mississippi, and the New Orleans and Mississippi Valley Railroad Company, a corporation created and existing under the laws of the State of Louisiana, and is the owner of a line of railway extending from Memphis, in the State of Tennessee, to New Orleans, in the State of Louisiana, and is authorized to construct branches thereto.

And whereas, the party of the first part and its successors are about to execute and issue, to the amounts hereinafter prescribed on that behalf, second-mortgage bonds for one thousand dollars each, of the general form and tenor following, to wit:

277 UNITED STATES OF AMERICA:

Louisville, New Orleans and Texas Railway Company.

No. —. *Second-mortgage Bond.* $1,000.

The Louisville, New Orleans and Texas Railway Company, for value received, promises to pay, at its agency in the city of New York, to the bearer hereof, or, if registered, to the registered owner hereof, one thousand dollars, on the first day of September, one thousand nine hundred and thirty-four, and also in the meantime, on the first day of March and September in each year after the year 1888, to pay, at such agency, on presentation of this bond for endorsement of such payment thereon, such interest on such principal sum, not exceeding five per centum per annum, payable semi-annually, from the 1st day of September, 1888, and interest on interest in arrears, as the net earnings of said railway company shall suffice to pay on the entire issue of which this bond is one, after making such deductions from the said net earnings as are provided for in the mortgage or deed of trust securing the same hereinafter referred to.

This bond is one of a series of second-mortgage bonds of like tenor and amount numbered consecutively from 1 upward, which are secured by a mortgage or deed of trust made by the said railway company to the Union Trust Company of New York, as trustee, dated August 26, 1886, and are subordinate in lien to the first-mortgage four per cent. gold bonds of said railway company or its successors, issued or to be issued under an indenture of mortgage or deed of trust, dated August 25, 1886. Each successive holder of this bond accepts the same subject to the terms, conditions and limitations expressed in said mortgage or deed of trust securing the same, and waives all right of action hereon except in accordance therewith.

278 The interest on this bond shall be payable only out of the net earnings of the said railway company, after making the deductions therefrom provided for in the said mortgage or deed of trust securing the same, and shall not be due at any time during the currency of this bond, until the amount payable in respect thereof shall have been determined and declared by the board of directors of said railway company.

But such interest shall be cumulative, and in case less than two and a half per centum be paid in any half year, the unpaid interest, with interest on such unpaid interest at the rate of five per centum per annum, shall be carried forward to the credit of this bond, for subsequent payment as such net earnings after such deductions shall suffice therefor, or at the maturity of the bond. All arrears of such interest, with the accrued interest thereon (so far as the same shall not have been previously paid), shall be paid with the principal of this bond, on the 1st day of September, 1934, and no dividend shall be paid upon the stock of the company or its income bonds until interest hereon, calculated at the rate of five per centum per annum from the 1st day of September, 1888, and payable semi-annually,

together with the accrued interest on any arrears of such interest shall have been fully paid.

It is further provided that the railway company or its successors may, at its or their option, at any time after two years from the date hereof, pay and extinguish such whole issue of second-mortgage bonds upon giving thirty days' notice in such manner as is prescribed in such mortgage or deed of trust securing the same, of its election to pay off such bonds at a prescribed date and place, and in case the said company shall at such prescribed date and place pay or be ready to pay the face of said bonds with five per cent. premium thereon, and such interest as up to that date may have been earned and become due on said bonds according to the terms thereof, and may remain unpaid, the said bonds shall thereupon cease to bear interest.

This bond shall pass by delivery unless registered. After registration, certified hereon by the company's transfer agent, no
279 transfer, except upon the company's books, shall be valid, unless the last registration shall have been to bearer.

This bond shall not be valid or obligatory until the certificate authenticating the same and endorsed hereon shall have been signed by the trustee hereunder.

In witness whereof, the said railway company has caused its corporate seal to be hereto affixed and attested by its secretary, and these presents to be signed by its president, the first day of September, one thousand eight hundred and eighty-six.

And whereas, all of the said second-mortgage bonds are to be equally secured by mortgage and hypothecation of the railways and railway lines of the party of the first part and its successors, constructed or to be constructed or acquired until the length of such railways shall amount, in the aggregate, to eight hundred miles, and of all their appurtenances, and the franchises relating or pertaining thereto.

Now therefore this indenture witnesseth, that the party of the first part, in consideration of the premises, and of one dollar to it paid by the party of the second part, the receipt whereof is hereby acknowledged, and for the purpose of securing the payment of such second-mortgage bonds, with the interest to accrue thereon, according to the true intent and meaning thereof, hath granted, bargained, sold, aliened, remised, released, conveyed and confirmed, and by these presents doth grant, bargain, sell, alien, remise, release, convey and confirm unto the said party of the second part, and its successors and assigns forever, all the railways and railway lines of the party of the first part, and its successors, whether constructed or to be constructed or acquired, until the length of such railways shall amount in the aggregate to eight hundred miles, and all their appurtenances, including therein all lands and rights of way, superstructure, rails, tracks, side tracks or sidings, bridges, build-
280 ings, fences, depots, station-houses, shops, warehouses, car-houses, engine-houses, machine shops, repair shops, buildings, erections and structures necessary to the operation of said railways or said railway lines, and all and singular the rolling stock, equip-

ment and machinery appertaining thereto, whether now owned or hereafter to be acquired; and also, all the rents, issues, tolls, incomes, earnings and profits of such railways and railway lines; and also, all the rights, privileges, immunities and franchises relating or pertaining to such railways or railway lines which the said party of the first part now possesses, owns or is entitled unto, or it or its successors may hereafter become possessed of or entitled unto; and also, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, and its successors, of, in and to the premises, and every part and parcel thereof, with the appurtenances.

To have and to hold; all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, and its successors and assigns forever, in trust, nevertheless for the security and benefit of all and every the persons or bodies corporate who or which shall be or at any time become the holder or holders of any such second-mortgage bonds, without preference to the holder of any of the said bonds over any of the others, by reason of priority in the date thereof or the time of the issuing or negotiating of the same, but subject at all times to the lien of the mortgage or deed of trust from said party of the first part to the party of the second part, dated August 25, 1886, securing the first mortgage four per cent. gold bonds of said party of the first part or its successors, as thereby appears.

Provided always, and these presents are upon the express condition, that if the party of the first part, or its successors or assigns, shall well and truly pay or cause to be paid to the holders of
281 the said second-mortgage bonds when and as the same shall become due and payable, the principal and interest moneys secured hereby, according to the terms, provisions and conditions, tenor and effect of the said bonds, then these presents and the estate hereby granted shall cease, determine and be null and void.

And it is covenanted and agreed by and between the parties hereto, that until default shall be made by the said party of the first part, its successors and assigns, in the payment of the principal or interest of the said bonds, of some of them, or some part thereof, the said party of the first part, its successors and assigns, shall be suffered and permitted to possess and enjoy the said premises with their appurtenances, and all and singular the rights and franchises hereinbefore described, and to receive, take and use the tolls, income, earnings and profits thereof, and the trustee or trustees hereunder shall have full power, in its or their discretion, upon written request of the party of the first part, its successors or assigns, to convey, by way of release or otherwise, and fully release from the lien of this mortgage, any lands or other property of any description which in its or their judgment shall not be necessary for, or for use in connection with, said railways, and to consent to such changes in the location of tracks, depots and other buildings as in its or their judgment may be expedient, and to make and deliver the releases and conveyances necessary to carry the same into effect, but any lands or other property which may be acquired for permanent use

in substitution for any so released or conveyed shall thereupon become subject to the lien of this mortgage, and upon request of the trustee or trustees hereunder shall be conveyed to it or them by the party of the first part, its successors or assigns, upon the trusts of these presents.

But if default shall be made in the payment of the principal or interest moneys mentioned in the said bonds, or any or either of them, or any part thereof, according to the tenor and effect of said bonds, or either of them, and if such default shall continue for the period of six months, then, and in that case, the party of the
282 second part, or its successors in the trust, are hereby authorized and empowered, at the request of the holders of one-fourth part of the said bonds then outstanding in respect of which such default shall have been made, to enter into and upon, and take and hold possession of, all and singular the premises, estates, franchises, rights, privileges and property hereby granted and conveyed, or intended so to be, and in person, or by one or more agents to operate the said railways, to make from time to time all such repairs and replacements as it or they may deem judicious, and all such useful alterations, additions and improvements as the income coming into its or their hands shall be adequate to pay for, and take, collect and receive all fares, freights, tolls, earnings, issues, profits and income of said railways, and apply such fares, freights, tolls, earnings, issues, profits and income to the proper expenses of holding, operating and managing the said railways and other premises, and conducting the business thereof, to the payment of and for all taxes and assessments which shall be levied or assessed thereon, and all necessary and proper repairs, replacements, alterations, additions and improvements upon said property, and all expenses, costs, charges and counsel fees in the premises of said party of the second part, or its successors in the trust, and a reasonable compensation for its or their services, and next to the payment of the interest and principal of the said bonds, according to the tenor and effect thereof, as the same may be or become due and payable, and in case the principal moneys secured by such bonds shall not have become due, the moneys applicable to the payment of interest shall be applied upon the interest remaining in default, in the order of its maturity; in case the said principal moneys shall have become due, the moneys applicable to the payment of the principal and interest on such bonds shall be applied to such principal and interest *pro rata* without any preference or priority whatsoever.

And further, if default shall be made in the payment of the principal or interest moneys mentioned in the said bonds, or any or either of them, or any part thereof, and if such default shall
283 continue for the period of six months, then, and in that case, at the request of the holders of one-fourth part of the said bonds then outstanding in respect of which such default shall have been made, the said party of the second part, or its successors in the said trust, may, and it and they are hereby authorized and empowered to, cause the whole of the said premises, estates, franchises, rights, privileges and property hereby granted and conveyed, or in-

tended so to be, with their appurtenances, and all benefit and equity of redemption of the said party of the first part, and its successors and assigns therein or thereto, to be sold at public auction in the city of New York, in the State of New York, or the city of Memphis, in the State of Tennessee, giving at least three months' previous notice of the time and place of such sale, by publishing the same at least once in each week during such period of three months, in two newspapers published in said city of New York, and two newspapers published in said city of Memphis, and giving such other notice of such sale as may be required by law, if any other notice be so required.

And it shall be lawful for the said party of the second part or its successors making such sale, and it and they are hereby authorized and empowered, as the attorney or attorneys of the party of the first part, and its successors, by these presents duly constituted and appointed for that purpose, to make, execute and deliver to the purchaser or purchasers on such sale, all such deeds and conveyances as shall be necessary or proper to convey and assure to, and vest in, him or them, the said premises, estates, franchises, rights, privileges and property, and every part and parcel thereof, and all of the estate, right, title and interest of said party of the first part, and its successors and assigns therein or thereto; and such sale, and the deeds and conveyances so to be thereupon executed, shall be valid and effectual forever, and shall be a perpetual bar, both in law and equity, against the said party of the first part and its successors and assigns, and against all persons claiming or to claim by, from or under it or them, or any of them.

And it is further declared and agreed, that the receipt of
284 the trustee or trustees who shall make the sale hereinbefore authorized shall be a sufficient discharge to the purchaser or purchasers at such sale for his or their purchase-money, and that such purchaser or purchasers, his or their heirs or assigns or personal representatives, shall not, after paying such purchase-money and receiving such receipt of such trustee or trustees therefor, be obliged to see to the application of such purchase-money upon or for the trusts or purposes of these presents, or be in anywise answerable for any loss, misapplication or non-application of such purchase-money by the trustee or trustees.

And it is hereby declared and agreed, that the said party of the second part, or its successors in the said trust, shall out of the proceeds of said sale, or of any sale which shall, under judicial proceedings or otherwise, be made of the said premises in enforcement of the security afforded by these presents, in the first place, pay and retain the costs and expenses attending such sale, and all counsel fees and other expenses incurred by it or them in reference to the same, and a reasonable compensation for its or their own services in the premises; and also any balance which may be due to it or them on account of any disbursements or expenses paid or incurred in or about the care and management of the said premises subsequent to the taking possession thereof by it or them, including the reasonable compensation of any agent or agents who may be employed in or

about such care and management, and shall apply the residue of the proceeds of such sale, or so much thereof as may be necessary to the payment of the whole amount of principal and interest which shall then be owing and unpaid upon the bonds secured hereby, or any of them, whether the said principal, by the tenor of the said bonds, be then due or yet to become due. And in case of a deficiency of such proceeds to pay in full the whole amount of principal and interest owing or unpaid upon the said bonds, they shall be paid ratably in proportion to the amounts owing and unpaid upon them respectively, and without discrimination as between principal and interest, and without preference of the holder of any one bond over any of the others; and any surplus which may remain after
285 the full payment of the principal and interest of all of the said bonds shall be paid over to the said party of the first part, or its successors or assigns, upon lawful demand being made therefor.

And it is hereby further provided, declared, granted and agreed, that upon the happening of such event or events as is or are hereinbefore declared agreed or provided to authorize the said party of the second part, or its successors, to sell the said premises, estates, franchises, rights, privileges and property, or to take the requisite proceedings to that end, the said party of the second part, or its successors, shall be entitled, in its or their discretion, instead of taking proceedings for and making sale of said premises, estates, franchises, rights, privileges, and property, under and by virtue of the power of sale hereinbefore contained, to proceed by bill in equity, or other appropriate proceedings, in any court or courts of competent jurisdiction, to foreclose this mortgage or enforce the rights, liens and securities of the trustee or trustees and the bondholders thereunder; and thereupon said trustee or trustees shall be entitled to have the said premises, estates, franchises, rights, privileges and property hereby granted or conveyed or intended so to be, sold by judicial sale under the order or decree of such court or courts, for or towards the satisfaction of the principal and interest due or owing upon the then outstanding second-mortgage bonds, issued under or entitled to the benefit of the security of this mortgage, and for the enforcement of the rights, liens and securities of the trustee or trustees and the bondholders; and in case of such judicial sale, the net proceeds thereof shall be applicable and distributable in like manner as hereinbefore provided in respect of the net proceeds of sale of such mortgaged premises and properties, rights and franchises, under and in virtue of the power of sale hereinbefore contained; and all the stipulations and provisions in this indenture contained with reference to or consequent upon a sale of such mortgaged premises and properties, rights, immunities and franchises, when or if sold under said power of sale, shall
286 be applicable and applied as far and as nearly as may be, in case of such judicial sale being made under the order or decree of the court.

And it is hereby further provided, declared and agreed that in case of such sale as is hereinbefore authorized being made by the

party of the second part or its successors in said trust, or in case of any judicial sale being made of the said premises, properties, rights and franchises hereby mortgaged, or any part thereof in enforcement of the mortgage lien hereby created, the purchaser or purchasers at such sale shall be entitled, in making settlement for and payment of the purchase-money bidden at such sale, to turn in or use towards the payment of such purchase-money the bonds held by such purchaser or purchasers, to or towards the payment whereof the net proceeds of such sale shall be legally applicable, reckoning such bonds, or the amount so turned in or used of the same for such purpose, at such sum as would be payable out of the net proceeds of such sale to such purchaser or purchasers, as holder or holders of such bonds, for his or their just share or proportion of such net proceeds of sale, upon due apportionment of and concerning such net proceeds.

And the said party of the first part, for itself, its successors and assigns, doth hereby covenant, grant and agree to and with the said party of the second part, and its successors in the trust, and to and with the respective persons and corporations who or which shall at any time become holders of the said bonds hereby secured, or any of them, that the said party of the first part, its successors and assigns, shall and will at any time and from time to time hereafter, upon request, make, do, execute and deliver all such further and other acts, deeds and things as shall be reasonably advised, devised or required to effectuate the intention of these presents, and to assure and confirm to the said party of the second part, or its successors, all and singular the property and estate, real and personal, hereinbefore described, and hereby intended to be granted, and so as to render the same, and especially such portions thereof as shall be hereafter acquired by the said party of the first part, or its
287 successors, available for the security and satisfaction of the said bonds, according to the intent and purpose herein expressed.

And it is hereby further provided, covenanted, declared and agreed that the party of the second part and its successors in the trust hereby created are forthwith, upon the request of the party of the first part, its successors or assigns, to authenticate and certify as issued hereunder and to deliver to the party of the first part, its successors or assigns, bonds of said party of the first part or its successors of the general form and tenor above set forth, to the amount of seven million eight hundred and ninety-nine thousand dollars, and that hereafter, from time to time, when and as it shall be certified to the party of the second part or its successors in this trust as hereinafter provided that any additional railway, not included in the present main line of the railway of the party of the first part from Memphis to New Orleans, has been constructed or acquired by said party of the first part or its successors, and has become subject to this mortgage or to any supplemental mortgage subjecting the same to a lien in favor of the second-mortgage bonds issued here-

under, the said party of the second part and its successors in the trust hereby created, are, upon request of said party of the first part or its successors, to authenticate and certify as issued hereunder and deliver to the party of the first part or its successors such additional amounts of such second-mortgage bonds (bearing interest to the like extent with the other second-mortgage bonds of this issue then outstanding), as shall justly represent the capitalization into said bonds, of the difference between five per cent. interest, payable semi-annually, and four per cent. interest payable semi-annually, for the remainder of the term of said bonds, upon twenty thousand dollars for each mile of such additional road. Provided that no such additional bonds shall be issued hereunder in respect of such additional railroad when the length of such railroads in respect of which such bonds shall have been issued, together with the main line above referred to, shall amount in the aggregate to eight
288 hundred miles; and that the certificate of the president of said party of the first part or its successors to the facts, entitling the party of the first part or its successors to receive such additional bonds, under the foregoing clause hereof, shall be sufficient evidence of such facts, and shall fully protect the said party of the second part or its successors in respect to the authentication, certification and delivery of such bonds.

It is hereby further provided, covenanted, declared and agreed that the amount which shall be appropriated and applied to or towards the payment of interest on such second-mortgage bonds each six months during the currency of such bonds, shall be ascertained by the board of directors of the party of the first part or its successors, by deducting from the earnings and income of said company from such railways, the expenses of operating said railways and the keeping up and maintaining the same, with their appurtenances, and of all improvements, additions, betterments, renewals and acquisitions, and of providing and keeping up suitable equipment and the expenses of conducting the said company's business and affairs, and maintaining its corporate organization, and the interest payable each six months upon the first-mortgage four per cent. gold bonds of the said railway company or its successors, issued under or secured by the indenture of mortgage or deed of trust from said railway company to the Union Trust Company of New York, dated August 25, 1886, and that such amounts so remaining after such deductions shall be distributed and applied *pro rata* among the holders or registered owners of the second-mortgage bonds secured hereby from time to time outstanding. Provided, however, that the amounts so from time to time distributed, shall not in the aggregate exceed five per cent. per annum, from the 1st day of September, 1888, payable semi-annually, and interest which may have accrued upon the arrears of interest remaining at any time, or from time to time, unpaid.

And it is further provided covenanted, declared and agreed
289 that the said party of the first part or its successors may at its or their option at any time after two years from September

1, 1886, pay and extinguish such whole issue of second-mortgage bonds secured by this indenture upon giving 30 days' notice by publication twice a week in two newspapers of good circulation in the city of New York, of its election to pay off the same at a prescribed date and place, and in case the said company shall at such prescribed date and place pay or be ready to pay the face of said bonds with five per cent. premium thereon, and such interest as up to that date may have been earned and become due on said bonds according to the terms thereof and may remain unpaid, the said bonds shall thereupon cease to bear interest.

And it is hereby further provided, declared and agreed, that any vacancy in the office of trustee hereunder may be permanently filled by the appointment of a new trustee or new trustees, by an instrument or concurrent instruments in writing, executed under the hands and seals of the holders of a majority in interest of the then outstanding bonds secured hereby or their attorneys-in-fact thereunto authorized, but that the board of directors of the party of the first part or its successors may make a temporary appointment to fill such vacancy until a permanent appointment shall be made in the manner above prescribed.

And it is hereby covenanted and agreed, that any new trustee or new trustees, appointed as aforesaid, whether by a permanent or temporary appointment, shall immediately upon its, his or their appointment, and without any further act, deed or conveyance, become and be vested with all of the estates, trusts, rights, powers and duties of the trustee or trustees in whose place it, he or they shall have been appointed; but, nevertheless, the respective parties hereto, and their respective successors and assigns, shall and will, upon request, make, execute and deliver all such releases, conveyances and assurances as shall be appropriate to vest in and confirm and assure to such new trustee or new trustees such estates, trusts, rights, powers and duties, according to the intent above expressed.

290 And the said party of the second part does hereby accept the trust conferred upon it by these presents, but with the understanding, and it is hereby expressly provided and agreed, that it shall not be liable or accountable for the acts, defaults or neglect of any agent or agents who may, in good faith and with reasonable discretion, be appointed under and by virtue of or for the purposes of these presents to do any of the matters or things herein provided for, and that no other liability or responsibility shall, under any circumstances, be borne by or attach to it than for the exercise of reasonable diligence only in the performance of the said trusts, when action on its part for that purpose shall become necessary. The party of the second part is to be entitled to compensation for services in the execution of this trust.

In witness whereof, the parties hereto have caused their respective corporate seals to be hereunto affixed and attested by their respective

secretaries, and these presents to be signed by their respective presidents the day and year first above written.

LOUISVILLE, NEW ORLEANS & TEXAS RAILWAY COMPANY,
[CORPORATE SEAL.] By R. T. WILSON, *President.*

Attest: C. H. BOSHER, *Secretary.*

UNION TRUST COMPANY OF NEW YORK.
[CORPORATE SEAL.] EDW'D KING, *President.*

Attest: JAS. H. OGILVIE,
Secretary P. T.

291 STATE OF NEW YORK, } ss:
City and County of New York, }

Be it remembered, that on this twenty-sixth day of August, in the year of our Lord one thousand eight hundred and eighty-six, before me, William Shillaber, a duly appointed notary public in and for the city and county of New York, State of New York, and commissioner for the State of Tennessee, in and for the State of New York, residing in said city and county of New York, personally appeared Richard T. Wilson, president of the Louisville, New Orleans and Texas Railway Company, and Charles H. Bosher, secretary of the same company, to me respectively personally known, and known to me to be such officers of the said company, who being by me severally duly sworn, did depose and say: That he, said Richard T. Wilson, resides in the city of New York, in the State of New York, and that he, said Charles H. Bosher, resides in the city of New York, in the State of New York; that he, said Richard T. Wilson, is the president, and he, said Charles H. Bosher, is the secretary, of the said company; that they know the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal, and that it was so affixed thereto by order of the board of directors of the said company, and that they, the said Richard T. Wilson and Charles H. Bosher, signed their names thereto by the like order as president and secretary of said company respectively.

In witness whereof, I have hereunto set my hand and affixed my official seal, this 26th day of August, one thousand eight hundred and eighty-six.

[NOTARIAL SEAL.] WILLIAM SHILLABER,
Notary Public, City and County of New York,
Commissioner for the State of Tennessee.

[Commissioner's Seal.]

292 STATE OF NEW YORK, } ss:
City and County of New York, }

Be it remembered, that on this twenty-sixth day of August, in the year of our Lord one thousand eight *eight* hundred and eighty-

six, before me, William Shillaber, a duly appointed notary public in and for the city and county of New York, State of New York, and commissioner for the State of Tennessee, in and for the State of New York, residing in said city and county of New York, personally appeared Edward King, president of the Union Trust Company of New York, and James H. Ogilvie, secretary *pro tem.* of the same company, to me respectively personally known and known to me to be such officers of the said company, who being by me severally duly sworn, did depose and say: That he, said Edward King, resides in the city of New York, in the State of New York; and that he, said James H. Ogilvie, resides in said city of New York, in the State of New York; that he, said Edward King, is the president, and he, said James H. Ogilvie, is the secretary *pro tem.* of the said company; that they know the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal, and that it was so affixed thereto by authority of the board of trustees of the said company, and that they, the said Edward King and James H. Ogilvie, signed their names thereto by the like authority as president and secretary *pro tem.* of said company respectively.

In witness whereof, I have hereunto set my hand and affixed my official seal, this 26th day of August, one thousand eight hundred and eighty-six.

[NOTARIAL SEAL.] WILLIAM SHILLABER,
Notary Public, City and County of New York,
Commissioner for the State of Tennessee.

[Commissioner's Seal.]

293 STATE OF NEW YORK, }
City and County of New York, } *ss:*

Be it remembered, that on this twenty-sixth day of August, in the year of our Lord one thousand eight hundred and eighty-six, before me, William Shillaber, a duly appointed notary public, in and for the city and county of New York, State of New York, and commissioner for the State of Mississippi, in and for the State of New York, residing in said city and county of New York, personally appeared the within-named Richard T. Wilson, president of the Louisville, New Orleans and Texas Railway Company, and Charles H. Bosher, secretary of the same company, to me respectively personally known, and known to me to be such officers of the said company, who acknowledged that in pursuance of authority in them vested by the board of directors of said company, and as such president and secretary they signed and delivered the foregoing instrument, and affixed thereto the corporate seal of said company, on the day and year therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal this 26th day of August, one thousand eight hundred and eighty-six.

[NOTARIAL SEAL.] WILLIAM SHILLABER,
Notary Public, City and County of New York,
Commissioner for the State of Mississippi.

[Commissioner's Seal.]

294 STATE OF NEW YORK, } ss:
City and County of New York, }

Be it remembered, that on this twenty-sixth day of August, in the year of our Lord one thousand eight hundred and eighty-six, before me, William Shillaber, a duly appointed notary public, in and for the city and county of New York, and State of New York, and commissioner for the State of Mississippi, in and for the State of New York, residing in said city and county of New York, personally appeared Edward King, president of the Union Trust Company of New York, and James H. Ogilvie, secretary *pro tem.* of the same company, to me respectively personally known, and known to me to be such officers of said company, who acknowledged to me that in pursuance of authority in them vested by the board of trustees of said company, and as such president and secretary, they signed and delivered the foregoing instrument and affixed thereto the corporate seal of said company, on the day and year therein mentioned, for the purposes therein expressed.

In witness whereof, I have hereunto set my hand and affixed my official seal this 26th day of August, one thousand eight hundred and eighty-six.

[NOTARIAL SEAL.] WILLIAM SHILLABER,
Notary Public, City and County of New York,
Commissioner for the State of Mississippi.

[Commissioner's Seal.]

295 STATE OF NEW YORK, } ss:
City and County of New York, }

Be it remembered, that on this twenty-sixth day of August, in the year of our Lord one thousand eight hundred and eighty-six, before me, William Shillaber, a duly appointed notary public in and for the city and county of New York, State of New York, and commissioner for the State of Louisiana, in and for the State of New York, residing in said city and county of New York, personally appeared Richard Thornton Wilson, president of the Louisville, New Orleans and Texas Railway Company, and Charles H. Bosher, secretary of the same company, to me respectively personally known and known to me to be such officers of the said company, and to be the same persons described in and who executed the foregoing instrument in my presence and in that of the two witnesses whose names are thereto subscribed as such, who being by me severally duly sworn, did depose and say: That he, said Richard Thornton Wilson, resides in the city of New York, in the State of New York, and that he, said Charles H. Bosher, resides in the city of New York, in the State of New York; that he, said Richard Thornton Wilson, is the president, and he, said Charles H. Bosher, is the secretary of the said company; that they know the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal, and that it was so affixed thereto by order of the board of directors of the said company, and that they, the said Richard Thornton Wilson and Charles H. Bosher, signed their names thereto by the like order as president and secretary of said company re-

spectively, and thereupon acknowledged that they had signed, sealed, and delivered such instrument as the voluntary act
296 and deed of said company, and as their own voluntary act and deed, for the considerations, uses and purposes therein expressed.

In witness whereof, I have hereunto set my hand and affixed my official seal, this twenty-sixth day of August, one thousand eight hundred and eighty-six.

R. T. WILSON.
C. H. BOSHER.

DANIEL OAKEY,
E. MORA DAVISON, *Witnesses.*

[NOTARIAL SEAL.] WILLIAM SHILLABER,
Notary Public, City and County of New York,
Commissioner for the State of Louisiana.

[Commissioner's Seal.]

297 STATE OF NEW YORK, } ss:
City and County of New York, }

Be it remembered, that on this twenty-sixth day of August, in the year of our Lord one thousand eight hundred and eighty-six, before me, William Shillaber, a duly appointed notary public in and for the city and county of New York, State of New York, and commissioner for the State of Louisiana, in and for the State of New York, residing in said city and county of New York, personally appeared Edward King, president of the Union Trust Company of New York, to me personally known, and known to me to be the president of the said company, and to be the same person described in and who executed the foregoing instrument in my presence and in that of the two witnesses whose names are thereto subscribed as such, who being by me duly sworn, did depose and say: That he resides in the city of New York, in the State of New York, and is the president of the said company; that he knows the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal, and that it was so affixed thereto by authority of the board of trustees of the said company, and that he signed his name thereto by the like authority as president of said company, and the said King thereupon acknowledged that he had signed, sealed and delivered the said instrument as the voluntary act and deed of said company, and as his own voluntary act and deed for the considerations, uses and purposes therein expressed.

In witness whereof, I have hereunto set my hand and affixed my official seal, this 26th day of August, one thousand eight hundred and eighty-six.

EDW'D KING.

E. MORA DAVIDSON,
JAS. H. OGILVIE, *Witnesses.*

[NOTARIAL SEAL.] WILLIAM SHILLABER,
Notary Public, City and County of New York,
Commissioner for the State of Louisiana.

[Commissioner's Seal.]

298 *Mortgage, August* 27, 1886.

Deed of trust for land-grant income bonds.

This indenture, made the twenty-seventh day of August, eighteen hundred and eighty-six, between the Louisville, New Orleans and Texas Railway Company, a corporation created and organized under the laws of the States of Tennessee, Mississippi and Louisiana, party of the first part, and Edward H. Pardee, of the city of New York in the State of New York, and Albert Crolius, of the city of Brooklyn in the State of New York, as trustees, as hereinafter mentioned, parties of the second part.

Whereas, the party of the first part has been formed by the consolidation, under the laws of the States of Tennessee, Mississippi and Louisiana, of the Tennessee Southern Railroad Company, a corporation created and existing under the laws of the State of Tennessee, the New Orleans, Baton Rouge, Vicksburg and Memphis Railroad Company and the Memphis and Vicksburg Railroad Company, corporations created and existing under the laws of the State of Mississippi, and the New Orleans and Mississippi Valley Railroad Company, a corporation created and existing under the laws of the State of Louisiana, and is the owner of a line of railway extending from Memphis in the State of Tennessee, to New Orleans in the State of Louisiana, and is authorized to construct branches thereto.

And whereas, the party of the first part, in accordance with the authority vested in it on that behalf, is about to execute and issue from time to time (but with the limitation hereinafter prescribed in respect to the aggregate amount thereof which may at any time be outstanding), its land-grant income bonds for one thousand dollars each, of the general form and tenor following, to wit:

299 No. —. $1,000.

Louisville, New Orleans and Texas Railway Company.

Land-grant Income Bond.

The Louisville, New Orleans and Texas Railway Company, for value received, promises to pay to the bearer hereof the sum of one thousand dollars at its agency in the city of New York fifty years after date, and further promises to pay the bearer hereof in the meantime, annually, on the first day of November in each year, at its agency in the city of New York, on presentation of this bond for endorsement of such payment thereon, such interest on such principal sum, (not exceeding, however, six per centum per annum,) as the net earnings and income of said railway company from its railways in each current year ending on the first day of July next preceding the day above fixed for the payment of the annual interest hereon shall suffice to pay upon all the bonds of this issue outstanding on such first day of July, after first paying from the earnings and income of said company from such railways

the expenses of operating said railways, and of keeping up and maintaining the same, with their appurtenances, and of all improvements, additions, betterments, renewals and acquisitions, and of providing and keeping up suitable equipment, and the expenses of conducting said company's business and affairs, and maintaining its corporate organization, and after likewise paying from said earnings and income the interest payable from time to time upon such other bonds of said company or its successors as shall be from time to time outstanding, and such amounts as may be prescribed to be paid to or towards sinking funds for the redemption thereof.

And if in any year the amount as ascertained and determined to be applicable to the payment of such annual interest on the bonds of this issue shall not be sufficient for the full payment of
300 interest at the rate of six per centum per annum thereon, the amount of such deficiency, whether partial or total, shall not be accumulative, nor be made up out of any surplus income of subsequent years, but shall be absolutely waived, relinquished and discharged.

This bond is one of a series of bonds of said railway company for one thousand dollars each, numbered consecutively from 1 (one) upwards, issued and to be issued at a rate not exceeding twenty thousand dollars per mile of railroad constructed ready for operation, all of which bonds are equally secured by a certain indenture of mortgage or deed of trust, bearing date the 27th day of August, one thousand eight hundred and eighty-six, executed by the said railway company to Edward H. Pardee and Albert Crolius, as trustees, conveying upon the terms and conditions therein expressed, all such lands of said railway company situated in the counties of DeSoto, Tunica, Quitman, Coahoma, Bolivar, Washington, Issaquena, Sharkey, Warren and Tate, in the State of Mississippi, as are not and shall not be required for the use of said railway company or its successors in the construction or operation of its or their railroads or branches.

This bond shall not become obligatory unless the certificate endorsed hereon is signed by the trustees under the indenture of mortgage or deed of trust securing the same.

In witness whereof, the said Louisville, New Orleans and Texas Railway Company has caused its corporate seal to be hereto affixed, and these presents to be attested by the signatures of its president and secretary, the first day of September, in the year of our Lord one thousand eight hundred and eighty-six.

LOUISVILLE, NEW ORLEANS AND TEXAS RAILWAY COMPANY,

By —— ——, *President.*

—— ——, *Secretary.*

301 And whereas, the said party of the first part desires to secure the due payment of said bonds by this mortgage:

Now, therefore, this indenture witnesseth: That the said party of the first part, in consideration of the premises, and for the purpose of securing the due payment of the aforesaid bonds, in accordance

with the terms, provisions and conditions thereof, and in further consideration of one dollar to the said party of the first part in hand paid at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, assigned, released, conveyed and confirmed, and by these presents doth grant, bargain, sell, assign, release, convey and confirm unto the said Edward H. Pardee and Albert Crolius, trustees as aforesaid, parties of the second part, and their successors or successor in said trust, all such lands of said party of the first part situated in the counties of De Soto, Tunica, Quitman, Coahoma, Bolivar, Washington, Issaquena, Sharkey, Warren and Tate, in the State of Mississippi, as are not and shall not be required for the use of said party of the first part, or its successors, in the construction or operation of its or their railroads or branches, together with the rents, issues and profits thereof, and also the deferred payments, still remaining unpaid, on account of the purchase price of the like lands sold by said party of the first part since the 25th day of August, 1885, and also (subject to the lien of the first mortgage from the party of the first part to the Metropolitan Trust Company of the City of New York, dated September 18, 1884; and the first mortgage to the Union Trust Company of New York, dated August 25, 1886; and the second mortgage to the Union Trust Company of New York, dated August 26, 1886), all the rents, issues, tolls, incomes, earnings and profits of its railways or railway lines, which the said party of the first part now possesses, or is entitled, to or may become possessed of or entitled to.

To have and to hold, unto the said parties of the second
302 part, and their successors or successor, in the said trust, but in trust for, and for the use, benefit and security of, all and singular the persons and corporations who or which shall, from time to time, be or become lawful owners or holders of any of said land-grant income bonds, and for securing the due payment of such bonds respectively, with *pro rata* equality, without preference or priority of any of such bondholders over any of the others.

And the party of the first part doth declare and covenant that the lands herein conveyed are free from all incumbrance whatsoever, except the mortgage or deed of trust between the parties hereto, dated September 18, 1884, and the supplemental deed of trust between the same parties, dated August 25, 1885, and that it has not caused or suffered to be placed thereon any other lien or incumbrance prior or paramount to the lien of this mortgage.

Provided always, nevertheless, and these presents are upon the express condition, that if the said party of the first part, its successors or assigns, do and shall well and truly pay the principal and interest of said land-grant income bonds when and as the same shall become due and payable, in accordance with the terms, provisions and conditions thereof, then these presents and the estates, rights and interests thereby granted or conveyed shall cease and determine, and become null and void.

And provided further, and it is an express provision and condition of this indenture, that the party of the first part, or its succes-

sors, notwithstanding the execution of these presents, shall be permitted at any time, and from time to time, by means of its land department, or otherwise, to lease, sell and dispose of the lands mortgaged hereby, or any part thereof, upon such terms as may be satisfactory to it, and in order that it may be enabled to give title thereto free and discharged from this mortgage, it is an express provision and condition of this indenture, that the trustees hereunder shall, at all times, upon payment to them of the purchase-money of such sales, or the transfer to them of the evidence of indebted-
303 ness given therefor by the purchaser, together with such security, if any, as may be taken therefor, execute full releases of the lien hereof, either by indorsement on the deeds to such purchasers, or by separate deeds or releases, as may be required of them.

And it is further agreed, that it shall be the duty of the parties of the second part, or their successors, to apply the gross receipts from such sales or disposition thereof, and collections of such deferred payments above mentioned, as follows:

First. To the payment of taxes and assessments accrued upon such lands, or imposed in respect thereof, since the 25th day of August, 1885, or which may hereafter accrue upon, or be imposed in respect of, such lands.

Second. To the payment of the expenses incurred since the 25th day of August, 1885, or which may hereafter be incurred in the care, custody, management, improvement, and in the cultivating, leasing and selling of such lands. The application of the money to these purposes shall be made from time to time, pursuant to and in accordance with the direction of the railway company; and the said trustees shall at all times apply any moneys or evidences of indebtedness held by them as purchase-money, or deferred payments on account of purchase-money, of any of such lands to the purposes hereinabove referred to, on the requisition of said company through its proper officers.

Third. The net proceeds of such sales or disposition thereof, and of collections of such deferred payments, after payment of such amounts as are prescribed in clauses "first" and "second" hereof to be paid, shall be applied *pro rata* to or towards the payment and discharge of the said land-grant income bonds issued and secured hereunder, upon the production of such bonds for the endorsement of such payments thereon, but the trustees hereunder shall not be required to make such application of proceeds to the payment
304 and discharge of said land-grant income bonds, except when and as they shall have in their hands applicable to such purpose moneys sufficient to pay at least one per cent. upon such land-grant income bonds then outstanding.

Provided, however, and the foregoing provisions and stipulations in respect to the sales of lands and the disposition to be made of the proceeds thereof, and of collections of deferred payments on lands sold, are subject to the express condition that until all of the income bonds of the Louisville, New Orleans and Texas Railway Company issued under the deed of trust securing income bonds, dated September 18, 1884, and the supplemental deed of trust se-

curing the same, dated August 25, 1885, shall be surrendered and cancelled, and the mortgages or deeds of trust securing the same satisfied of record, the provisions of said deed of trust and supplemental deed of trust, dated September 18, 1884, and August 25, 1885, respectively, shall continue and remain in full force and effect; and all sales made in accordance therewith shall be valid and effectual as well against the rights of the trustees hereunder, and the holders of bonds secured hereby as in respect of the trustees under said deeds of trust and the holders of the income bonds therein referred to, and the moneys received from the proceeds of the sales of land and from collections of deferred payments, shall be held, dealt with and disposed of as prescribed in said deed of trust and supplemental deed of trust, dated September 18, 1884, and August 25, 1885, respectively, and until such income bonds shall be so surrendered and cancelled, and such deeds of trust satisfied of record, the provisions hereinbefore contained in respect to the disposition of the proceeds of land sales and collections of deferred payments, so far as the same may differ from the provisions of said deed of trust and supplemental deed of trust hereinbefore referred to, shall not take effect, but when all of said income bonds shall be surrendered and cancelled, and said mortgages or deeds of trust, dated September 18, 1884, and August 25, 1885, respectively, securing the same, shall be satisfied of record, then the provisions
305 of this deed of trust in respect to land sales and the disposition of the proceeds thereof and of collections of deferred payments shall take full effect.

And provided further, and it is likewise an express condition of this indenture, that until the party of the first part, its successors and assigns, shall have made some default in the payment of the said bonds hereby secured, or of some of such bonds, the said party of the first part, its successors and assigns, shall be entitled to continue in the possession, use and enjoyment of the said mortgaged premises, and in receipt of the income, rents and profits thereof.

But it is an express condition and agreement that the rents, issues and profits of the said lands shall be applied from time to time as they shall be received by the company to such payments as at such time are authorized hereinbefore to be made out of the proceeds of the sales of said lands.

And it is hereby further provided, declared, granted and agreed, that the bonds which may be issued from time to time under this mortgage shall not exceed twenty thousand dollars for each mile of railroad at the time constructed ready for operation, and that the said trustees, or their successors or successor in the trust, shall accept a certificate signed by the president of the party of the first part or its successors, as conclusive evidence of the number of miles of road constructed ready for operation, and the said trustees or their successors shall not be required to look beyond the certificate of the president as herein provided and shall not be responsible in any event for any act done in pursuance of such certificate.

And it is hereby further provided, declared, granted and agreed, that the bonds which have been, or are to be, issued hereunder are

and shall be serial numbers from one to ten thousand, in-
306 clusive, and that no more shall be issued thereunder, and none other shall participate in the benefits or security hereof.

And it is hereby further provided, declared, granted and agreed, that in case default shall be made in the payment of the principal of said bonds hereby secured, or of any of such bonds, when such principal shall be due and payable, then, and in that event, the said parties of the second part, or their successors in the said trust, shall be entitled to, and may, and upon the requisition in writing to that effect of holders of a majority of such bonds hereby secured, and upon being duly and properly indemnified by such bondholders against expense or loss in the premises, shall, either personally, or by agent or attorney, enter into and upon such part of the said mortgaged premises as shall then remain subject to the lien and operation of this indenture of mortgage, and shall have, hold and possess the same, with the rights and privileges thereunto appertaining.

And thereupon it shall be lawful for the said parties of the second part hereto, or their successors in the trust, either personally or by attorney or agent duly constituted therefor by the said trustees, to sell and dispose of all such part of the said mortgaged premises as shall then remain subject to the lien and operation of this indenture of mortgage, at public auction to the highest bidder, either in the city of New York, in the State of New York, or in the city of Vicksburg, in the State of Mississippi, as the said trustees may in their discretion designate, and at such time as they may appoint therefor; provided, however, and it is hereby declared and agreed, that, preparatory to such auction sale as aforesaid, the said trustees shall give public notice of the time and place, when and where the same is to be made, and of the property to be sold, by advertisement in a newspaper published in the said city of Vicksburg, and in two newspapers of good circulation published in the city of New York, and that such advertisements shall be published in each of such newspapers at least twice in each week for the twelve suc-
307 cessive weeks next previous to the day fixed for such sale, with the right, however, to the trustees, after such notice shall have been so published, to adjourn the sale so advertised, from time to time, in the discretion of the trustees, giving reasonable notice or notices of such adjournment or adjournments, and, after so adjourning, to make the sale at the time to which it may be finally adjourned. And it shall be lawful for the said trustees, and they are expressly authorized and empowered upon making any such auction sale of such part of such mortgaged premises as above authorized, to make and deliver to the purchaser or purchasers thereof at such sale, upon his or their paying the purchase-money therefor, a good and sufficient deed or deeds of conveyance in the law of the same, which auction sale and the deed or deeds thereupon made as above authorized, it is hereby granted, declared and agreed, shall be good and valid in the law, and shall operate to vest in the grantee or grantees in such conveyances such part of such mortgaged premises so sold in fee-simple and absolutely; and

such deed or deeds shall operate to foreclose all equity of redemption of the said party of the first part and its successors or assigns, and shall be a perpetual bar both at law and equity, against the said party of the first part, its successors and assigns, and against any and all persons or corporations claiming, or to claim, such part of such mortgaged premises so sold and conveyed, or any thereof, by, from, through, or under the said party of the first part, or its successors or assigns.

And it is further provided, declared and agreed, that, from the proceeds of such sale made as aforesaid, the said trustees shall be entitled, in the first place, to deduct and retain or pay for all proper charges or expenses of, or incident to, such advertisement, foreclosure, and sale, and conveyance, including attorney's and counsel's fees, and any and all unreimbursed advances, expenses, charges, and liabilities which may have been properly made or incurred by such trustees in taking possession of such part of said mortgaged
308 premises, or managing the same while in their possession, or in arranging for and completing the sale aforesaid; and also all unreimbursed payments which may have been made by the said trustees for taxes or assessments, and for charges or liens prior to the lien of this indenture, if any such there shall be, as well as the just and reasonable compensation for the services of such trustees in the premises, and the said trustees shall apply the residue of the proceeds of such sale, after the deductions and payments above authorized to be first made thereout, to the payment of the principal of the said land-grant income bonds by this mortgage secured, or intended so to be, or of such of said bonds as may at that time remain outstanding and unpaid; and likewise to the payment of the interest which, according to the provisions, stipulations and conditions of said bonds, shall have accrued up to that time upon the principal of the said bonds hereby secured, and which shall remain unpaid and properly payable, with any interest accrued on such interest after default, without discrimination or preference as between principal and interest, but ratably according to the aggregate amount of such unpaid principal and accrued and unpaid interest, which payments shall be made to the bondholders, without any discrimination or preference between them on account of the time of the actual issuing of the bonds, or the time of maturing of the interest thereon.

And it is further declared and agreed, that the receipt of the trustees who shall make the sale hereinbefore authorized, shall be a sufficient discharge to the purchaser or purchasers at such sale for his or their purchase-money, and that such purchaser or purchasers, his or their heirs or assigns, or personal representatives, shall not, after paying such purchase-money and receiving such trustees' receipt therefor, be obliged to see to the application of such purchase-money upon or for the trusts or purposes of these presents, or be in anywise answerable for any loss, misapplication, or non-application of such purchase-money by the trustees.

309 And it is hereby further provided, declared and agreed, that the trustees under this indenture, or their successors,

upon payment to them of their reasonable claims of charges for services rendered in the trust up to that time, may at any time be removed from the trust by instrument in writing, or concurrent instruments in writing, under the hands and seals of the holders of a majority in interest of the then outstanding bonds secured hereby, or their attorneys-in-fact thereunto authorized.

And it is hereby further provided, declared and agreed, that any vacancy in the office of trustee hereunder may be permanently filled by the appointment of a new trustee or new trustees, by an instrument or concurrent instruments in writing, executed under the hands and seals of the holders of a majority in interest of the then outstanding bonds secured hereby, or their attorneys-in-fact thereunto authorized, but that the board of directors of the party of the first part or its successors may make a temporary appointment to fill such vacancy until a permanent appointment shall be made in the manner above prescribed.

And it is hereby covenanted and agreed, that any new trustee or new trustees, appointed as aforesaid, whether by a permanent or temporary appointment, shall immediately upon his, its or their appointment, and without any further act, deed or conveyance, become and be vested with all of the estate, trust, rights, powers and duties of the trustee or trustees in whose place he, it or they shall have been appointed; but, nevertheless, the respective parties hereto, and their respective successors and assigns shall and will, upon request, make, execute and deliver all such releases, conveyances and assurances as shall be appropriate to vest in and confirm and assure to such new trustee or new trustees such estate, trust, rights, powers and duties, according to the intent above expressed.

310 And it is hereby further provided, declared and agreed, that the trustees hereunder shall at once execute a good and sufficient bond, with sufficient surety, in the penalty of $50,000, to secure the faithful performance of the trusts herein assumed, payable to the party of the first part for the benefit of itself and the holders of the bonds herein secured; and shall be entitled to receive reasonable compensation for all services performed, and the repayment of all necessary or proper disbursements made, by them in and about the execution of the trusts hereby created, which compensation, if there shall have been an entry by the trustees themselves, or through a receiver or receivers, upon the mortgaged premises, or a sale made of such premises in enforcement of this mortgage, shall be payable out of such mortgaged premises and the proceeds thereof.

The trustees shall not be required to take any steps in the execution of this trust which may subject them to liability or expense unless the holders of the bonds secured hereby, or some of them, shall, from time to time, as required by the trustees, give sufficient security to indemnify them against such liability or expense. The said trustees shall be at liberty to appoint counsel learned in the law in all suitable cases, and the trustees shall not be liable for any default or neglect of any cotrustee, or of any agent by them appointed, when such agent shall have been selected with reasonable discretion, and shall only be required to exercise good faith and

ordinary diligence in the performance of their duties under this indenture. It is further agreed that the trustees may at any time resign and discharge themselves from their trust upon giving to the party of the first part, or its successors, ninety days' notice of their purpose so to do, unless a shorter notice may be accepted by the party of the first part or its successors therefor.

And the said party of the first part, for the considerations aforesaid, doth hereby covenant and agree to and with the said parties of the second part and their successors, as trustees, and likewise to and with the holders from time to time of the several bonds issued under and secured by this indenture, that the said party of the first part, its successors and assigns, shall and will from time to time, and at all times hereafter, upon reasonable request, make, do, execute, acknowledge, and deliver all such further acts, deeds, conveyances and assurances in the law, for the better and more effectually assuring, conveying and confirming unto the said trustees and their successors in the trust hereby created, upon the trusts and for the uses and purposes herein expressed or intended, all and singular the premises hereby mortgaged or conveyed in trust, or agreed or purporting or intended so to be, as by such trustees or bondholders, under the advice of counsel, shall be reasonably advised, devised or required.

311

And the said parties of the second part do hereby accept the trusts hereby created, upon the terms and conditions hereinbefore expressed.

In witness whereof the said party of the first part hath hereto affixed its corporate seal, and caused the same to be attested by its president and secretary; and the said parties of the second part respectively have hereunto set their hands and seals the day and year first above written.

LOUISVILLE, NEW ORLEANS AND TEXAS RAILWAY COMPANY,
By R. T. WILSON, *President.*

[Corporate Seal.]

Attest: C. H. BOSHER, *Sec'y.*

E. H. PARDEE. [SEAL.]
ALBERT CROLIUS. [SEAL.]

312 STATE OF NEW YORK, }
City and County of New York, } *ss:*

Be it remembered that on this twenty-seventh day of August, in the year of our Lord one thousand eight hundred and eighty-six, before me, William Shillaber, a duly appointed notary public, in and for the city and county of New York, State of New York, and commissioner of the State of Mississippi in and for the State of New York, residing in said city and county of New York, personally appeared the within-named Richard T. Wilson, president of the Louisville, New Orleans and Texas Railway Company, and Charles H. Bosher, secretary of the same company, to me respectively person-

ally known, and known to me to be such officers of the said company who acknowledged that in pursuance of authority in them vested by the board of directors of said company, and as such president and secretary they signed and delivered the foregoing instrument, and affixed thereto the corporate seal of said company, on the day and year therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal, this 27th day of August, one thousand eight hundred and eighty-six.

[Notarial Seal.]

WILLIAM SHILLABER,
Notary Public, City and County of New York,
Commissioner of the State of Mississippi.

[Commissioner's Seal.]

313 STATE OF NEW YORK, } ss:
City and County of New York, }

Be it remembered that on this twenty-seventh day of August, in the year of our Lord one thousand eight hundred and eighty-six, before me, William Shillaber, a duly appointed notary public in and for the city and county of New York, and State of New York, and commissioner for the State of Mississippi in and for the State of New York, residing in said city and county of New York, personally appeared the within-named Edward H. Pardee and Albert Crolius, to me respectively personally known, and known to me to be two of the persons who executed the foregoing instrument, and acknowledged to me that they signed and delivered the foregoing instrument, and affixed thereto the corporate seal of said company, on the day and year therein mentioned, for the purposes therein expressed.

In witness whereof, I have hereunto set my hand and affixed my official seal, this 27th day of August, one thousand eight hundred and eighty-six.

[Notarial Seal.]

WILLIAM SHILLABER,
Notary Public, City and County of New York,
Commissioner of the State of Mississippi.

[Commissioner's Seal.]

314 *Mortgage, November* 27, 1886.

STATE OF NEW YORK, } ss:
County of New York, City of New York, }

Be it known, that on this twenty-seventh day of November, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States of America the one hundred and eleventh, before me, William Shillaber, a commissioner of the State of Louisiana for the State of New York, duly commissioned and qualified, and residing in the city of New York, and

in the presence of the witnesses hereinafter named and undersigned, personally came and appeared:

Richard Thornton Wilson, of the State, county and city of New York, the duly elected and qualified president of the Louisville, New Orleans and Texas Railway Company, a corporation created, organized and existing under the laws of the States of Tennessee, Mississippi and Louisiana, domiciled at the city of Memphis, in the State of Tennessee, and whose domicile in the State of Louisiana, in so far as the laws of said State require that it should have a domicile in the same, is in the parish of Orleans; said Wilson acting in his said capacity of president, and for and on behalf of said corporation, pursuant to the authority in him vested by the stockholders thereof at their meeting held at the office of said company in said city of Memphis, on the 19th day of August, 1886, a duly certified copy of the resolutions adopted in the premises by said stockholders being hereto annexed for reference and made part hereof, and also pursuant to the authority in him vested by the board of direct-
315 ors thereof at their meeting held at the office of said company on the 24th day of August, 1886, a duly certified copy of the resolutions adopted in the premises by said board of directors being also hereto annexed for reference and made part hereof.

Which said Richard Thornton Wilson declared in his said capacity of president, and for and on behalf of said Louisville, New Orleans and Texas Railway Company, and in pursuance of the provisions of said resolutions aforesaid, that,

Whereas, an indenture or deed of mortgage and trust was made on or about the twenty-sixth day of August, 1886, by and between the Louisville, New Orleans and Texas Railway Company aforesaid, and the Union Trust Company of New York, a corporation created, organized and existing under the laws of the State of New York, whereby said railway company did mortgage and convey in trust unto said trust company, its successors and assigns:

All the railways and railway lines of the said Louisville, New Orleans and Texas Railway Company, and its successors, whether constructed or to be constructed or acquired, until the length of such railways shall amount, in the aggregate, to eight hundred miles, and all their appurtenances, including therein all lands and rights of way, superstructure, rails, tracks, side tracks, or sidings, bridges, buildings, fences, depots, station-houses, shops, warehouses, car-houses, engine-houses, machine shops, repair shops, buildings erections and structures necessary to the operation of said railways or said railway lines, and all and singular the rolling stock, equipment and machinery, appertaining thereto, whether now owned or hereafter to be acquired; and also, all the rents, issues, tolls, incomes, earnings and profits of such railways and railway lines; and also, all the rights, privileges, immunities and franchises relating or pertaining to such railways or railway lines which the said Louisville, New Orleans and Texas Railway Company now possesses, owns, or is entitled unto, or it or its successors may hereafter become possessed of or entitled unto; and also, all the estate,
316 right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said railway

company, and its successors, of, in and to the premises, and every part and parcel thereof with the appurtenances;

And whereas, said mortgage and deed of trust was made for the purpose of securing the payment of nine thousand bonds, each for a like and equal sum of one thousand dollars, all of which will appear from said mortgage and deed of trust which has been duly recorded in the mortgage books and registered in the conveyance books of the parish of Orleans in the State of Louisiana, on the 25th day of November, 1886;

And whereas, it has been and is deemed and determined to be desirable for the better protection and security of said bonds issued as aforesaid, and under due and legal authority, that a mortgage should be executed to secure the same in the manner and form customary under the laws of the State of Louisiana:

Now, therefore, said Richard Thornton Wilson declared in his said capacity of president, and for and on behalf of said Louisville, New Orleans and Texas Railway Company, and its successors, that, in pursuance of the provisions of said resolutions hereto annexed, said railway company and its successors are about to issue nine thousand bonds, each for the sum of one thousand dollars, to be numbered from 1 to 9,000, both inclusive, with the seal of the railway company affixed to each by its secretary, and signed for and on behalf of said company by its president, and dated September 1st, 1886, and payable on the first day of September, 1934, with interest thereon in the meantime as expressed in said bonds, a copy of which is hereinafter set forth, such payments of principal and interest to be made at the agency of said company in the city of New York, as stated in said bonds; and said bonds being of the general form and tenor following, viz:

317 UNITED STATES OF AMERICA.

Louisville, New Orleans and Texas Railway Company.

No. —. *Second-mortgage Bond.* $1,000.

The Louisville, New Orleans and Texas Railway Company, for value received, promises to pay, at its agency in the city of New York, to the bearer hereof, or, if registered, to the registered owner hereof, one thousand dollars, on the first day of September, one thousand nine hundred and thirty-four, and also in the meantime, on the first day of March and September in each year after the year 1888, to pay at such agency, on presentation of this bond for endorsement of such payment thereon, such interest on such principal sum, not exceeding five per centum per annum, payable semi-annually, from the 1st day of September, 1888, and interest on interest in arrears, as the net earnings of said railway company shall suffice to pay on the entire issue of which this bond is one, after making such deductions from the said net earnings as are provided for in the mortgage or deed of trust securing the same hereinafter referred to.

This bond is one of a series of second-mortgage bonds of like

tenor and amount numbered consecutively from 1 upward, which are secured by a mortgage or deed of trust made by the said railway company to the Union Trust Company of New York, as trustee, dated August 26, 1886, and are subordinate in lien to the first-mortgage four per cent. gold bonds of said railway company or its successors, issued or to be issued under an indenture of mortgage or deed of trust, dated August 25, 1886. Each successive holder of this bond accepts the same subject to the terms, conditions and limitations expressed in said mortgage or deed of trust securing the same, and waives all right of action hereon except in accordance therewith.

318 The interest on this bond shall be payable only out of the net earnings of the said railway company, after making the deductions therefrom provided for in the said mortgage or deed of trust securing the same, and shall not be due at any time during the currency of this bond, until the amount payable in respect thereof shall have been determined and declared by the board of directors of said railway company.

But such interest shall be cumulative, and in case less than two and a half per centum be paid in any half year, the unpaid interest, with interest on such unpaid interest at the rate of five per centum per annum, shall be carried forward to the credit of this bond, for subsequent payment as such net earnings after such deductions shall suffice therefor, or at the maturity of the bond. All arrears of such interest, with the accrued interest thereon (so far as the same shall not have been previously paid), shall be paid with the principal of this bond, on the 1st day of September, 1934, and no dividend shall be paid upon the stock of the company or its income bonds until interest hereon, calculated at the rate of five per centum per annum from the 1st day of September, 1888, and payable semi-annually, together with the accrued interest on any arrears of such interest shall have been fully paid.

It is further provided that the railway company or its successors may, at its or their option, at any time after two years from the date hereof, pay and extinguish such whole issue of second-mortgage bonds upon giving thirty days' notice in such manner as is prescribed in such mortgage or deed of trust securing the same, of its election to pay off such bonds at a prescribed date and place, and in case the said company shall at such prescribed date and place pay or be ready to pay the face of said bonds with five per cent. premium thereon, and such interest as up to that date may have been earned and become due on said bonds according to the terms thereof, and may remain unpaid, the said bonds shall thereupon cease to bear interest.

319 This bond shall pass by delivery unless registered. After registration, certified hereon by the company's transfer agent, no transfer, except upon the company's books, shall be valid unless the last registration shall have been to bearer.

This bond shall not be valid or obligatory until the certificate authenticating the same and endorsed hereon shall have been signed by the trustee hereunder.

In witness whereof, the said railway company has caused its corporate seal to be hereto affixed and attested by its secretary, and these presents to be signed by its president, the first day of September, one thousand eight hundred and eighty-six.

That the amount of said bonds in the aggregate is nine million dollars.

That, in order to secure the full, faithful and punctual redemption and payment of each and all of the aforesaid bonds, to any future holder or holders thereof, and to each and every one of them, by said railway company and its successors, when the same shall become due and payable, respectively, said Richard Thornton Wilson moreover declared in his said capacity, and pursuant to the authority aforesaid, that he does, by these presents, in the name of the said Louisville, New Orleans and Texas Railway Company and of its successors, specially mortgage, affect and hypothecate unto and in favor of said Union Trust Company of New York, its successors and assigns, as well as in favor of any and all such person or persons, institution or institutions as may hereafter become the holder or holders, or owner or owners of the aforesaid bonds, or of either or any of them, or of any number thereof, the following-described property, viz:

All the railways and railway lines of the said Louisville, New Orleans and Texas Railway Company, and its successors, whether constructed or to be constructed or acquired, until the length
320 of such railways shall amount in the aggregate to eight hundred miles, and all their appurtenances, including therein all lands and rights of way, superstructure, rails, tracks, side tracks, or sidings, bridges, buildings, fences, depots, station-houses, shops, warehouses, car-houses, engine-houses, machine shops, repair shops, buildings, erections, and structures necessary to the operation of said railways or said railway lines, and all and singular the rolling stock, equipment and machinery appertaining thereto, whether now owned or hereafter to be acquired; and, also, all the rents, issues, tolls, incomes, earnings and profits of such railways and railway lines; and, also, all the rights, privileges, immunities, and franchises relating or pertaining to such railways or railway lines, which the said Louisville, New Orleans and Texas Railway Company now possesses, owns or is entitled unto, or it or its successors may hereafter become possessed of or entitled unto; and, also, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said railway company, and its successors, of, in and to the premises, and every part and parcel thereof, with the appurtenances; and the portion of said railways, lying in the State of Louisiana, and now built, is the railroad extending from the city of New Orleans, through the parishes of Orleans, Jefferson, St. Charles, St. John the Baptist, St. James, Ascension, Iberville, East Baton Rouge and East Feliciana, to the boundary line between the States of Mississippi and Louisiana, and being the same railroad lately belonging to and heretofore commonly known as the railroad of the New Orleans and Mississippi Valley Railroad Company.

Said Wilson, president as aforesaid, hereby mortgaging and

hypothecating said property as aforesaid, and moreover promising for and binding said Louisville, New Orleans and Texas Railway Company and its successors and assigns, not to alienate, deteriorate or encumber, or in anywise affect, the hereinbefore-described and herein mortgaged and hypothecated railways and their appurtenances, as hereinabove described, or any part or parcel thereof, to the prejudice of this act and of these presents, save, except,
321 and in so far as, and in the manner, set forth in said deed of mortgage and trust aforesaid.

This mortgage is executed, and said bonds are to be issued, subject to all the terms, conditions and limitations of said deed of mortgage and trust aforesaid, the sole and true intent and meaning of this instrument being to ratify and give greater validity to said deed of trust, as a mortgage, by clothing the same with the forms customary in the State of Louisiana in executing mortgages on property.

And now, personally came and appeared the Union Trust Company of New York, through James H. Ogilvie, its second vice-president, hereto duly authorized by resolution of the executive committee of the board of trustees of said company, of which a duly certified copy is hereto annexed and made part hereof, and the said Ogilvie, after having read the above and foregoing act of mortgage, declared that he does by these presents accept the same, as well for and on behalf of said company, as for all and every other person or persons who may hereafter become the purchaser or purchasers, assignee or assignees, or holder or holders of the said bonds, or any number thereof, or any of them, together with all rights, benefits and privileges thereunto accruing or in anywise appertaining under and by virtue thereof.

Thus done and passed at my office in the city of New York, State of New York aforesaid, in the presence of Herbert D. Lacey and Edward S. Tournier, competent witnesses, both of the said city, who hereunto sign their names with the said appearers and me, the said commissioner, on the day and date aforesaid.

R. T. WILSON.
JAS. H. OGILVIE.

H. D. LACEY.
E. S. TOURNIER.

[Seal of Louisiana Commissioner.]

WILLIAM SHILLABER,
A Commissioner for Louisiana in New York.

322 At a meeting of the stockholders of the Louisville, New Orleans and Texas Railway Company, held at the city of Memphis, in the State of Tennessee, on the 19th day of August, 1886, at which the holders of 37,773 out of a total of 44,550 shares of the capital stock of said company were present in person or by proxy, the following resolution was unanimously adopted:

Resolved, That Richard Thornton Wilson, the president of this company, be and he is hereby authorized and empowered, on behalf of this company, to do any and all acts, and execute any and all

instruments, which, in the opinion of counsel, may be necessary or expedient for the purpose of assuring and confirming under and in accordance with the laws of the State of Louisiana, the mortgage of this company to the Union Trust Company of New York, securing the second-mortgage bonds of this company, or its successors, of the property in said mortgage described, upon the terms and conditions therein expressed, as security for second-mortgage bonds to an amount not exceeding $9,000,000, to be issued from time to time under the limitations in said mortgage prescribed.

In witness whereof, I have hereunto set my hand as secretary, and affixed the corporate seal of said railway company, this 27th day of November, 1886.

[CORPORATE SEAL.] C. H. BOSHER, *Sec'y.*

323 At a meeting of the board of directors of the Louisville, New Orleans and Texas Railway Company, held at the company's office, on the 24th day of August, 1886, at which a quorum was present, the following resolution was unanimously adopted:

Resolved, That Richard Thornton Wilson, president of this company, be and he is hereby authorized and directed, on behalf of this company, to do any and all acts, and execute any and all instruments, which, in the opinion of counsel, may be necessary or expedient for the purpose of assuring and confirming under and in accordance with the laws of the State of Louisiana, the second mortgage of this company to the Union Trust Company of New York of the property in said second mortgage described, upon the terms and conditions therein expressed, as security for second-mortgage bonds to an amount not exceeding at their par or face value, the sum of $9,000,000, to be issued from time to time under the limitations in said mortgage prescribed.

In witness whereof, I have hereunto set my hand as secretary, and affixed the corporate seal of said railway company, this 27th day of November, 1886.

[CORPORATE SEAL.] C. H. BOSHER, *Sec'y.*

324 At a meeting of the executive committee of the board of trustees of the Union Trust Company of New York, held at the company's office, on the 24th day of November, 1886, at which a quorum was present, the following resolution was duly adopted:

Resolved, That the second vice-president of this company be and he is hereby authorized to accept an act of mortgage from the Louisville, New Orleans and Texas Railway Company confirmatory of the mortgage from said railway company to this company, dated August 26, 1886, and as security for the proposed issue of bonds, amounting in the aggregate to $9,000,000, mentioned therein, and that he be and is hereby authorized to accept the same as well for and on behalf of this company as for all and every other person or persons who may hereafter become the purchaser or purchasers, assignee or assignees, or holder or holders of the said bonds, or any number thereof, or any of them, together with all rights, benefits and privileges thereunto accruing, or in anywise appertaining,

under and by virtue thereof, and that he be and is hereby authorized to sign his name and attach the corporate seal of this company to any requisite or suitable instruments to be executed in connection with the acceptance of such act of mortgage.

In witness whereof, I have hereunto set my hand as secretary, and affixed the corporate seal of said company, this 27th day of November, 1886.

[Trust Co. Seal.]

A. O. RONALDSON, *Sec'y.*

325 *Mortgage of April 14th, 1893.*

This indenture, made the fourteenth day of April, A. D. 1893, by and between the Yazoo and Mississippi Valley Railroad Company, a corporation created, organized, and existing under the laws of the States of Mississippi, Tennessee, and Louisiana, party of the first part, and the United States Trust Company of New York, a corporation created, organized, and existing under the laws of the State of New York, party of the second part, witnesseth:

Whereas, heretofore, to wit, on the first day of September, A. D. 1892, the Illinois Central Railroad Company, a corporation created, organized, and existing under the laws of the State of Illinois, entered into a certain indenture or agreement with the party of the second part hereto, by which the said Illinois Central Railroad Company assigned, transferred, and set over to the said party of the second part certain securities of the Louisville, New Orleans and Texas Railway Company (a corporation created and organized under the laws of the States of Tennessee, Mississippi, and Louisiana) representing a par value of over $34,000,000, for the purpose of securing the payment of certain bonds of the said Illinois Central Railroad Company to the amount of twenty-five millions of dollars ($25,000,000), that is to say, twenty-eight thousand bonds to be numbered consecutively from one to twenty-eight thousand, both inclusive, twenty-two thousand thereof for the sum of one thousand dollars each and six thousand for five hundred dollars each, to be issued and used from time to time as might be required for the payment of indebtedness contracted in acquiring the securities of the said Louisville, New Orleans and Texas Railway Company assigned,

326 transferred, and set over in and by the said indenture to the party of the second part, and for such other objects and purposes as were specified in the said indenture, all of the said bonds thereby secured to bear date as of the first day of September, A. D. 1892, and to be made payable in the city of New York on the first day of November, A. D. 1953, in gold coin of the United States of America of the present standard of weight and fineness, and to bear interest from November 1, 1892, at the rate of four per cent. per annum, payable in like gold coin on the first days of May and November in each year, the said bonds to be in the general form and to contain the provisions following, that is to say:

Total issue, $25,000,000.

UNITED STATES OF AMERICA, *State of Illinois.*

Illinois Central Railroad Company.

No. —. $1,000 (or $500).

Four Per Cent. Gold Bond of 1953.

Payable, principal and interest, in gold.

The Illinois Central Railroad Company hereby acknowledges its indebtedness in the sum of one thousand dollars (or five hundred dollars), which it promises to pay, in the city of New York, to the holder of this bond, on November 1, A. D. 1953, in gold coin of the United States of America, of the present standard of weight and fineness. And the said company also and hereby promises to pay interest on the said sum from November 1, 1892, in like gold coin, at the rate of 4 per cent. per annum, on the first days of May and November in each year, upon the surrender of the coupons
327 hereto attached (authenticated by the engraved signature of its treasurer) as they respectively become payable and until such principal sum of one thousand dollars (or five hundred dollars) shall be paid.

The holder hereof may have the ownership of this bond registered on the books of the said railroad company, such registry being noted on the bond, after which no transfer shall be valid unless made on the said books by the registered holder in person, or by his attorney duly authorized, and noted on the bond, but the same may be discharged from registry by being in like manner transferred to bearer, after which it shall be transferable by delivery. Or the holder hereof may, at any time, surrender to the said railroad company all the coupons hereto annexed not then due, for cancellation and have this bond entered on the company's books as a registered bond. The surrender and cancellation of the coupons shall be noted on the back hereof, after which this bond shall finally cease to be transferable by delivery and become a registered bond, transferable only on the books of the company, and in that case the interest thereon semi-annually, and the principal thereof when due, shall be payable only to the registered holder hereof, or his legal representatives or assigns.

This is one of a series of bonds authorized to be issued to the total amount of twenty-five million dollars, all of the same date and payable at the same time, certain of which bonds are for $1,000 each, and certain others for $500 each; which bonds are described in a certain deed of trust between the Illinois Central Railroad Company and the United States Trust Company of New York, bearing date, September 1, A. D. 1892, all of which bonds are equally secured as therein provided by the deposit and pledge of certain securities of the Louisville, New Orleans and Texas Railway Company representing a par value of more than thirty-four million dollars.

In witness whereof, the said Illinois Central Railroad Company

328 has, by a resolution of its board of directors, passed July 21, A. D. 1892, caused its common seal and the signatures of its president or vice-president and secretary to be hereto affixed the first day of September, 1892.

—— ——, *President.*

—— ——, *Secretary.*

With coupons attached thereto for the installments of interest to become due upon such bonds in the following form:

(*Coupon.*)

The Illinois Central Railroad Company will pay bearer twenty dollars (or ten dollars) in gold coin, in New York, on May 1 (or November 1)—being six months' interest on its four per cent. gold bond of 1953, No. —.

—— ——, *Treasurer.*

And each of them to be further authenticated by the following form of certificate to be placed thereon, signed by the president or one of the vice-presidents of the said party of the second part, to wit:

(*Trustee's Certificate.*)

The within is one of a series of twenty-eight thousand bonds, of which 22,000 bonds are for $1,000 each, and 6,000 bonds for $500 each, mentioned in the deed of trust dated September 1, A. D. 1892, between the Illinois Central Railroad Company and the United States Trust Company of New York, and secured by the deposit of securities as therein provided.

UNITED STATES TRUST COMPANY
OF NEW YORK.

—— ——, *President.*

329 And whereas, it was provided in the said indenture that the bonds issued and authenticated thereunder, or their proceeds, might be used by the said Illinois Central Railroad Company, in its discretion, for any of the following purposes, and no other, that is to say: (1) For the acquisition or payment for stock of the said Louisville, New Orleans and Texas Railway Company and bonds of said company of the several issues or classes described in the first article of the said indenture, including as well the stock and bonds theretofore purchased and deposited thereunder as stock and bonds that might be thereafter purchased; (2) for the payment of obligations or indebtedness of the said Louisville, New Orleans and Texas Railway Company; (3) for protecting, repairing, completing, improving or extending the railroad and branches then owned by the said Louisville, New Orleans and Texas Railway Company, and providing elevators and docks for use in connection therewith, and such works and structures, rolling stock and other equipment as would enable the said railroad and branches to be operated to the best advantage, or in the payment of debts and liabilities incurred for such improvements.

And whereas, it was further provided in the said indenture, and made an express condition thereof, that if the said Louisville, New Orleans and Texas Railway Company, its successors or assigns, should thereafter secure the twenty-eight thousand four per cent. gold bonds issued or proposed to be issued by the Illinois Central Railroad Company thereunder, and intended to be secured thereby by a mortgage or deed of trust covering all the railways and railway lines then belonging to that company, and their appurtenances, and also all the lands of that company which should then remain unsold, situated in the counties of De Soto, Tunica, Quitman, Coahoma, Bolivar, Washington, Issaquena, Sharkey, Warren and Tate, in the State of Mississippi, which should be subject only to the outstanding mortgages theretofore made and executed by that
330 company, other than the land-grant income mortgage to Edward H. Pardee and Albert Crolius, trustees, dated August 27, 1886, then all the stock of the said Louisville, New Orleans and Texas Railway Company deposited under the trust created by the said indenture, should be released and surrendered to the said Illinois Central Railroad Company free and discharged from all the liens and obligations of said indenture, it being expressly understood and agreed that suitable provisions might be inserted in such new mortgage permitting the said Louisville, New Orleans and Texas Railway Company, its successors or assigns, to sell and dispose of the mortgaged lands above referred to, and to give title thereto free and discharged from the lien of the said mortgage, similar to the provisions in that behalf contained in the supplementary mortgage or deed of trust made by the said Louisville, New Orleans and Texas Railway Company, under date of August 25, 1885, to Edward H. Pardee and Albert Crolius, trustees. And after the execution and delivery of such new mortgage, and when all the bonds issued under and secured by the several mortgages theretofore made by the said Louisville, New Orleans and Texas Railway Company should have been deposited with the party of the second part (the said United States Trust Company of New York), said party of the second part might, if requested so to do by the said Illinois Central Railroad Company, and if said party of the second part should deem it desirable so to do, but not otherwise, cause all such bonds to be cancelled and the mortgages securing the same to be discharged of record, to the end that the said new mortgage might become and be a first-mortgage lien upon the property therein described, subject, however, to the provisions to be therein inserted permitting sales of the said mortgaged lands as therein above contemplated and provided.

And whereas, by articles of consolidation made the twenty-
331 fourth day of October A. D. 1892, the said Louisville, New Orleans and Texas Railway Company became consolidated with the Yazoo and Mississippi Valley Railroad Company, a corporation of the State of Mississippi, and the stock, property and franchises of said two corporations were thereby united or merged in one single corporation under the corporate name of the Yazoo and Mississippi Valley Railroad Company, the party of the first part

hereto; by virtue whereof the said party of the first part has succeeded to all and singular the rights powers, privileges, immunities and franchises, and all the railroads, real and personal estate, easements, fixtures, equipments, choses in action and property and assets of every description theretofore vested in or belonging to the said Louisville, New Orleans and Texas Railway Company.

And whereas, the party of the first part is in need of necessary funds for the payment of obligations or indebtedness of the said Louisville, New Orleans and Texas Railway Company, contracted before the said consolidation was effected, and for protecting, repairing, completing, improving and extending the railroad and branches owned by that company at the date of the aforesaid indenture of September 1, 1892, and providing elevators and docks for use in connection therewith, and desires to obtain advances and accommodations from the Illinois Central Railroad Company out of the proceeds of the said twenty-eight thousand bonds hereinbefore mentioned, to be applied to the aforesaid purposes, and also desires to co-operate with the said Illinois Central Railroad Company in procuring the cancellation of all the bonds issued under and secured by the several mortgages heretofore made by the said Louisville, New Orleans and Texas Railway Company, and the release and discharge of the said mortgages as contemplated in the said indenture of September 1, 1892.

Now, therefore, the said party of the first part, in considera-
332 tion of the premises, and for the purpose of securing the due payment of the principal and interest of the said twenty-eight thousand four per cent. gold bonds issued or to be issued by the Illinois Central Railroad Company as contemplated and provided in the before-mentioned indenture of September 1, 1892, as the same shall become payable, according to the tenor and effect of the said bonds and the interest coupons thereto annexed, all of which bonds are to be deemed equally secured by these presents, without regard to the time or times when the said bonds shall have been actually issued, and without any discrimination or preference of one over another, and in further consideration of one dollar to the party of the first part in hand paid at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, conveyed and confirmed, and by these presents doth grant, bargain, sell, convey and confirm unto the said party of the second part, its successors and assigns, forever, all the railways and railway lines and branches of the party of the first part in the States of Tennessee, Mississippi and Louisiana, or wherever the same may be situated, which heretofore, to wit, on the first day of September, A. D. 1892, belonged to or were in the ownership and possession of the aforesaid corporation then known as the Louisville, New Orleans and Texas Railway Company, and all their appurtenances, including therein all lands and rights of way, superstructure, rails, tracks, side tracks or sidings, bridges, fences, depots, station-houses, shops, warehouses, car-houses, engine-houses, machine shops, repair shops, buildings, erections and structures, held or acquired for use in connection with the said

railways, railway lines and branches, or the business or operation thereof; also all such extensions of said railways, railway lines and branches as may be hereafter constructed or acquired by the party of the first part by or through the use or application of the proceeds of the bonds intended to be secured hereby, or any part of the same, together with all and singular
333 the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and all elevators and docks that may be hereafter provided, constructed or acquired, for use in connection with the railways, railway lines and branches aforesaid, or any extension thereof, through the application of the proceeds of such bonds or any of them; also all betterments and improvements of the said railways, railway lines and branches, including everything done for protecting, repairing, completing or improving the same, which shall be hereafter made or provided for out of the proceeds of the said bonds or any of them, or out of any moneys applicable to such purposes, which may be received by the said Illinois Central Railroad Company, its successors or assigns, from the trustees or their successors in trust under the two mortgage- or deeds of trust, again hereinafter referred to, made by the said Louisville, New Orleans and Texas Railway Company to Edward H. Pardee and Albert Crolius, trustees, under date respectively of September 18, 1884, and August 25, 1885, for or as the price of any of the income bonds secured by said two mortgages or deeds of trust, which may be offered to the said trustees or their successors, and accepted by them for redemption and cancellation; and also all the rents, issues, tolls, incomes and profits of the railways, railway lines and branches aforesaid, and all the corporate rights, privileges, immunities and franchises, pertaining to the said railways, railway lines and branches, which the said party of the first part now possesses or is entitled to, or it or its successors may hereafter become possessed of or entitled unto; and also all the lands of the party of the first part situated in the counties of De Soto, Tunica, Quitman, Coahoma, Bolivar, Washington, Issaquena, Sharkey, Warren and Tate, in the State of Mississippi, which heretofore, to wit, on the first day of September, A. D. 1892, belonged to or were in the ownership and possession of the said Louisville, New Orleans and
334 Texas Railway Company, together with the rents, issues and profits thereof.

To have and to hold all and singular the above mentioned and described premises, property, rights, privileges, immunities and franchises, and every part and parcel thereof, with all the appurtenances in anywise thereunto belonging or appertaining, unto the said party of the second part and its successors and assigns forever, in trust, nevertheless, for the joint and equal benefit and security of all and every the persons or bodies corporate who or which shall be, or at any time become the holder or holders of any of the above mentioned twenty-eight thousand four per cent. gold bonds issued or to be issued by the said Illinois Central Railroad Company as contemplated and provided in the before-mentioned indenture of September 1, 1892, without preference to the holder of any of the said bonds over any

of the others, by reason of priority in the date or time of the issuing or negotiating of the same, but subject at all times to the reservations, terms and conditions hereinafter expressed, and also subject to the lien of the several mortgages or deeds of trust heretofore made and executed by the said Louisville, New Orleans and Texas Railway Company, and next hereinafter particularly referred to, that is to say: (1) A mortgage or deed of trust under date of September 18, 1884, to the Metropolitan Trust Company of the City of New York, trustee, securing an issue of bonds, all of which are deposited under collateral trust indenture, dated August 25, 1886, with the Union Trust Company as collateral security for the bonds issued under mortgages hereinafter mentioned, designated (5) and (7) respectively. (2) An act of mortgage passed January 27, 1885, before William Shillaber, a commissioner of the State of Louisiana for the State of New York, for the purpose of ratifying and confirming the mortgage or deed of trust last above referred to in the manner and form customary under the laws of the State of Louisiana. (3) A mortgage or deed of trust under
335 date of September 18, 1884, to Edward H. Pardee and Albert Crolius, trustees. (4) A mortgage or deed of trust under date of August 25, 1885, to Edward H. Pardee and Albert Crolius, trustees, supplemental to the mortgage or deed of trust last above referred to. (5) A mortgage or deed of trust under date of August 25, 1886, to the Union Trust Company of New York, trustee. (6) An act of mortgage passed November 8, 1886, before William Shillaber, a commissioner of the State of Louisiana for the State of New York, for the purpose of ratifying and confirming the mortgage or deed of trust last above referred to in the manner and form customary under the laws of the State of Louisiana. (7) A mortgage or deed of trust under date of August 26, 1886, to the Union Trust Company of New York, trustee. (8) An act of mortgage passed November 27, 1886, before William Shillaber, a commissioner of the State of Louisiana for the State of New York, for the purpose of ratifying and confirming the mortgage or deed of trust last above referred to in the manner and form customary under the laws of the State of Louisiana.

Provided, always, and these presents are upon the express condition, that if the said Illinois Central Railroad Company, its successors or assigns, or the said party of the first part, its successors or assigns, shall well and truly pay or cause to be paid to the holders of the said twenty-eight thousand four per cent. gold bonds issued or to be issued by the said Illinois Central Railroad Company as aforesaid, when and as the same shall become due and payable, the principal and interest of the said bonds, according to their tenor and effect, then these presents and the estate hereby granted shall cease, determine and be null and void.

And provided further, that the party of the first part or its successors, notwithstanding the execution of these presents, shall be permitted at any time and from time to time, by means of its land department or otherwise, to sell and dispose of the lands
336 mortgaged hereby situated in the counties of De Soto, Tunica, Quitman, Coahoma, Bolivar, Washington, Issaquena, Sharkey,

Warren and Tate, in the State of Mississippi, or any part thereof, which shall not be required for the use of the party of the first part, or its successors, in the construction or operation of its or their railroads and branches, upon such terms as may be satisfactory to it or them, provided that the purchase-money of such sales and the evidence of indebtedness given therefor by the purchaser, together with such security, if any, as may be taken therefor, shall be paid over, transferred or delivered to the trustees, or their successors in trust, under the supplemental mortgage or deed of trust hereinbefore referred to, made by the said Louisville, New Orleans and Texas Railway Company to Edward H. Pardee and Albert Crolius, trustees, under date of August 25, 1885, to be by them applied in accordance with the directions or provisions in the said mortgage or deed of trust contained; and in order that the party of the first part may be enabled to give title to the lands so sold free and discharged from this mortgage, it is an express provision and condition of this indenture that the trustee or trustees hereunder shall at all times, upon being furnished with satisfactory evidence that the above conditions have been complied with by the party of the first part, execute full releases of the lien hereof, either by endorsement on the deeds to such purchasers, or by separate deeds or releases, as may be required by it or them.

And it is hereby further provided and made an express condition of this indenture, that until default shall be made in the payment of the principal or interest of the bonds intended to be secured hereby, or some of them, or some part thereof, the said party of the first part, its successors and assigns, shall be permitted to possess and enjoy all and singular the premises hereby granted with their appurtenances, and the rights and franchises hereinbefore described, and to receive, take and use the tolls, incomes,
337 earnings and profits thereof. And the trustee or trustees hereunder shall have full power, in its or their discretion, upon written request of the party of the first part, its successors or assigns, to release from the lien of this mortgage any lands or other property of any description which in its or their judgment shall not be necessary for, or for use in connection with the railways, railway lines, and branches hereinbefore described, and to consent to such changes in the location of tracks, depots and other buildings as in its or their judgment may be expedient, and to make and deliver the releases and conveyances necessary to carry the same into effect; but any lands or other property which may be acquired for permanent use in substitution for any so released shall thereupon become subject to the lien of this mortgage, and, upon request of the trustee or trustees hereunder, shall be conveyed to it or them by the party of the first part, its successors or assigns, upon the trusts of these presents.

But if default shall be made in the payment of the principal or interest moneys mentioned in the bonds hereby secured, or any or either of them, or any part thereof, according to the tenor and effect of said bonds; and if such default shall continue for the period of six months, then the party of the second part, or its successors in

this trust, are hereby authorized and empowered, at the request of the holders of one-third part of the said bonds then outstanding in respect of which such default shall have been made, to enter into and upon and take and hold possession of all and singular the premises, estates, franchises, rights, privileges and property hereby granted or conveyed, or intended to be, or all such parts thereof as shall then remain subject to the lien and operation of this indenture of mortgage, and in person, or by one or more agents, to operate the said railways and branches, to make from time to time all such repairs and replacements as it or they may deem judicious, and all such useful alterations, additions and improvements as the income coming into its or their hands shall be adequate to pay for,
338 and to take, collect and receive all fares, freights, tolls, earnings, issues, profits and income of said railways and branches, and apply the same to the proper expenses of holding, operating and managing the said railways and branches and other premises, and conducting the business thereof, to the payment of all taxes and assessments which shall be levied or assessed thereon, and all necessary and proper repairs, replacements, alterations, additions and improvements upon said property, and all expenses, costs, charges and counsel fees in the premises of said party of the second part, or its successors in trust, and a reasonable compensation for its or their services, and next to the payment of the interest and principal of the said bonds, according to the tenor and effect thereof, as the same may be or become due and payable; and in case the principal money secured by such bonds shall not have become due, the moneys applicable to the payment of interest shall be applied upon the interest remaining in default, in the order of its maturity, but in case the said principal moneys shall have become due, the moneys applicable to the payment of the principal and interest on such bonds shall be applied to such principal and interest *pro rata* without any preference or priority whatsoever.

And further, if default shall be made in the payment of the principal or interest moneys mentioned in the said bonds, or any or either of them, or any part thereof, and if such default shall continue for the period of six months, then, at the request of the holders of one-third part of the said bonds then outstanding, in respect of which such default shall have been made, the said party of the second part, or its successors in the said trust, may, and it and they are hereby authorized and empowered to cause the whole of the said premises, estates, franchises, rights, privileges and property hereby granted and conveyed, or intended so to be, which shall then remain subject to the lien and operation of this indenture of mortgage, with their appurtenances, and all benefit and equity of redemp-
339 tion of the said party of the first part and its successors and assigns therein or thereto, to be sold at public auction in the city of Memphis, in the State of Tennessee, giving at least three months' previous notice of the time and place of said sale, by publishing the same at least once in each week during such period of three months in one or more daily newspapers published in each of the cities of New York, in the State of New York, and Memphis,

in the State of Tennessee, and giving such other notice of such sale as may be required by law, if any other notice be so required. And it shall be lawful for the said party of the second part or its successors making such sale, as the attorney or attorneys of the party of the first part and its successors, by these presents duly constituted for that purpose, to make, execute and deliver to the purchaser or purchasers on such sale all such deeds and conveyances as shall be necessary or proper to convey and assure to, and vest in him or them, the said premises, estates, franchises, rights, privileges and property, and every part and parcel thereof, and of the estate, right, title and interest of said party of the first part and its successors and assigns therein or thereto; and such sale, and the deeds and conveyances so to be thereupon executed, shall be valid and effectual forever, and shall be a perpetual bar, both in law and equity, against the said party of the first part, its successors and assigns, and against all persons claiming or to claim by, from or under it or them, or any of them. And it is further hereby provided and agreed, that the receipt of the trustee or trustees who shall make the sale hereinbefore authorized shall be a sufficient discharge to the purchaser or purchasers at such sale for his or their purchase-money, and that such purchaser or purchasers, his or their heirs or assigns or personal representatives, shall not, after paying such purchase-money and receiving such receipt of such trustee or trustees therefor, be obliged to see to the application of such purchase-money upon or for the trusts or purposes of these presents, or be in anywise answerable for any loss, misapplication or non-application of such purchase-money by the trustee or trustees.

And it is hereby provided and agreed, that the said party of the second part, or its successors in the said trust, shall out of the proceeds of said sale, or of any sale which shall, under judicial proceedings or otherwise, be made of the said premises in enforcement of the security afforded by these presents, in the first place, pay and retain the costs and expenses attending such sale, and all counsel fees and other expenses incurred by it or them in reference to the same, and a reasonable compensation for its or their own services, and also any balance which may be due it or them on account of any disbursements or expenses paid or incurred in or about the care and management of the said premises subsequent to the taking possession thereof by it or them, including the reasonable compensation of any agent or agents who may be employed in or about such care or management, and shall apply the residue of the proceeds of such sale, or so much thereof as may be necessary, to the payment of the whole amount of principal and interest which shall then be owing and unpaid upon the bonds secured hereby, or any of them, whether the said principal, by the tenor of said bonds, be then due or yet to become due. And in case of a deficiency of such proceeds to pay in full the whole amount of principal and interest owing or unpaid upon the said bonds, they shall be paid ratably in proportion to the amounts owing and unpaid upon them respectively, and without discrimination as between principal and interest,

and without preference of the holder of any one bond over any of the others; and any surplus which may remain after the full payment of the principal and interest of all of the said bonds shall be paid over to the party of the first part, or its successors or assigns, upon lawful demand being made therefor.

And it is hereby further provided and agreed, that upon the
341 happening of such event or events as would, by virtue of the preceding provisions of this indenture, authorize the said party of the second part, or its successors in trust, to sell the premises, estates, franchises, rights, privileges and property aforesaid, or to take the requisite proceedings to that end, the said party of the second part, or its successors in the said trust, shall be entitled, in its or their discretion, instead of taking proceedings for and making sale of said premises, estates, franchises, rights, privileges, and property, under and by virtue of the power of sale hereinbefore contained, to proceed by bill in equity, or other appropriate proceedings, in any court or courts of competent jurisdiction, to enforce the rights, liens and securities of the trustee or trustees and the bondholders hereunder; and thereupon said trustee or trustees shall be entitled to have the said premises, estates, franchises, rights, privileges and property hereby granted or conveyed, or intended so to be, sold by judicial sale under the order or decree of said court or courts, for or towards the satisfaction of the principal and interest due or owing upon the then outstanding bonds entitled to the benefit of the security of this mortgage, and for the enforcement of the rights, liens and securities of the said trustee or trustees and the said bondholders; and in case of such judicial sale, the net proceeds thereof shall be applicable and distributable in like manner as hereinbefore provided in respect of the net proceeds of sale of such mortgaged premises, estates, franchises, rights, privileges and property under and in virtue of the power of sale hereinbefore contained; and all the stipulations and provisions in this indenture contained with reference to or consequent upon a sale of such mortgaged premises, estates, franchises, rights, privileges and property, when or if sold under said power of sale, shall be applicable and applied as far and as nearly as may be, in case of such judicial sale being made under the order or decree of the court.

And it is hereby further provided and agreed, that in case of such
342 sale as is hereinbefore authorized being made by the party of the second part, or its successors in said trust, or in case of any judicial sale being made of the said premises, estates, franchises, rights, privileges and property hereby mortgaged, or any part thereof, in enforcement of the mortgage lien hereby created, the purchaser or purchasers at such sale shall be entitled in making settlement for and payment of the purchase-money bidden at such sale, to turn in or use towards the payment of such purchase-money the bonds held by such purchaser or purchasers, to or towards the payment whereof the net proceeds of such sale shall be legally applicable, reckoning such bonds, or the amount so turned in or used of the same for such purpose at such sum as would be payable out of the net proceeds of such sale to such purchaser or purchasers,

as holder or holders of such bonds, for his or their just share or proportion of such net proceeds of sale, upon due apportionment of and concerning such net proceeds.

And the said party of the first part, for itself, its successors and assigns, doth hereby covenant and agree with the party of the second part, and its successors in the said trust and to and with the respective persons and corporations who or which shall at any time become holders of the said bonds hereby secured, or any of them, that the said party of the first part, its successors and assigns, shall and will, at any time and from time to time hereafter, upon request, make, do, execute and deliver all such further and other acts and other things as shall be reasonably advised, devised or required to effectuate the intention of these presents, and to assure and confirm to the said party of the second part, or its successors, all and singular the premises, estates, franchises, rights, privileges and property hereinbefore described, and hereby intended to be granted, and so as to render the same, and especially such portions thereof as shall be hereafter acquired by the said party of the first part, or its successors, available for the security and satisfaction of the said bonds, according to the intent and purpose herein expressed.

And it is hereby further provided and agreed that any
343 vacancy in the office of trustee hereunder may be permanently filled by the appointment of a new trustee or trustees, by an instrument or concurrent instruments in writing, executed under the hands and seals of the holders of a majority in interest of the then outstanding bonds secured hereby or their attorneys-in-fact thereunto authorized, but that the board of directors of the party of the first part or its successors may make a temporary appointment to fill a vacancy until a permanent appointment shall be made in the manner above prescribed. Any new trustee or trustees appointed as aforesaid, whether by a permanent or temporary appointment, shall immediately upon its, his or their appointment, and without any further act, deed or conveyance, become and be vested with all of the estates, trusts, rights, powers and duties of the trustee or trustees in whose place it, he or they shall have been appointed; but, nevertheless, the respective parties hereto, and their respective successors and assigns, shall and will, upon request, make, execute and deliver all such releases, conveyances and assurances as shall be appropriate to vest in and confirm and assure to such new trustee or new trustees such estates, trusts, rights, powers and duties according to the intent above expressed.

And the party of the second part does hereby accept the trust conferred upon it by these presents, but with the understanding, and it is hereby expressly provided and agreed, that it shall not be liable or accountable for the acts, defaults or neglect of any agent or agents who may in good faith and with reasonable discretion be appointed under and by virtue of or for the purposes of these presents to do any of the matters or things herein provided for, and that no liability or responsibility shall, under any circumstances, be borne by or attached to it than for the exercise of reasonable dili-

gence only in the performance of the said trusts when action on its part for that purpose shall become necessary.

344 In witness whereof, the parties hereto have caused their respective corporate seals to be hereunto affixed and attached by their respective secretaries, and these presents to be signed by their respective presidents the day and year first above written.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY,
[SEAL.] By STUYVESANT FISH, *President.*

Attest: A. G. HACKSTAFF, *Secretary.*

Witness-:
JNO. W. CARLIN.
E. T. H. GIBSON.

UNITED STATES TRUST COMPANY OF NEW YORK,
[SEAL.] By JOHN A. STEWART, *President.*

Attest: H. L. THORNELL, *Secretary.*

Witness-:
S. C. WINSHIP.
E. L. KINSLEY.

345 STATE OF NEW YORK, }
City and County of New York, } ss:

Be it remembered that on this 24th day of May, in the year of our Lord one thousand eight hundred and ninety-three, before me, George H. Taylor, a duly appointed notary public in and for the city and county of New York, in the State of New York, and commissioner for the State of Tennessee, in and for the State of New York, residing in the said city and county of New York, personally appeared Stuyvesant Fish, president of the Yazoo and Mississippi Valley Railroad Company, and Alexander G. Hackstaff, secretary of the same company, to me personally known, and known to me to be such officers of the said company, and to be the same persons whose names are subscribed to the foregoing instrument as having executed the same on the part and behalf of the said company, and acknowledged that they signed, sealed and delivered the said instrument as the free and voluntary act and deed of said company for the uses and purposes therein set forth. And the said Stuyvesant Fish and Alexander G. Hackstaff, being by me duly sworn, did severally depose and say: That he, the said Stuyvesant Fish, is the president, and he, the said Alexander G. Hackstaff, is the secretary of the said company; that the seal affixed to the foregoing instrument, purporting to be the corporate seal of the said company, is such corporate seal; that it was affixed thereto by order of the board of directors of said company, and that they, the said Stuyvesant Fish and Alexander G. Hackstaff, signed their names thereto by the like order as the president and secretary of the said company respect-

ively. And on the same day, before me also personally appeared John A. Stewart, president, and H. L. Thornell, secretary, of the United States Trust Company of New York, respectively personally known to me, and known to me to be such officers of said company,
346 and to be the same persons whose names are subscribed to the foregoing instrument as having executed the same on the part and behalf of the last-named company, and acknowledged that they signed, sealed and delivered the said instrument as the free and voluntary act and deed of the last-named company for the uses and purposes therein set forth, and the said John A. Stewart and H. L. Thornell, being by me duly sworn, did severally depose and say: That they were the president and secretary respectively of the United States Trust Company of New York; that the seal affixed to the foregoing instrument, purporting to be the corporate seal of the said trust company, is such corporate seal; that it was affixed thereto in pursuance of authority in them vested by the board of trustees of said company, and that they signed their names thereto as such president and secretary in pursuance of like authority.

In witness whereof, I have hereunto set my hand and affixed my official seals this 24th day of May, in the year of our Lord one thousand eight hundred and ninety-three.

[SEAL.] GEORGE H. TAYLOR,
Notary Public and Commissioner for Tennessee
[SEAL.] *in New York.*

347 STATE OF NEW YORK, } ss:
City and County of New York, }

Be it remembered, that on this 24th day of May, in the year of our Lord one thousand eight hundred and ninety-three, before me, George H. Taylor, a duly appointed notary public in and for the city and county of New York, in the State of New York, and commissioner for the State of Mississippi in and for the State of New York, residing in the said city and county of New York, personally appeared Stuyvesant Fish, president of the Yazoo and Mississippi Valley Railroad Company, and Alexander G. Hackstaff, secretary of the same company, to me personally known, and known to me to be such officers of the said company, and to be the same persons whose names are subscribed to the foregoing instrument as having executed the same on the part and behalf of the said company, and acknowledged that they signed, sealed and delivered the said instrument as the free and voluntary act and deed of said company for the uses and purposes therein set forth. And the said Stuyvesant Fish and Alexander G. Hackstaff, being by me duly sworn, did severally depose and say: That he, the said Stuyvesant Fish, is the president, and he, the said Alexander G. Hackstaff, is the secretary of the said company; that the seal affixed to the foregoing instrument, purporting to be the corporate seal of the said company, is such corporate seal; that it was affixed thereto by order of the board of directors of said company, and that they, the said Stuyve-

sant Fish and Alexander G. Hackstaff, signed their names thereto by the like order as the president and secretary of the said company respectively. And on the same day, before me also personally appeared John A. Stewart, president, and H. L. Thornell, secretary, of the United States Trust Company of New York, respectively personally known to me, and known to me to be such officers of said company, and to be the same persons whose names are sub-
348 scribed to the foregoing instrument as having executed the same on the part and behalf of the last-named company, and acknowledged that they signed, sealed and delivered the said instrument as the free and voluntary act and deed of the last-named company for the uses and purposes therein set forth, and the said John A. Stewart and H. L. Thornell, being by me duly sworn, did severally depose and say: That they were the president and secretary respectively of the United States Trust Company of New York; that the seal affixed to the foregoing instrument, purporting to be the corporate seal of the said trust company, is such corporate seal; that it was affixed thereto in pursuance of authority in them vested by the board of trustees of said company, and that they signed their names thereto as such president and secretary in pursuance of like authority.

In witness whereof, I have hereunto set my hand and affixed my official seals this 24th day of May, in the year of our Lord one thousand eight hundred and ninety-three.

[SEAL.] GEORGE H. TAYLOR,
Notary Public and Commissioner for Mississippi
[SEAL.] *in New York.*

349 STATE OF NEW YORK, }
City and County of New York, } *ss:*

Be it remembered, that on this 24th day of May, in the year of our Lord one thousand eight hundred and ninety-three, before me, George H. Taylor, a duly appointed notary public in and for the city and county of New York, in the State of New York, and commissioner for the State of Louisiana in and for the State of New York, residing in the said city and county of New York, personally appeared Stuyvesant Fish, president of the Yazoo and Mississippi Valley Railroad Company, and Alexander G. Hackstaff, secretary of the same company, to me personally known, and known to me to be such officers of the said company, and to be the same persons whose names are subscribed to the foregoing instrument as having executed the same on the part and behalf of the said company, and acknowledged that they signed, sealed and delivered the said instrument as the free and voluntary act and deed of said company for the uses and purposes therein set forth. And the said Stuyvesant Fish and Alexander G. Hackstaff, being by me duly sworn, did severally depose and say: That he, the said Stuyvesant Fish, is the president, and he, the said Alexander G. Hackstaff, is the secretary of the said company; that the seal affixed to the foregoing instrument, purporting to be the corporate seal of the said company, is

such corporate seal; that it was affixed thereto by order of the board of directors of said company, and that they, the said Stuyvesant Fish and Alexander G. Hackstaff, signed their names thereto by the like order as the president and secretary of the said company respectively in the presence of John W. Carlin and E. T. H. Gibson, competent witnesses. And on the same day, before me also personally appeared John A. Stewart, president, and H. L. Thornell, secretary, of the United States Trust Company of New York, respectively personally known to me, and known to me to be such
350 officers of said company, and to be the same persons whose names are subscribed to the foregoing instrument as having executed the same on the part and behalf of the last-named company, and acknowledged that they signed, sealed and delivered the said instrument as the free and voluntary act and deed of the last-named company for the uses and purposes therein set forth, and the said John A. Stewart and H. L. Thornell, being by me duly sworn, did severally depose and say: That they were the president and secretary respectively of the United States Trust Company of New York; that the seal affixed to the foregoing instrument, purporting to be the corporate seal of the said trust company, is such corporate seal; that it was affixed thereto in pursuance of authority in them vested by the board of trustees of said company, and that they signed their names thereto as such president and secretary in pursuance of like authority in the presence of S. C. Winship and E. L. Kinsley, competent witnesses.

In witness whereof, I have hereunto set my hand and affixed my official seals and caused the said witnesses to hereunto set their hands this 24th day of May, in the year of our Lord one thousand eight hundred and ninety three.

[SEAL.] GEORGE H. TAYLOR,
Notary Public and Commissioner of Deeds
[SEAL.] *for Louisiana in New York.*

S. C. WINSHIP.
E. L. KINSLEY.
JNO. W. CARLIN.
E. T. H. GIBSON.

351 *Mortgage of April 15, 1893.*

An indenture, made the fifteenth day of April, in the year of our Lord one thousand eight hundred and ninety-three, by and between the Yazoo and Mississippi Valley Railroad Company, a corporation created, organized and existing under the laws of the States of Mississippi, Tennessee and Louisiana, party of the first part, and the Union Trust Company, of New York, a corporation created, organized and existing under the laws of the State of New York, party of the second part, witnesseth: That

Whereas, heretofore, on the twenty-sixth day of August, one thousand eight hundred and eighty-six, the Louisville, New Orleans and Texas Railway Company, a corporation created, organ-

ized and existing under the laws of the States of Tennessee, Mississippi and Louisiana, and the party of the second part hereto, did enter into a certain indenture known as a second mortgage, and hereinafter called the original mortgage, by which the said Louisville, New Orleans and Texas Railway Company, for the purposes of securing the payment of certain of its second-mortgage bonds, did grant, bargain, sell, alien, remise, release, convey and confirm unto the said party of the second part and its successors and assigns forever, all the railways and railway lines of the said railway company and its successors, whether constructed or to be constructed or acquired, until the length of such railways should amount in the aggregate to eight hundred miles, and all their appurtenances, including therein all lands and rights of way, superstructure, rails, tracks, side tracks or sidings, bridges, buildings, fences, depots, station-houses, shops, warehouses, car-houses, engine-houses, machine shops, repair shops, buildings, erections and structures necessary to the operation of said railways or said railway lines, and all and singular the rolling stock, equipment and machinery appertaining thereto, whether then owned or thereafter to be acquired, and also
352 all the rents, issues, tolls, incomes, earnings and profits of such railways and railway lines; and also all the rights, privileges, immunities and franchises relating or pertaining to such railways or railway lines which the said railway company then possessed, owned or was entitled unto, or it or its successors might thereafter become possessed of or entitled unto; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said railway company and its successors, of, in and to the premises, and every part and parcel thereof, with the appurtenances; and

Whereas, by articles of consolidation made the twenty-fourth day of October, one thousand eight hundred and ninety-two, by and between the said Louisville, New Orleans and Texas Railway Company and the Yazoo and Mississippi Valley Railroad Company, a corporation of the State of Mississippi, the said two corporations covenanted and agreed to unite, merge and consolidate their several corporate stocks, corporate rights, franchises, immunities and privileges and property of every kind, real, personal and mixed; and

Whereas, in pursuance of said agreement, said consolidation has taken place and the said consolidated company is the party of the first part hereto; and

Whereas, the Illinois Central Railroad Company, a corporation, created, organized and existing under and by virtue of the laws of the State of Illinois, has acquired and purchased a large amount of the bonds and stock of the said Louisville, New Orleans and Texas Railway Company; and

Whereas, the said Illinois Central Railroad Company has by an indenture dated the first day of September, one thousand eight hundred and ninety-two hereinafter called the collateral trust indenture, a copy of which is hereto annexed, marked "A," between itself, as

party of the first part, and the United States Trust Company
353 of New York, as party of the second part, assigned, transferred and set over to the said United States Trust Company of New York the bonds and stocks of the said Louisville, New Orleans and Texas Railway Company, therein referred to, representing a par value of more than thirty-four million dollars, such bonds and stock to be held by the said United States Trust Company upon trust for the benefit of the several persons and corporations who should be or become holders of any of the bonds of the said Illinois Central Railroad Company, issued or to be issued thereunder; and

Whereas, by article fourth of said collateral trust indenture it was provided that the bonds of the Illinois Central Railroad Company issued and authenticated thereunder, might be used and applied by said Illinois Central Railroad Company in its discretion for any of the purposes thereafter specified, among which purposes was (3) for protecting, repairing, completing, improving or extending the railroad and branches then owned by the said Louisville, New Orleans and Texas Railway Company, and providing elevators and docks for use in connection therewith, and such works and structures, rolling stock and other equipment as would enable the said railroad and branches to be operated to the best advantage, or in the payment of debts and liabilities incurred for such improvement; and

Whereas, by the fifth article of said collateral trust indenture the said Illinois Central Railroad Company covenanted and agreed to cause all the moneys received by it from certain trustees therein mentioned for or as the price of any of the income bonds issued under the two mortgages or deeds of trust made by the said Louisville, New Orleans and Texas Railway Company, under date respectively of September eighteenth, eighteen hundred and eighty-four, and August twenty-fifth, eighteen hundred and eighty-five, to Edward H. Pardee and Albert Crolius, trustees, to be applied to the payment of expenses incurred for betterments and improvements of the said Louisville, New Orleans and Texas railway and its appurtenances; and

354 Whereas, some question has arisen as to whether or not the said original mortgage does or will cover all such improvements or extensions of the said railroad and branches formerly of the said Louisville, New Orleans and Texas Railway Company, and certain elevators and docks for use in connection therewith, and such works and structures, rolling stock and other equipment as will enable the said railroad and branches to be operated to the best advantage as shall be made or acquired by the proceeds of the said bonds of the Illinois Central Railroad Company in pursuance of the obligations under the fourth article of the said collateral trust indenture of the said Illinois Central Railroad Company; and

Whereas, some question has arisen as to whether or not the said original mortgage does or will cover all betterments and improvements of the said Louisville, New Orleans and Texas railway, and its appurtenances, the expenses incurred for which are paid by the application thereto of the price of any of the said income bonds received by said Illinois Central Railroad Company as is provided

in the fifth article of said collateral trust indenture of the Illinois Central Railroad Company; and

Whereas, it is the intention and desire of the party of the first part hereto that such original mortgage shall cover all such property and betterments and improvements; and

Whereas, it is provided in said original mortgage that the party of the first part therein shall and will at any time, and from time to time thereafter upon request, make, do, execute and deliver all such further acts, deeds and things as shall be reasonably advised, devised or required to effectuate the intention thereof, and to assure and confirm to the said party of the second part, or its successors, all and singular the property and estate, real and personal, thereinbefore described, and thereby intended to be granted, and so as to render the same, and especially such portions thereof as should be thereafter acquired by the said party of the first part, or its
355 successors, available for the security and satisfaction of the bonds secured by said original mortgage, according to the intent and purpose therein expressed:

Now, therefore, the parties hereto have mutually agreed together as follows:

First. The said party of the first part doth confirm the grant made by the said Louisville, New Orleans and Texas Railway Company in and by said original mortgage, and for the purposes of securing the payment of said bonds, with the interest to accrue thereon, hath granted, bargained, sold, aliened, remised, released, conveyed and confirmed, and by these presents doth grant, bargain, sell, alien, remise, release, convey and confirm unto the said party of the second part, and its successors and assigns forever, all the property, both real and personal, that by the said original mortgage dated the twenty-sixth day of August, one thousand eight hundred and eighty-six, was granted, bargained, sold, aliened, remised, released, conveyed and confirmed unto the said party of the second part, and the party of the first part further covenants and agrees that the said mortgage does and will cover each and everything that shall be done for protecting, repairing, completing, improving and extending the railroad and branches formerly owned by the said Louisville, New Orleans and Texas Railway Company, and providing elevators and docks for use in connection therewith, and such works and structures, rolling stock and other equipment as will enable the said railroad and branches to be operated to the best advantage, to the extent that the same shall be done with the proceeds of the said bonds of the said Illinois Central Railroad Company, as referred to in the fourth article of said collateral trust indenture, and the said party of the first part further covenants and agrees that the said original mortgage does and will cover all betterments and improvements of the railroad formerly owned by the said Louisville, New Orleans and Texas Railway Company, and its appurtenances, to the extent that such betterments and im-
356 provements shall be made by moneys received by the Illinois Central Railroad Company from trustees for or as the price of any of the said income bonds of the said Louisville, New Orleans

and Texas Railway Company, as referred to in the fifth article of the collateral trust indenture. The intention of this supplemental mortgage is especially to extend the said lien of the said original mortgage to all property that shall be acquired or improved by the proceeds of the bonds hereinbefore referred to, but in no way to limit or restrict such original mortgage, which is to remain unimpaired in every respect so far as its existing liens and rights of lien are concerned.

Second. In all other respects, except as herein specifically changed, the said original mortgage is hereby adopted and confirmed.

In witness whereof, the parties hereto have caused their respective corporate seals to be hereunto affixed and attested by their respective secretaries, and these presents to be signed by their respective presidents, the day and year first above written.

THE YAZOO AND MISSISSIPPI VALLEY
RAILROAD COMPANY,
By STUYVESANT FISH, *President.*

[Corporate Seal.]

Attest: A. G. HACKSTAFF, *Secretary.*

Witness-:
JNO. W. CARLIN.
E. T. H. GIBSON.

UNION TRUST COMPANY OF NEW YORK,
By EDW'D KING, *President.*

[Corporate Seal.]

Attest: A. W. KELLEY, *Sec'y.*

Witness-:
C. C. RAWLINGS.
F. B. TORREY.

357 STATE OF NEW YORK, } ss:
City and County of New York, }

Be it remembered, that on this 27th day of May, in the year of our Lord one thousand eight hundred and ninety-three, before me, George H. Taylor, a duly appointed notary public in and for the city and county of New York, in the State of New York, and commissioner for the State of Louisiana in and for the State of New York, residing in the said city and county of New York, personally appeared Stuyvesant Fish, president of the Yazoo and Mississippi Valley Railroad Company, and Alexander G. Hackstaff, secretary of the same company, to me personally known, and known to me to be such officers of the said company, and to be the same persons whose names are subscribed to the foregoing instrument as having executed the same on the part and behalf of the said company, and acknowledged that they signed, sealed and delivered the said instrument as a free and voluntary act and deed of said company for the uses and purposes therein set forth. And the said Stuyvesant

Fish and Alexander G. Hackstaff, being by me duly sworn, did severally depose and say: That he, the said Stuyvesant Fish, is the president, and he, the said Alexander G. Hackstaff, is the secretary of the said company; that the seal affixed to the foregoing instrument, purporting to be the corporate seal of the said company, is such corporate seal; that it was affixed thereto by order of the board of directors of said company, and that they, the said Stuyvesant Fish and Alexander G. Hackstaff, signed their names thereto by the like order as the president and secretary of the said company respectively, in the presence of John W. Carlin and E. T. H. Gibson, competent witnesses. And on the same day, before me also personally appeared Edward King, president, and Augustus W. Kelley, secretary, of the Union Trust Company of New York, respectively personally known to me, and known to me to be
358 such officers of said company, and to be the same persons whose names are subscribed to the foregoing instrument as having executed the same on the part and behalf of the last-named company, and acknowledged that they signed, sealed and delivered the said instrument as the free and voluntary act and deed of the last-named company for the uses and purposes therein set forth, and the said Edward King and Augustus W. Kelley, being by me duly sworn, did severally depose and say; That they were the president and secretary respectively of the Union Trust Company of New York; that the seal affixed to the foregoing instrument, purporting to be the corporate seal of the said trust company, is such corporate seal; that it was affixed thereto in pursuance of authority in them vested by the board of trustees of said company, and that they signed their names thereto as such president and secretary in pursuance of like authority in the presence of C. C. Rawlings and F. B. Torrey, competent witnesses.

In witness whereof, I have hereunto set my hand and affixed my official seals and caused the said witnesses to hereunto set their hands this 27th day of May, in the year of our Lord one thousand eight hundred and ninety-three.

[SEAL.] GEORGE H. TAYLOR,
Notary Public and Commissioner of Deeds
[SEAL.] *for Louisiana in New York.*

C. C. RAWLINGS.
F. B. TORREY.
JNO. W. CARLIN.
E. T. H. GIBSON.

359 STATE OF NEW YORK, } ss:
City and County of New York, }

Be it remembered, that on this 27th day of May, in the year of our Lord one thousand eight hundred and ninety-three, before me, George H. Taylor, a duly appointed notary public in and for the city and county of New York, in the State of New York, and commissioner for the State of Mississippi, in and for the State of New York, residing in the said city and county of New York, personally

appeared Stuyvesant Fish, president of the Yazoo and Mississippi Valley Railroad Company, and Alexander G. Hackstaff, secretary of the same company, to me personally known and known to me to be such officers of the said company, and to be the same persons whose names are subscribed to the foregoing instrument as having executed the same on the part and behalf of the said company, and acknowledged that they signed, sealed and delivered the said instrument as the free and voluntary act and deed of said company for the uses and purposes therein set forth; and the said Stuyvesant Fish and Alexander G. Hackstaff, being by me duly sworn, did severally depose and say: That he, the said Stuyvesant Fish, is the president, and he, the said Alexander G. Hackstaff, is the secretary of the said company; that the seal affixed to the foregoing instrument, purporting to be the corporate seal of the said company, is such corporate seal; that it was affixed thereto by order of the board of directors of said company, and that they, the said Stuyvesant Fish and Alexander G. Hackstaff, signed their names thereto by the like order as the president and secretary of the said company respectively. And on the same day, before me also personally appeared Edward King, president, and Augustus W. Kelley, secretary, of the Union Trust Company of New York, respectively personally known to me, and known to me to be such officers of said company, and to be the same persons whose names are subscribed to the foregoing instrument as having executed the same on the part
360 and behalf of the last-named company, and acknowledged that they signed, sealed and delivered the said instrument as the free and voluntary act and deed of the last-named company for the uses and purposes therein set forth, and the said Edward King and Augustus W. Kelly, being by me duly sworn, did severally depose and say: That they were the president and secretary respectively of the Union Trust Company of New York; that the seal affixed to the foregoing instrument, purporting to be the corporate seal of the said trust company, is such corporate seal; that it was affixed thereto in pursuance of authority in them vested by the board of trustees of said company, and that they signed their names thereto as such president and secretary in pursuance of like authority.

In witness whereof, I have hereunto set my hand and affixed my official seals, this 27th day of May, in the year of our Lord one thousand eight hundred and ninety-three.

[SEAL.]
[SEAL.]

GEORGE H. TAYLOR,
Notary Public and Commissioner for Mississippi in New York.

361 STATE OF NEW YORK, }
City and County of New York, } ss:

Be it remembered, that on this 27th day of May, in the year of our Lord one thousand eight hundred and ninety-three, before me, George H. Taylor, a duly appointed notary public in and for the city and county of New York, in the State of New York, and commissioner for the State of Tennessee, in and for the State of New York, residing in the said city and county of New York, person-

ally appeared Stuyvesant Fish, president of the Yazoo and Mississippi Valley Railroad Company, and Alexander G. Hackstaff, secretary of the same company, to me personally known, and known to me to be such officers of said company, and to be the same persons whose names are subscribed to the foregoing instrument as having executed the same on the part and behalf of the said company, and acknowledged that they signed, sealed and delivered the said instrument as the free and voluntary act and deed of said company for the uses and purposes therein set forth. And the said Stuyvesant Fish and Alexander G. Hackstaff, being by me duly sworn, did severally depose and say: That he, the said Stuyvesant Fish, is the president, and he, the said Alexander G. Hackstaff, is the secretary of the said company; that the seal affixed to the foregoing instrument, purporting to be the corporate seal of the said company, is such corporate seal; that it was affixed thereto by order of the board of directors of said company, and that they, the said Stuyvesant Fish and Alexander G. Hackstaff, signed their names thereto by the like order as the president and secretary of the said company respectively. And on the same day before me also personally appeared Edward King, president, and Augustus W. Kelley, secretary, of the Union Trust Company of New York, respectively personally known to me, and known to me to be such officers of said company, and to be the same persons whose names are subscribed to the
362 foregoing instrument as having executed the same on the part and behalf of the last-named company, and acknowledged that they signed, sealed and delivered the said instrument as the free and voluntary act and deed of the last-named company for the uses and purposes therein set forth, and the said Edward King and Augustus W. Kelley, being by me duly sworn, did severally depose and say that they were the president and secretary respectively of the Union Trust Company of New York; that the seal affixed to the foregoing instrument, purporting to be the corporate seal of the said trust company, is such corporate seal; that it was affixed thereto in pursuance of authority in them vested by the board of trustees of said company, and that they signed their names thereto as such president and secretary in pursuance of like authority.

In witness whereof, I have hereunto set my hand and affixed my official seals, this 27th day of May, in the year of our Lord one thousand eight hundred and ninety-three.

[SEAL.]
[SEAL.]

GEORGE H. TAYLOR,
Notary Public and Commissioner for Tennessee in New York.

363 B. C. PFOUTS, a witness for the defendant, being duly sworn, testified as follows:

Q. Are you in the employ of the Y. & M. V. R. R. Co.?
A. Yes, sir.
Q. What position do you occupy?
A. Book-keeper.
Q. In the offices at Chicago?

A. Yes, sir; in charge of the general books of the Y. & M. V. R. R. Co.

Q. Are you the gentleman who furnished to Mr. Welling the sheet which has been used by him here in his testimony and marked Exhibit 1?

A. I made up these figures.

Q. Made them up from the books?

A. Yes, sir.

Q. Are those books regularly and properly kept?

A. Yes, sir.

Q. I will get you to state to the jury whether or not the sheet which was furnished by you to Maj. Welling correctly shows what the books show and the results.

A. It does; yes, sir.

Q. You have those books here and can produce them if he desires?

A. Yes, sir.

Q. And you can make any explanation desired in the matter?

A. Yes, sir.

Q. Will you please tell us whether or not the affairs and business of the Y. & M. V. R. R. Co. are mixed up with the Illinois Central matters or kept seperate?

A. In handling the general books of the company they are kept seperate.

Q. Seperate and distinct?

A. Yes, sir.

364 Cross-examination:

Q. You say you are the book-keeper for the Illinois Central R. R. Co. and the Yazoo & Miss. Valley R. R. Co.?

A. No, sir; I am not; no, sir.

Q. Which company are you book-keeper for?

A. I keep the general books of the Y. & M. V. R. R. Co.; not of the Illinois Central R. R. Co.

Q. Where do you keep those books?

A. I have them in Chicago.

Q. You live in Chicago?

A. Yes, sir.

Q. You keep those books of Y. & M. V. R. R. Co. in the offices of the Illinois Central R. R. Co. in Chicago, do you not?

A. In the building of the Illinois Central R. R. Co.

Q. Is it not in the office of the Illinois Central R. R. Co.?

A. Yes, sir.

Q. Can you tell us why it is that you as book-keeper of the Y. & M. V. R. R. Co. have your office with the Illinois Central R. R. Co. in Chicago?

A. I cannot; no, sir.

Q. Are all the books of the Y. & M. V. R. R. Co. kept there under your supervision?

A. The general books of the company.

Q. You are the head book-keeper of the company?

A. With their general books; yes, sir.

Q. You have stated that these books were correctly kept. Do you know anything about the items entered on these books, except as they were furnished to you by others?

A. That is all, sir.

Q. All you know is that you correctly entered on the books the items the others furnished to you?

A. Yes, sir.

Q. You do not know anything about the original correctness of the items?

A. I have every reason to believe that they are correct.

Q. I am not talking about a matter of faith; I am talking about a matter of knowledge.

A. Yes, sir.

Q. You do not know anything about them except they were correctly entered as furnished to you?

A. That is all.

Q. Were you in the employ of the Y. & M. V. R. R. Co. as book-keeper—I mean by the Illinois Central R. R. Co.?

A. No, sir.

Q. Who employed you?

A. I am employed by the Illinois Central Railroad Company, but not as their book-keeper.

Q. What position do you hold with the I. C. R. R.?

A. Clerk in the vice-president's office.

Q. Do you keep these books in the same office?

A. Yes, sir.

Q. All right there together?

A. Yes, sir.

Q. And the books there belong to the I. C. R. R. Co?

A. Belong to the Yazoo & Miss. Valley R. R. Co., as I understand it.

Q. That is the way they are labelled?

A. Yes, sir.

Q. The Y. & Miss. Valley R. R. does not go to Chicago?

A. No, sir; not direct.

Q. Then the headquarters for the Yazoo & Mississippi Valley R. R. Co. are in Chicago, are they not?

A. I hardly understand what you mean by the headquarters; a great many of their general officers are located there.

Q. Does Mr. Welling, the vice-president of the two companies, have an office in the same building with you?

A. Yes, sir.

Q. In the same room?

A. Yes, sir.

365 Q. Does Mr. Morehouse, who is here, who is the tax commissioner, have an office in the same building with you in Chicago?

A. Yes, sir.

Q. He is a tax commissioner for the I. C. railroad, is he?
A. I believe so.
Q. He is the tax commissioner also for the Y. & M. V. R. R.?
A. Yes, sir.
Q. Are not the headquarters of all the general officers of the Y. & M. V. R. R. Co. except the ass't gen'l sup't in Chicago?
A. No, sir; they are not.
Q. Which one has offices anywhere else and where?
A. As I understand it, the president, the secretary, and treasurer are in New York.
Q. Do they have headquarters there or are not their headquartes—their official headquarters—also in Chicago?
A. No, sir.
Q. Then does the I. C. R. R. Co. have offices in the city of New York also?
A. Yes, sir.
Q. And these general officers whom you have mentioned have their general headquarters in New York? They are also general officers of the Illinois Central R. R. Co.?
A. Yes, sir; I believe they are.
Q. Then the general offices of the Y. & M. V. R. R. Co. in New York is in the general offices of the Illinois Central R. R. Co. in New York?
A. I have never been in their offices in New York. I believe they are in the same building.
Q. Then you have only heard that Mr. Fish lives in New York?
A. That is all.
Q. Where are the books which are kept by you and which you say are here present in court?
A. Over there, sir.
Q. Show me the books, please, sir.

(Books were here produced by the witness.)

Q. What years do those books cover?
A. Back to 1885. My handling of them has been since 1892 up to the present day.
Q. You do not know anything about these books prior to 1892, do you?
A. No, sir.
Q. Don't you know it to be a fact that the L., N. O. & T. R'y was built prior to 1885?
A. I do know that the construction of the road was commenced prior to 1885.
Q. Where were you while the road was being built?
A. I was not with the company then, sir.
Q. You do not know of your own knowledge when the railroad was built?
A. No, sir.
Q. You do not know anything about anything in these books except what was entered in 1892?
A. I know all about my own entries.

Q. Beginning with the first of 1892?

A. No, sir; commencing with the 1st Nov., 1892, the 1st January, 1893.

Q. Do you know anything about these statements here in Exhibit 1 to the testimony of J. C. Welling as to the year 1892?

A. I simply figured it out of these books.

Q. It was entered in there by somebody else?

A. Yes, sir.

Q. You do not know anything about the accuracy of that?

A. No, sir.

Q. You just copied these items out of these books as they appeared?

A. Yes, sir.

Q. The items that you copied on to this Exhibit 1 by Mr. Welling are simply a summation of the items on the books?

A. Yes, sir.

Q. The books do not contain these items as they are here?

A. No, sir.

366 Q. That is just a summation?

A. Yes, sir.

Q. The books show the individual items from which these are taken?

A. To a great extent.

Q. If they do not entirely, how do you get them?

A. They are all worked out over six months at a time. For instance, this interest is summed up every six months, and I had to compile it.

Q. Do the exact items of interest appear on the books that are here, the exact amount?

A. Yes, sir.

Q. Was not the interest on the bonds payable in March and November, twice a year?

A. No, sir; March and Sept.

Q. They were coupon bonds, and as the interest was paid the bonds were clipped and cancelled?

A. I suppose that was the regular form. I have never had the pleasure of handling the coupons yet, or the cash.

Q. Do you know of your own knowledge anything about the cost of construction of the L., N. O. & T. R. R. from Memphis to New Orleans?

A. No, sir.

Q. Do you know anything about the cost of construction in the State of Mississippi?

A. No, sir.

Redirect examination:

Q. Do you know anything about the Y. & M. V. R. R. Co. having some headquarters and general officers in Memphis?

A. Yes, sir; they had two.

Q. Do you know whether they have any there now—general offices?

A. Not that I know of, unless you term the assistant general supt. a general officer. He has his office there.
Q. Is not there an assistant general freight agent there?
A. Yes, sir.
Q. And a claim agent there also?
A. But not in Memphis now. He is located in New Orleans.
Q. These books here are the gathering up, are they not, of the regular reports that come into the headquarters' offices?
A. Yes, sir.
Q. In the regular course of business of the company?
A. Yes, sir.

Objected to as leading. Objection overruled. Plaintiff excepts.

The deposition of R. T. WILSON was then read, which is as follows:

Q. How old are you, Major?
A. Well, I am over 60 years considerably.
Q. What is your present place of business?
A. 33 Wall street, N. Y.
Q. Are you the Wilson of the firm of R. T. Wilson & Co.?
A. I am.
Q. And who was connected with the L., N. O. & T. R'y Co.?
A. I am the same Wilson.
Q. Please state where you resided from the year 1884 to the year 1892, inclusive.
A. In New York.
Q. What was your occupation during that time?
A. I was a banker and president of the railroad.
Q. Were you connected with the Louisville, New Orleans & Texas railroad during that time?
A. I was.
Q. What time during that period?
A. All of the time.
Q. What was your connection with it?
A. I was the president of it.
Q. I believe that you have stated that you were the president of the railroad company during the time, during the year 1892?
A. Yes, sir. I don't know that I was during all of the year 1892. I have forgetten about that.
367 Q. How did your connection as president of that company terminate?
A. By my resignation, after I had sold the holding of my firm.
Q. Now, then, I will get you to state whether or not it was ever the case that the L., N. O. & T. R'y Co. ever sold its railroad or corporate property to anybody.
A. It did not that I am aware of; not during that time. I am certain that it did not. During my connection with it it never did.
Q. When did your connection terminate?
A. In 1892. I think that I resigned my presidency during the year of 1892.

Q. Who succeeded you?

A. Well, I don't recollect at the moment who they did elect in my place.

Q. The president was elected after you resigned?

A. Yes, sir; he was elected and succeeded me. I knew who it was, but I don't recollect at this moment. I have forgotten.

Q. Now I will ask you to state, if you please, whether or not it was the case that in any of the years from 1884 to 1892, inclusive, during the period that you were connected with the railway company, that the Louisville, New Orleans & Texas Railway Company did declare and pay to its stockholders out of the profits an annual dividend of eight per cent. upon its capital stock over and above the payment of its debts and liabilities.

A. It never did.

Objected to. Objection sustained. Defendant excepts.

Q. Did it declare and pay a dividend of any other per cent.?

A. It never declared or paid a dividend of one per cent. during the whole period.

Q. I will get you to state whether or not during the period from 1884 until your connection with it terminated the profits of that railroad company enabled it to declare and pay to its stockholders an annual dividend of eight per cent. on its capital stock over and above its liabilities.

A. The profits never did in any one year enable us to pay eight per cent. or any other per cent.

Objected to. Objection sustained. Defendant excepts.

Q. Major, I want to ask you if during that period the profits of your company enabled it in any one of these years to declare and pay an annual dividend on its capital stock of any per cent. over its construction debts and liabilities.

A. It never did. The profits never did.

Q. I will get you to state whether or not during any of that period the annual profits of that company enabled it to declare and pay to its stockholders a dividend of any amount over and above its then due and payable construction debts and liabilities.

A. It never did.

Q. Please state whether or not that previous to September, 1892, that the debts and liabilities which the L., N. O. & T. R'y Co. had incurred in construction of its railroad and money borrowed by the said company upon lands and otherwise to be used in constructing the railroad and in paying the debts incurred in constructing the railroad had been paid off by novation of the bonds of the Illinois Central R. R. Co., or otherwise.

A. They had not.

Q. Now, can you state, then, either exactly or approximately, what the amount of the outstanding debts of the L., N. O. & T. R'y Co. of the caharacter styled above were outstanding and unpaid on Sept. 22nd, 1892?

A. That is thirty-seven millions of dollars.

Q. On the 22nd of Sept., 1892?

A. Yes, sir. That does not include the capital stock. By way of explanation, I wish to state that this thirty-seven millions of dollars—of that there were $35,236,000.00 that was represented in bonds; that consisted of bonds. There was about, as well as I remember, in the neighborhood of $2,000,000.00 of accumulated interest on the second-mortgage bonds, and there was a floating debt of several hundred thousand dollars above its assets, so that in the aggregate there was more than $37,000,000.00 on the 22nd of September, 1892, of existing debts against the company that was created for the construction of the road.

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Q. Could you state whether the liabilities incurred in the construction had been paid off by novation with the I. C. R. R. bonds or otherwise on the first Monday in June, 1893?

A. No, sir; I cannot state about that date.

Q. You don't know what happened in 1893?

A. No, sir; I do not.

Q. And you don't know what happened in 1894?

A. I do not.

Q. Major, I will ask you to state if the main lines of the railroad from Memphis to New Orleans, and certain branches of it—say the Tallahatchie branch and Riverside division, I believe that is all—were not constructed by the L., N. O. & T. R'y Co. while you were president of it.

A. Yes, sir; they were.

Q. Now, I will ask you to state whether the railroad company itself built that railroad and branches, or whether it was done by contract with a construction company.

A. The main line and what is known as the Leland branch. The main line was built by a contract with a construction company. The Leland branch, I believe, was built under the same contract with the construction company. That is my recollection as to the Leland branch. I know that the main line was. Maj. Edwards reminds me that the Leland branch was built under a different charter.

Q. That is what is called in here the special charter?

A. Yes, sir; the special charter.

Q. What my question alluded to was what was in addition to the special charter known as the Riverside division.

A. A part of that; that branch. We purchased that for so much stock and so many bonds. The L., N. O. & T. purchased that branch.

Q. That was the property of the Memphis & New Orleans R. R. & Levee Company?

A. Yes, sir.

Q. That was supplemented by building some additional branch lines?

A. Yes, sir.

Q. My question is as to whether those additional branch lines were built under your supervision.

A. Yes, sir; while I was president of it.

Q. Could you produce the contract under which the main line was built?

A. Yes, sir.

Q. I will get you to produce it.

A. In respect to this contract for the construction of this railroad that was made originally, by way of explanation, it is proper for me to state that these contracts were made for several divisions of the companies. Previous to the date that you have first spoken about they were first made by William M. Johnston—he was in my firm—who agreed to build them, and then he assigned these contracts to the construction company, and it took them over and executed them in accordance with the terms of the same.

Q. Are these the original contracts that you speak of in your answer? These are the contracts produced to be filed?

A. Yes, sir; those are the original contracts.

It is here agreed by counsel that copies of the contract may be filed in the place of the original contracts.

Q. These contracts that you have here are the contracts under which the main line and branches were constructed?

A. Yes, sir.

Q. Those are the original contracts?

A. Yes, sir; under which they were begun. The contract of William M. Johnston was assigned to the Financial Improvement Co. and was carried out by the Financial Improvement Co. All of these contracts were executed by the Financial Improvement Co; all of them.

By Mr. BECKET:

Q. Are they signed by the Financial Improvement Co.?

A. In the first instance they are not. I find that all of the contracts were signed in the first instance by the Financial Im-
369 provement, but one. Here are the contracts. They speak for themselves.

By Mr. MAYES:

Q. Major, before you became connected with the railroad as president of the L., N. O. & T. R. R. and before the L., N. O. & T. was organized there were some outside railroad companies connected in this matter, one of which was the Vicksburg & Memphis railroad?

A. Yes, sir.

Q. And the officers of the Vicksburg & Memphis R. R. were different from yours?

A. Yes, sir; those preceded me.

Q. And they began this work?

A. Yes, sir.

Q. Then the L., N. O. & T. R'y Co. was formed, of which you were president, and took up this work and carried it to its completion?

A. Yes, sir; through its completion.

Q. Major, these construction contracts which you have produced

here, were some of them executed with parties other than the Financial Improvement Co.? Is not that true?

A. Yes, sir; there was only one of them. That was in the case of the Memphis & Vicksburg.

Q. Such of them as were made with other parties than the Financial Improvement Co. were afterwards assigned to the Financial Improvement Co.?

A. Yes, sir.

Q. And the Financial Improvement Co. completed the road under these contracts?

A. Yes, sir—that is, it executed them.

Q. Now, then, this railroad and the branches that were built by the L., N. O. & T. R'y Co., were they or were they not under separate contracts?

A. They were.

Q. And those papers which you have produced, are they or are they not the originals of these contracts?

A. They are the originals. It is proper that I should say in regard to the construction and the provisions of these contracts there are some of them that provided originally that the Financial Improvement Co. should be paid at the rate of $20,000.00 per mile, first-mortgage six per cent. bonds, at $20,000.00 per mile of income bonds and $20,000.00 per mile of stock. That is the provision of some of the first contracts, whether or not of all of them I do not know, and afterwards these contracts were changed so as to make $24,000.00 first-mortgage five per cent. bonds instead of $20,000.00 per mile six per cent. bonds, and $20,000.00 of income was still retained, and the stock was reduced from $20,000.00 to $10,000.00 per mile—the capital stock.

Q. Now, then, were these bonds and that stock delivered to the Financial Improvement Co. in the sums indicated by you in payment for the construction of this railroad?

A. They were. Whether this further explanation comes in here I don't know, but the facts are that, going on still further, there was another change in the scheme of the Financial Improvement Co. The first-mortgage bonds were reduced from five to four per cent.

Q. That was what time—in 1886?

A. Yes, sir; in 1886. There was a second-mortgage six per cent. bond issued and represented the concessions that had been made of the proportion of the first — to the difference between the four and five per cent.

Q. That is the transaction out of which the mortgage of 1886 came?

A. Yes, sir; that is the transaction out of which the mortgage of 1886 came. There are three series of bonds. They have an element of a second mortgage, with a fixed charge there in 1886; the reduction of the amount of the first mortgage and the rate of interest.

Q. And this mortgage of 1886 was executed in order to adjust the remaining bonds to the reduced rate of interest?

A. Reduced rate of interest; and the real reason for that—the real moving cause—was to so reduce the fixed charges on the first-

mortgage bonds to give them some financial standing so as to come in the power of the company to earn interest on them and to be able to dispose of them. The fixed charges on the first mortgage bonds, it had become apparent, could not be paid out of the net earnings of the company, and therefore they were reduced.

370 Q. Well, in that connection I will get you to state whether the fixed charges as they were reduced were made above the operating expenses.

A. They were not; they never did.

Q. Now, coming back to the question I started with a while ago, Major, is it or not correct that at or soon after the building of the railroad in 1886 that the series of bonds bearing interest at the rate of four per cent. per annum, amounting to $13,800,000.00, and another series bearing interest at the rate of five per cent. per annum, amounting to $8,700,000.00, and another series bearing interest at the rate of six per cent. per annum, amounting to $8,350,000.00, in round numbers aggregating $30,888,000.00, were sold and disposed of by the L., N. O. & T. R'y Co. for cash?

A. They never were.

Q. And is it or is it not true that out of the cash obtained on the sale of such bonds the sum of about four millions of dollars was used to pay off the construction debt of the railroad and to pay for the building of the railroad?

A. No, sir; it is not. It is not true.

Q. I will get you to state further whether or not it is true that previous to January 1st, 1891, or at any other time, so far as that is concerned, the L., N. O. & T. R'y Co. issued or disposed of to its incorporators or other parties, in order to make them stockholders, 48,242 shares of the stock for much less than its face value and for little or no consideration.

A. It never did.

Q. The stock that was disposed of, as I understand you, was disposed — in payment of the building of the railroad?

A. It was; a part consideration for the building of the railroad.

Q. To the construction Co.?

A. To the construction company.

Q. Major, have you any interest in this litigation?

A. I have not.

Q. Directly or indirectly?

A. I have not, one single cent, directly or indirectly.

Cross-examination:

A map, admitted to be a correct representation of the railroads in litigation, was here introduced in evidence and marked Exhibit "I."

Q. Now, Major Wilson, what we want you to explain are the different charters that the different parts of this railroad were built under.

A. That is a matter of detail that I could not explain unless I had the charters before me.

Q. Here is the assessment that was given in to the railroad commission that puts as exempt from taxation a certain part. On the assessment-roll it is put down here as taxable, the road from Hampton to Leland and then from Wilczinski to Glen Allen.

A. I don't know anything in the world about that part of it. That is a matter of detail that I did not pay any attention to. I only dealt with the results. You can get that from other people that know all about it. I don't know anything about it.

It is admitted by the counsel for the defense that the line of road running between Leland and Huntington and from Wilczinski to Hampton and thence to Glen Allen was constructed under the charter of the Memphis & New Orleans R. R. & Levee Co.—that is, what is known as that part of the Riverside division known as special charter.

Q. On the map filed as an exhibit with your deposition it shows that the Helena branch commences at Glendale, west of the main line, and extends across the main line to Eagle's Nest. State how the L., N. O. & T. R'y Co. acquired this Helena branch.

It is here admitted by the counsel for the defense that it was built originally by the Mobile & North Western railroad, and that it was mortgaged by the company, and under a decree of foreclosure rendered by the United States court at Oxford it was sold, and that it was purchased, a part by Holmes Cummings and a
371 part by Charles M. Calhoun, and that that part that was purchased by Chas. M. Calhoun, which was from Glendale to Lula, was sold to the L., N. O. & T. R'y Co. That part that was purchased by Holmes Cummings was never conveyed. It was torn up.

Q. You say from 1884 to 1892 you were the president of the L., N. O. & T. R'y Co.?

A. I was.

Q. Who composed the firm of R. T. Wilson & Co.?

A. R. T. Wilson—B. F. Wilson for a part of the time. I don't know whether he was in the firm all of the time or not. S. M. Johnston was in it a part of the time, and Charles B. Busher, as I remember now. William M. Johnston was a member part of the time, but whether all of the time I don't remember now.

Q. Was your firm a partnership or corporation?

A. It was a partnership.

Q. Are you R. T. Wilson, who was one of the members of it?

A. I am.

Q. Was the Pacific Improvement Company a partnership or corporation?

A. I have understood that it was a corporation, but I don't know. I am not advised to say.

Q. Do you know who the members were that composed it?

A. I do not.

Q. Were you one of the members of it?

A. I was not.

Q. In your dealings with the Pacific Improvement Co. who represented it?

A. I don't remember to have had any dealings as president with the Pacific Improvement Co. I don't think I had any with them, so far as I know. The L., N. O. & T., as far as I know, never had any dealings with the Pacific Improvement Co.

Q. I mean the Financial Improvement Co. Was the Financial Improvement Co. a corporation or a partnership?

A. It was a corporation.

Q. Do you know who composed the members of it?

A. I don't know all of the members that composed it. My general understanding, however, was that it was owned by C. P. Huntington associates, and that they were in control of it—a part of it. The other part was owned by R. T. Wilson & Co. R. T. Wilson & Co. owned forty per cent. and the C. P. Huntington associates owned sixty per cent.—that is, the various members of the firm of R. T. Wilson & Co. Who they were I don't remember now.

Q. Did R. T. Wilson have any interest in the part that was owned by C. P. Huntington associates?

A. I did not.

Q. Major Wilson, the reports filed with the railroad commission for Mississippi by the Y. & M. V. R. R. Co. for the years from 1892 to 1895 show the gross earnings of the former L., N. O. & T. R'y Co. in this State to be an average of something over two millions of dollars. Will you please state about how much of the gross earnings was required for operating expenses per annum?

A. Now, you are asking for my opinion as to what it would take to operate the railroad. I don't know that or anything about it. You want to know my opinion as to what would be a proper charge for operating expenses. I have no knowledge.

Q. I want to know in your judgment about what it was. Of course, you have no knowledge.

This question is objected to on the ground that it is not the best evidence and that it is not testimony.

A. If you would let me go by past experience I would say that it would consume about all of it. If you will take my past reports you will see that it took nearly all of it. In other words, there was scarcely any money made on that road that was not applied to the operating expenses or charged to the construction account, and that account, you may say, was construction or maintenance or whatever you please. It was money that was earned from the operation and that was expended on the main line of the railroad after the road was opened. If you will take my expenses from 1884 to 1886 you will see, if you go over the money it took that was expended on the road in order to operate, it to keep it up, there would not be twenty per cent. of it or anything like that left. I have my reports that will verify that. In other words, it took nearly all of it.

372 Of course, you gentlemen must understand the physique of the road and its location and the character of the soil and the country that it runs through, the timber that you get, the

rapidity of the washing. Unfortunately for this road, I don't want to discredit it, but it has many disadvantages to labor under; more than the average ills that attend on a railroad.

Q. Have you the originals or any of the copies of the annual reports of the gross and net earnings of the L., N. O. & T. R'y Co. in 1884 to 1892 and for any of said years?

A. Yes, sir; I think I have them all here. There were never any reports issued until the first of 1887. We have the result of the operatoons.

Q. Will you please file the said reports or copies of the same as exhibits to your answer to this deposition?

A. These reports, gentlemen, are filed, beginning the year and ending on the 31st of December, 1887, and goes down to June 30th, 1891.

Q. Are they annual or biannual?

A. They are annual, except that we made a change in the fiscal year. The fiscal year began on the 30th of June, 1890. During that period—I will say from the beginning of the operations of the road—we spent on the construction $1,942,981.89. That was simply on the main line of the road that we spent for construction after the road was opened. We spent that. It was called the construction account. During that period the interest on the first-mortgage bonds that were outstanding *were* charged, you know, and the surplus, what were called the net earnings, were not sufficient to pay the money that we actually put out, and for which the L., N. O. & T. R'y Co. incurred a floating indebtedness by the difference between the sum that I have just given as $1,942,981.69 and $1,277,904.64, the floating debt. In other words, if you will take those two sums, one from the other, you will see how much the railroad failed to make the interest on the first mortgage bonds during this period. I think that you will further see that the operating expenses amounted to more than eighty per cent. of the entire gross earnings.

Q. What year was that?

A. This was in June, 1891, the 30th, and that does not embrace all of the difference, either. Of course, you want to know the facts in this case. In addition to that we spent on the N. J. & C. R. R. $141,273.03 and the Southport branch and the elevator $194,155.02 and on the L., N. O. & T. in Arkansas $48,336.91, so that you will find that the floating indebtedness of the L., N. O. & T. was increased by all of these sums during this period, and there is no money drawn from the operation of the road and no money charged except to pay the interest on the first-mortgage bonds that were outstanding. Gentlemen, I want you to go through these things and understand them. I can tell you that there is no more chance for a dividend on this stock then, nor any now, or any other time, I am afraid, than there is for the sun to turn the wrong way.

Q. How much did the L., N. O. & T. pay for what is known as the Riverside division, special charter, railroad?

A. That I don't remember. Maj. Edwards can give you that information in detail. Maj. Edwards gives me this to refresh my

memory with. It is as follows: $453,000.00 of the capital stock of the company; first-mortgage bonds, $1,140,000.00; second-mortgage bonds, $218,000.00; income bonds, $906,000.00.

Q. How much did the L., N. O. & T. R. R. pay for the Helena branch?

—. All of those other branch lines, gentlemen, we built, as I now recall, on the basis of the actual cash that was paid out. That was advanced by the Financial Improvement Co., and was settled for in the first-mortgage bonds, 100 cents of the first-mortgage bonds and 31 cents of the second-mortgage bonds at ninety-seven and one-half cents on the dollar of the first. That is the actual cash that they cost, without applying to all of the rest of them. At that time we could not have sold the bonds to save our lives to the public.

Q. About how much in bonds was given for the Helena branch?

A. I don't remember. You can find out very easily. I don't remember those details at all.

Q. You can give it altogether—the Bayou Sara branch and the Helena branch and the Tallahatchie branch—either together or separately.

373 A. Yes, sir; I can give you that information. For all of the three branches except the N. J. & C. branch there was paid $3,114,522.00 of the first-mortgage bonds. There was paid with this $987,000.00 of the second-mortgage bonds, which represented the cost of these roads at 97, taking the accrued interest—that is, the money it actually cost was refunded to the parties that furnished it in bonds.

Q. Have you any estimates or memoranda or accounts, engineers' estimates, showing what it actually cost to build the main line of the L., N. O. & T. R. R. in Mississippi?

A. Well, I have not the estimates of the engineers or anything of that kind. That would not be worth much if I did. Let me give you an instance of what the for-cast of even an intelligent man means. For instance, you take the Yazoo bridge. It was my estimate that that could be built for $80,000.00. We got into it and it cost us $278,000.00, as I remember, before we got it built. You take the Vicksburg tunnel, and we estimated that that could be built for $80,000.00 or $90,000.00, and we came in contact with quicksand and it cost us $160,000.00, and you get down to what is called the big divide there and we estimated that we could get through with $25,000.00 or a little more. I don't remember the exact estimate, but it began to slide in there when we struck the quicksand and it cost us $100,000.00. Mr. Huntingdon remarked to me one day when we were making engineers' estimates, "You have not built as many railroads as I have." He said to take the most liberal engineer that you have and get him to make an estimate and then double that and add fifty per cent. and you will get nearer to the cost of your road than any engineers' estimates in the country, and that is my experience. You have to clean out the ditches and then things give away. It will cost you two and one-half times any engineer's estimate as certain as I sit in this chair.

The defense here objects to any testimony as to what it cost the Financial Improvement Co. as being irrelevant.

Q. The question that was just asked you was with reference to the estimate of the engineers that was made after the work was done.

A. I have no such estimates.

Q. Give the accounts of the cost of the work.

A. I never retain any estimate of that kind.

Q. Have you within your possession or knowledge or your control the estimates made by the engineers of the Financial Improvement Co. of the work actually done in the construction of this railroad, upon which estimates the payments were made?

Objected to as being irrelevant and incompetent to the issues in this case.

A. I have not them in my possession or control. I don't know whether they are in existence or not, but if they are, they may be, they are a matter of detail that I paid no attention to. If there were any such estimates made and footed up, I have never seen them.

Q. Of the 48,242 shares of the L., N. O. & T. R'y Co. did not R. T. Wilson & Co. own 11,898 shares and the Pacific Improvement Co. have 25,288 shares?

A. I don't know what amount R. T. Wilson & Co. owned of the stock nor do I know the amount C. P. Huntington'- associates owned at any particular date of this stock. The proportion in which R. T. Wilson and associates owned the stock and C. P. Huntington and associates and the Pacific Improvement Co. owned the stock, as the case may be, was in the proportion of forty to sixty per cent. The amount I don't know, but that is the proportion.

Q. On the first day of September there was a deed of trust executed in this county of Hinds by the I. C. R. R. Co. and it is on record in this county, and in the said deed of trust it is recited that the party of the first part, meaning the I. C. R. R. Co., assigns and sets over to the trustees 13,805 one-thousand-dollar first-mortgage four per cent. gold bonds of the L., N. O. & T. R'y Co. issued un-er and secured by two several mortgages or deeds of trust made on Aug. 25th, 1886, amounting in all at their face value to $13,805,000.00, with the interest coupons attached due March 1st, 1893, and thereafter, and 8,731 one-thousand-dollar five per cent. second-mortgage bonds of the said railway company issued under and secured by two several mortgages or deeds of trust made on August 25th and 26th, and 8,347 six per cent. income bonds for one thousand
374 dollars each issued under and secured by two several mortgages or deeds of trust made on Sept. 14th, 1884, and Aug. 25th, 1885, to Edward H. Pardee and Albert Crolius, trustees, and 37,339 shares of capital stock of the said L., N. O. & T. R'y Co. It is also recited in the said deed of trust that the said I. C. R. R. Co., in pursuance of its corporate power, has acquired and now holds the

said bonds and stock of the L., N. O. & T. R'y Co. Is that recital true or false?

The counsel objects to the question on the ground that it is irrelevant to the issue in this case.

A. Well, I cannot say whether it is or not. I don't know.

Q. In conclusion of section or paragraph 3 in the said deed of trust of the I. C. R. R. Co. it — stated as follows: That it further covenants and agrees that it will cause to be paid off and discharged in due season all taxes and assessment which may from time to time be lagally liable and imposed by competent authority upon the railroads or the railroad property or premises described in the several mortgages, so that the lien of the said mortgages shall at all times remain unimpaired until all of the bonds secured hereby shall be fully paid and satisfied. Was not the said agreement of the I. C. R. R. Co. understood and agreed on between you as president of the L., N. O. & T. R'y Co. and the said I. C. R. R. Co.?

A. It was not. No, sir; it was not.

Q. Who did the said I. C. R. R. Co. acquire the stock and bonds from?

A. That I cannot say. I don't know. I am answering as to whom they acquired them from. Whether they acquired them from the Mississippi Valley or, if they did acquire them, whether they acquired them direct from the sellers I cannot answer for the reason that these contracts were all made under the direction of the counsel of C. P. Huntington & associates. If I have ever seen that and saw the details of it, I don't remember it. Perhaps I did, but I don't remember in whose names the things were purchased. Mr. Chas. H. Tweed, a man in whom I had absolute confidence, was the counsel for *the* C. P. Huntington and did all of the drawing of the papers, and my partner, who is dead, Mr. Busher, attended to the transactions. I did the talking and that sort of thing, but as to matters of detail I only dealt with the facts. They put the contracts in shape and I have not refreshed my memory about it or seen them.

Q. These stocks and bonds, then, were either acquired by the I. C. R. R. Co. or by the Mississippi Valley Co.?

A. I would say so, but I am not absolutely certain in whose name the contract was made or whether it was individuals or one of the two companies. I would say that it was one of the two companies, but I am not sure. All that I cared for was to know whether I was selling and what I was going to get for it; that is all I troubled myself about. If you lived in New York as I do, you would find that the business there is classified. We have lawyers there by the thousands and we keep them working there every day in the year; that is the way it is, gentlemen. I am a stranger to you, but those are the absolute facts. You should remember the vast amount of business that I have, and that I could not tell you the details to save my life.

Q. Please look at the map and explain how the trains run. Was there a seperate train run on the Bayou Sara branch?

A. That I could not tell you.

Q. I mean at the time you were president of the railroad.

A. I could not tell you that. I lived in New York and I had no knowledge of how the trains run, I don't suppose, any more than you did. Possibly Maj. Edwards can tell you. I don't know.

Q. Was there a seperate train run on the N. J. & C. R. R.?

A. That I cannot tell you, either.

Q. Was there a seperate train run on the Helena branch?

A. That I cannot tell you. I don't know.

Q. Well, do you know how the trains were run on the Riverside division?

A. No, sir; I do not.

Q. You don't know, then, how the trains were run on the roads?

A. No, sir; I do not.

Q. Who would be able to give that information?

A. I would think that Maj. Edwards as well as anybody. I would think so, but I don't know that any one could do it
375 without refreshing their minds with the schedules.

Q. I want to know whether the trains on the main line run out on the branches or whether they run seperate trains.

A. I think that Maj. Edwards might furnish you with that information. I never knew much more about the physical operation than any one else.

Q. There were three series of bonds, to wit, the four per cent. first mortgage, and the five per cent. second mortgage, and the six per cent. income?

A. Yes, sir.

Q. And the stock that was issued, as I understand, was issued to the construction companies for the building of the road?

A. Yes, sir.

Q. That is, they were issued to them; a renewal of their bonds had been issued?

A. Yes, sir; under the contract, you know, for the main line certain parts of it were issued for that, and then under the building of these branches the second-mortgage bonds. All of the income bonds and all of the stock and certain of the first mortgage and certain of the second mortgage was paid to the construction company for building the main line and for acquiring the Leland branch. That is how the thing was, and then the remainder of the bonds that were issued, the first-mortgage bonds and the second-mortgage bonds, were paid to the Financial Improvement Co., which furnished the money to the L., N. O. & T. R. R. Co. to do this work, and they were paid at the rate of 97½ cents on the dollar in cash for 100% of the first-mortgage bonds, plus 3% of the second-mortgage bonds. That is the way the other branches were constructed—the Leland branch, the Helena branch. I have not the data here. I think, perhaps, Maj. Edwards can give you that.

Q. What I wanted to get at is that these bonds were not sold on the market, but were issued under a contract to the construction Co. for the building and the purchase of the road and branches?

A. Yes, sir; we found it absolutely impracticable to sell them at

any price. The construction Co. tried to sell them and we tried to sell them. They were without credit, and the only way was for the individuals to advance the money to the construction Co. and nurse them until they were marketable, and they were never marketable until the time they were sold. There had never been a day when the construction Co. could have sold them to brokers or otherwise for the actual cost value of them; in other words, there was never a day when the parties who contributed this money could have sold them in the market or otherwise and have gotten their money back.

By Mr. CRITZ:

Q. Are there any other reports of the net and gross income of the road in question from 1887 to 1891 except the reports which you have filed as exhibits to your deposition?

A. Those are the only ones that I have any knowledge of. I don't think there are. I never heard of them, to my recollection, if there are.

Q. Were each of these reports made in the year that they are dated?

A. Yes, sir; as I remember, they were all made subsequent to it. It took some time to get the statements in. I don't know whether they bear the date that they were actually made and issued or not. Sometimes it took two or three months to get the accounts up so that we could make these reports.

Q. Please state why it is that no report appears dated in 1890.

A. The fiscal year was changed, you know, and the other report was issued on June 30th instead of the 31st of December.

Q. June 30th following?

A. Yes, sir; June 30th following.

Q. Did the construction Co. keep no account of the actual expenditures in money in the construction of the road?

Objected to as being incompetent and irrelevant.

A. Well, I say that it did keep an account of the cash expended in the purchase of the property.

Q. Did the construction Co. have any estimates of the engineers showing the amount of work and the amount of money that was actually expended for the work?

Objected to for the same reason stated above.

376 A. Do you mean to enquire whether they had estimates showing this before the work was done or afterwards?

Q. After it was done.

A. I don't know that they had the estimates of the engineers that showed it. I think not. The books showed what was actually expended. As I explained to you awhile ago, it was utterly impossible to make estimates of the costs of these things or approximate anything like it beforehand. You would make a contract with a man and he would break down and he could not do it and you would go ahead and have it done yourself and charge the cost to

the cash account of this Financial Improvement Co. and you would sometimes have to give two or three times as much as the original contract was for.

Q. Did you keep any account of the money that was actually paid out; any record of it?

A. I cannot speak for the construction company. All that I can speak for is R. T. Wilson's forty per cent. and Mr. Huntington and the Pacific Improvement Co. amounted to sixty per cent. I can give you that if you want to know it. The actual cash cost of this road, if that is what you want, I will get it and give it to you.

Q. Well, give us the actual cash cost of the road that was paid out for work that was done and material furnished.

Objected to. Objection overruled. Defendant excepts. All of this testimony is objected — for the reason stated above.

A. The cash cost of this property, with interest computed at eight per cent. per annum, after deducting the receipts and income from the net earnings of the road and everything else that was collected, was $26,339,101.29 in actual cash, with the interest computed on it up to the time that we sold these securities. At six per cent. per annum, it was $22,569,912.94, after deducting all of the net earnings of the road. In other words, it is precisely what the Financial Improvement Co.—what cash was supplied to the road—forty per cent. by R. T. Wilson & Co. and sixty per cent. by C. P. Huntington. That is the cash cost of the road with the interest.

Q. From whence did you get this statement?

A. I got it from my accounts of R. T. Wilson & Co. and the accounts of C. P. Huntington; the money that was advanced and paid to the Financial Improvement Co. with which to do this work, and we took these securities in payment for it. That is the history of the whole thing.

Q. This, then, is the money that you say that you advanced to the Financial Improvement Co. for work?

A. Yes, sir; and it was paid out by the Financial Improvement Co., unless we were robbed bu our own men. Here are the men tha- disbursed it or through whom it was disbursed.

Q. What was the amount of the actual cash paid to the men who did the work and furnished the material, not considering the interest?

A. That I have not got separated. Maj. Edwards may have it. I don't know. The account was kept as a running account. I don't know whether he has it or not. This was the balance after giving credit for every bit of money that came to us from any source of this railroad.

Q. Please state about what it cost per cubic yard to do the earthwork in the construction of this railroad.

A. I have not the slightest idea what it cost. In some cubic yards it would cost one price and some another. It is utterly impossible to approximate it. Take the different kinds of earth, quicksands and buckshot, and sometimes it would cost thirty or forty cents and sometimes it would cost a dollar a yard, and there

where the quicksands came into the tunnel I won't approximate it because I cannot. I just know one thing. I believe that the work was honestly and conscientiously and economically done as it could be done. I had men at it in whom I had the utmost confidence and this is the money that he drew for doing the work. After giving all credits that is the balance, and, looking back over it, I can say candidly that I don't see how I could have constructed it more economically than I did. I had the best men that I could employ, and that, I think, is the most economical piece of work that I ever did. That was a most difficult piece of work and the most
377 wonderful outcome that I ever had in my life, and I think that it was only finished by having people that never knew how to let up or to say what it was to stop—Mr. Huntington and myself—and if we had not we would have lost everything that we had there. These items of construction that you see charged here in the reports will more than consume the net earnings, and it was absolutely necessary to keep the property in a condition so that it could earn anything at all. There were places to replace, and then there was this buckshot land, the track would sink down, and there were hills there at Vicksburg to cut through, and there were trestles that we had to build in a hurry out of timber that soon rotted out; and in the swampy portion of it, it was not much better than the hills. It may seem large to you gentlemen, but if I had to duplicate it, under the then existing circumstances, I don't believe that I could duplicate it for a cent less. If there was a dollar expended there wastefully and without due diligence and foresight that could have been avoided I have no knowledge of it.

Q. State, if you can, what the wood-work cost per thousand feet.

A. Well, I have no idea of what it did cost per thousand feet; trestles, etc. I have no idea about it. I can only say in respect to the first lot of cross-ties that we attempted to procure a lot from the Yazoo river. They had to come up the river and drag them out and saw them, and float them down, too. I would think that they cost double as much as ties usually cost—getting them and bringing them to the places where they had to be used. Now, Maj. Edwards may be able to tell you more about these details than I can, but I want you gentlemen to take this whole situation in. It is proper and right that you should know the whole facts in this case. Imagine yourselves in an almost inpenetrable wilderness and attempting to build a railroad and the river washing you away as fast as you would put it up, and then come down to Big Black swamp and see what we had to contend with there—the river rising up—and follow me up to the hill sections if you have not been there. If you have not been, go and see it. No way to reach it there by railroads or anything of the kind. We had to have these ties all hauled up there across swamps, and this bridge timber and all that sort of a thing, and then you will see the reason for the cost of this road.

Q. Do you mean to say that you, as a member of the construction Co., paid out this money for this work without knowing what the earthwork cost or the wood-work cost, and you paid it out without

having or seeing an engineer's estimate of what work was actually done?

A. I don't mean to say any such thing. I mean to say that those are the things that I did not charge my mind with. I had an organization in whom I placed absolute and entire confidence. I would see the general lump sums and the results of things, but as to going into the details of them, except when they were brought to my attention, I never thought of doing so. I have had men that I have known all of their lives. I can say honestly here that I don't think that there was a single dollar wasted that could have been avoided by the best possible diligence.

Q. You never knew in fact the details of the amount or kind of work that *that* was done?

A. Well, I never knew it in the sense of examining and going over it. No, sir; nothing like it. There was a man in my office that had charge of them. He was a gentleman that every one that knew him had as much confidence in him as I did. His name was Mr. Busher, and he died two years ago. He was connected with the whole transaction, and he is the man that had charge of my books for over twenty-five years, and he only gave me the results. I would have trusted him with my life—everything. I relied upon him. As I say, I directed the policy of R. T. Wilson & Co. The whole person-el was directed by me, but Mr. Buscher had charge of these things and entering these things. I never looked after any of the details at all. I knew all about them first, last, and all the time, as I did everything that I had anything to do with, but I did not know them in detail, as the question you put. It would probably take me a month or two months to get what you want if I had access to the papers and I have not, but that they were correct I know and believe.

378 Q. If you had access to what papers?

A. To the original papers, if they were preserved; the original papers of the detail of the construction; the number of the cubic yards and the cost and what this item of money was expended for and what that item was expended for and the number of feet of trestle and the cost; the bridges that were washed out and replaced, and what the engines cost. I don't know that they are in existence. I suppose that they are not. They would take up more room than I have to put them in. Those items were all kept in the South.

Q. If such papers ever existed, in whose custody were they?

A. Well, I really don't know. They were originally in the custody of Maj. Edwards, I suppose.

Q. Maj. J. M. Edwards?

A. Yes, sir.

Q. What position does he hold now?

A. Maj. Edwards is the confidential man in my office and is entrusted with the management of nearly all my work in the construction of railroads and street railroads, much as he was then, except that now he has moved to N. Y. He has never had such a position as that before. Mr. Buuher, who was my partner for years,

was the man that held that position in my office, and, in a certain sense, Maj. Edwards holds that position now.

Q. I simply had reference to in what capacity he had these papers.

A. I am speaking of what he is now. He remained with the L., N. O. & T. R. R. Co. for some time after I sold out there. All of these papers, as I remember, were left down there.

Q. Were these papers, if they ever existed, left in the possession of Maj. Edwards, as an officer of the L., N. O. & T. R. R. Co.?

A. Well, I should think not. I would think, as an agent of the Financial Improvement Co., but I don't know.

Q. Is this Financial Improvement Co. still in existence?

A. Well, I think it is. Mr. Huntington had control of the company—the majority—and he took it away from New York, and I think that he took it to New Orleans, with Mr. Hutchinson and some of those people down there—some of his roads. It had no value whatever, and I don't know where it is really, but I think that it has headquarters in New Orleans for the organization of some of his roads down there.

Q. Were not these papers which should show the details of this work turned over to the consolidated company after the consolidation in 1892?

A. Well, I don't know that there was any consolidated Co. What company do you speak of now?

Q. The Yazoo & Miss. Valley.

A. I don't know anything in the world about that. I don't know really whether they were or not. As to the consolidation—officially I don't know that there was ever any consolidation made.

Q. Was not this work of the Louisville, New Orleans and Texas R. R. done by subcontractors?

A. I think it was done in every way—subcontractors and directly and every way. As I have stated to you, they would sometimes contract for a lot of work and the contractor would break down, and it would come back and we would have to recontract for it. It was done in every way. It was just like marching an army through there. You had to get over the places the best you could. It was a difficult country and it was done every way.

Q. Did not the L., N. O. & T. R. R. Co., of which you were the president, become the owners of all the lands that was deeded by the State of Mississippi to E. C. Gordon in the delta and along the line there?

Objected to on the ground that it is irrelevant and incompetent.

A. Well, I cannot say, as far as I know, that. They never acquired any land the title of which came through E. C. Gordon that I am aware of. It may have been done so, but I never traced the titles.

Q. Did not the L., N. O. & T. R. R. Co. acquire all the lands that belonged to the Memphis & Vicksburg Co.?

A. I think they did.

Objected to as being incompetent and irrelevant to the issue.

379 Q. Under the act of the State of Mississippi in the year 1888 did not this L., N. O. & T. R. R. Co. file a list of all their lands here in the auditor's office to have their titles quieted under that act?

A. I don't know. I think likely it did. My recollection is that there were some steps taken to have it done. I don't know whether the list was all filed or not. If they were filed, they were filed by Maj. Edwards or some other party besides myself. I did not file them; I don't think that I did.

Q. Has not the L., N. O. & T. R. R. Co. since that list was filed sold a large quantity of the said lands at from four to six dollars per acre to individuals?

All of the questions and answers relating to these lands are objected to by the defense.

A. Well, I think that it sold considerable lands, but at what prices I don't remember. I notice in this report, if you want the history of the land—I don't know that that is exactly relevant to your question, but it will probably give you the history.

Q. State what year that is in.

A. It embraces everything that was sold. It is the report of the 30th of June, 1891. There is what seems to be the gain over all the land sold in town sites up to that time—that is, collected—about $169,000.00. That is the net gain as I read that in there. There is a very large lot of the land, as I remember, that was sold nearly altogether on credit. They would make small payments and then relap[illegible] know, and we really realized very little money out of it. We [illegible] claims for a considerable body of land, but there was not more than one in ten, probably, that made more than the first payment. Sometimes we did not exact the first payment, because our object was to get the country settled up.

Redirect examination.

By Mr. MAYES:

Q. Major, you have been asked about the receipts from the-e land sales. Those receipts are shown by these reports?

A. Yes, sir.

Q. The net of them?

A. Yes, sir.

Q. What you mean by the net is the amount that you received, less the amount of the cost and taxes, etc., by way of expenses?

A. Yes, sir.

Q. Well, now, Major, is it or not true that when you said awhile ago that the railroad Co. had cost in actual cash on the six per cent. basis about twenty-three millions of dollars over and above the receipts that the land receipts were computed in that estimate?

A. They were deducted from the money that we furnished of the cost of the road.

Q. Mention has been made once or twice of Mr. Busher. He was a member of your firm, was he not?

A. Yes, sir.

Q. While these transactions were going on?

A. Yes, sir.

Q. He was just as much a member of the firm as you were?

A. Yes, sir; just exactly. We came together after the war—right after the war—and he was one of the most competent men in books and accounts that I have ever seen in my life, and the dearest man to me.

Q. You have spoken of some of the difficulties in constructing the road and the obstacles that were to be overcome in the construction. I will get you to state whether those difficulties are peculiar to the country in which the road runs.

A. They were.

Q. Extraordinary difficulties?

A. Yes, sir; extraordinary difficulties. The nature of that section of the country, particularly between Vicksburg and Memphis, presented difficulties the like of which I have never seen in the construction of any other piece of property that I have ever had anything to do with, and it was more difficult to forecast the cost than any piece of railroad that I have ever had anything to do with.

380 Q. Major, do you know enough about the locality down there to know whether the road, being completed as it is, is still to any extent subject to the difficulties that were found in its construction, such as overflows and such things as that? Is it true that the danger has passed away?

A. No, sir; I don't regard it as a danger that has entirely passed away at all. On the contrary, I greatly fear a recurrence of the periodical floods that we have had in epochs of every five or ten years.

Q. You mean the floods of the Mississippi river?

A. Yes, sir.

Q. And its tributary streams?

A. Yes, sir; that is what I mean, and then in addition to that, owing to the nature of the soil, it is much more difficult to operate and maintain a road-bed there than in any other soil that I have ever seen in my life. It is excessively difficult to do so.

Q. Major, I will direct your attention to this point: In the course of your cross-examination you have spoken of the expenditures to be made there from year to year, which you have spoken of as being construction expenses. I will get you to say whether this road could have been operated without meeting these expenses.

A. I don't believe that it could.

Q. So that if these expenses were not to be classed as construction expenses, they were to be classed as operating expenses?

A. As absolutely necessary operating expenses, and in order to give the road any earning capacity at all they had to do it.

Q. Major, you were asked the question on cross-examination as to whether there were any other reports or records than those four or five that you have filed here as exhibits to your deposition, and

you answered that you believed that there was not. Did you mean by that to indicate that there were no other books?

A. No, sir; I did not.

Q. What did you mean by that expression?

A. I meant that there were no others published and kept seperately.

Q. Reports to the stockholders?

A. Yes, sir.

Q. There were other books kept?

A. Absolutely, I think, that the books showed everything of this thing, whether it was published or not.

Q. You were asked something about your knowledge of the operation of the trains on these branches, on the Riverside division and the Helena branch and the Woodville branch. You answered that you did not know about that. Were you in superintendence of the operating department of the railroad?

A. Never for a moment.

Q. Major, I see from the charter book on the 18th of September, 1884, a mortgage was exeeuted by the L., N. O. & T. R. R. Co. to the Metropolitan Trust Co. of New York as trustee. Do you remember anything about that mortgage? Do you remember about that? It was the first mortgage that was given in the year 1884?

A. Yes, sir; I remember that.

Q. That is a mortgage on the railroad and all its appurtenances to secure the issuance of bonds, not to exceed at their par value the sum of $20,550,000.00, to bear interest at the rate of five per cent. per annum. Do you remember the execution of that mortgage?

A. Yes, sir; I remember that.

Q. Then there was another mortgage executed by the L., N. O. & T. R. R. Co. to the Union Trust Co. of New York, as trustee, on the 25th day of August, 1886, which was given to secure bonds to the amount not in any case to exceed at the par or face value of such bonds the sum of $16,000,000.00 first-mortgage bonds, to bear interest at the rate of four per cent. per annum?

A. Yes, sir.

Q. You spoke in your cross-examination about the alteration of these first mortgages. These are the mortgages that you spoke of?

A. Yes, sir; those are the two mortgages that I spoke of.

Q. This mortgage of 1886 that I call your attention to was
381 the mortgage that was executed to bring about the reduction of the interest on the mortgage of 1884?

A. Yes, sir; it was, as I told you today. It was found or at least it was thought that the net proceeds from the operation of the road would not suffice for a long time to reach an amount that would enable us to sell the first-mortgage fice per cent. bonds, on which, as I remember, there was no interest that had been earned and paid from the date of the issuance to 1886. It was thought to be best. It would be possible to reach a point sooner where they could sell these bonds if they were still to reduce the interest charges as therein stated. It was covering more road at that time than it was originally because we had built some after the purchase. We wanted to

reduce the amount of the outstanding fixed obligations to the point at which we thought that we could be safe in telling purchasers and investors that they could buy these bonds with confidence, and therefore we reduced the amount of the first-mortgage bonds and the rate of interest and made the second-mortgage bonds, in which this was brought. That is the second-mortgage bond of 1886. That is the way it was done, and that was the reason for doing it.

Q. What became of the bonds that were conte-plated by the second mortgage of 1884?

A. They were incomes, you know. They were not seconds. They were income mortgage and they remained.

Q. That is the mortgage to Pardee & Crolius?

A. Yes, sir; that is my recollection, that they remained.

Q. Now, refer to these reports to the stockholders which have been put in evidence as a part of your cross-examination. I see at the foot of page 8, for instance, on the report of 1887, the first annual report, and the same note appears in the second annual report at the foot of page 10, and the same note appears in the third annual report at the foot of page 11, and the same note appears at the foot of page 16 in the fourth annual report. Now, this note says that the first-mortgage bonds are fifty-year four per cent. gold bonds, dated io 1886, interest payable March and September 1st. I want to ask you if they are the same series of bonds that are secured in this first mortgage of 1886.

A. They are.

Q. The first mortgage of 1886 grew out of the first mortgage of 1884?

A. Yes, sir.

Q. This note further says that the second-mortgage income bonds are fifty-year five per cent. currency bonds, dated 1886, interest accumulative, payable March and September the first, commencing in September, 1888, and payable one year only when earned. That is the fifty-year five per cent. bond. Is that the same series of bonds or not that is spoken of in this second mortgage of 1886?

A. Yes, sir; it is.

Q. This note says further that the income bonds are fifty-year six per cent. currency bonds, dated 1884, interest non-accumulative and payable September 1st and first of March, if earned. Is that or not the same series of bonds that is referred to in the income mortgage of 1886 and income mortgage of 1884?

A. The series of bonds thus referred to in this 1884 and 1886, one is non-accumulative income bond, and those are the bonds issued under the mortgage of Pardee & Crolius, dated in 1884. These second-mortgage accumulative income bonds are those issued under the mortgage of 1886.

Q. Now, then, these three series of bonds are the same series of bonds that are secured in this mortgages of 1884 and 1886?

A. Yes, sir.

Q. I want you to state whether or not these three series of bonds referred to in this note are the same series and are those bonds that you spoke of as being paid to the Financial Improvement Co.

A. They are.

Q. They constitute a part of these bonds?

A. Yes, sir. Now, it is possible and even probable that a great number of the first-mortgage bonds had been made and delivered up to the Financial Improvement Co. was issued under the first mortgage of 1884, if they were so issued, and the- when it was found the road could not earn sufficient money to sell them they
382 were placed in trust to secure this series of first and second bonds — were issued under the second-mortgage income bond of 1886. They were placed in trust with the Union Trust Company and they held them as trustee.

Q. Are these the same bonds that went into the hands of these parties to whom you sold, whether is was the Illinois Central R. R. Co. or whether it was the Mississippi Valley Co.? They are the same bonds?

A. They are the same bonds; the bonds issued under the first mortgage of 1886 and the second-mortgage accumulative of 1886 and those of 1884.

Q. Whether it was the I. C. or the M. V., you don't know?

A. No, sir.

Q. Major, you have been requested by the counsel for the plaintiff to make as an exhibit to your testimony these four annual reports, and there are one or two items here that I want to call your attention to and ask you to explain. I will get you to take the first annual report and look on pages 3 and 4 and you will see the table which strikes the balance on the top of page 4, leaving $173,257.71. I will get you to explain that balance and show whether it was applicable to dividends. I mean the table which concludes with the statement of transportation earnings of $2,200,000.00; operating expenses, 1,500,000.00, in round numbers; earnings from operating expenses, $700,000.00; and then after deducting the taxes and other yearly charges against the fund, strikes a balance of $173,857.71.

A. That shows the balance of $173,257.71, resulting from what is called the net earnings, less the payment of taxes and miscellaneous expenses and the rent of the Port Hudson road; the interest on the first-mortgage bonds of $445,600.00. These items aggregating $548,000.00 left this balance.

Q. Why was not it applied to distribution among the stockholders?

A. In the first place, then, there was the interest on these outstanding second-mortgage bonds which amounted that year to —. There was no interest on the income bonds paid, and the note shows that the interest on the second-mortgage bonds did not begin to run until the first of September, 1888. For this balance would have been applicable to the interest on these income bonds but for that fact, and the income bondholders might have so compelled us to apply them, except for the fact that there was that year an expenditure that year for the construction which was made up of bills for the main line, and of these detailed items, putting in side tracks, etc., $522,193.94. Now, that $172,000.00 taken from this was applied to the payment of these items of construction.

Q. If it had not been so applied the holders of the income bonds would have been entitled to it?

A. Yes, sir; and after applying it, it will be observed that all of the earnings of this road for this year did not suffice to pay the interest on the first-mortgage bonds and what was absolutely expended for construction by $353,000.00.

Q. Well, now, here is the second annual report, and on page 4 of the same you will find the same sort of a table showing the balance of $95,652.00. I will get you to make an explanation along the same line about that matter.

A. The earning over operating expenses for that year, with other receipts, was $652,441.59. Now, all of these items I spoke of included the interest on the first-mortgage bonds, amounted to $556,789.36, which leaves a balance as resulting from that operation of $56,652.23.

Q. That is against the road?

A. No, sir; there was that much surplus. Now, then, we come back to the same account and what was done with the surplus. It was not applied to pay interest on the income bonds. It was applied to pay these debts, and then it did not suffice. That year we spent in the construction account the sum of $278,872.04, showing that the road got in debt that year for these absolutely necessary things $183,220.00.

Q. And if it had not been needed to make that application of that nominal balance, then the interest on the second-mortgage bonds would have been entitled to take it?

A. No, sir.

383 Q. Did not the second-mortgage bonds come into play then?

A. No, sir—yes, sir; there was four months' interest on the second-mortgage bonds.

Q. And all of the interest on the income bonds?

A. Yes, sir; if in this case it had not been spent—if this balance, $95,652.00, had not been spent for the construction purposes and supplemented by the amount that I have stated, this $95,652.00 would have been applicable to the payment of the interest on the second-mortgage bonds.

Q. Four months' interest?

A. Yes, sir.

Q. And after that the interest on the income bonds?

A. Yes, sir.

Q. On the 3rd Annual Report, pages four and five, there is the same sort of a table. I will get you to make an explanation on the same line about that. That shows the nominal balance of some $600,000.00.

A. That represents the apparent surplus after paying the interest on the first-mortgage bonds, and not paid on the second-mortgage or income bonds leaves a surplus of $615,023.78. Now, that year we spent for construction $357,615.65. That taken from the apparent surplus it would have left a gain. It would have shown that. That left a surplus of $257,408.00 over and above paying the construction account for that year, and also paid the interest on the first-mortgage

bonds. That was not applied to the payment of the interest on the second-mortgage bonds, as I now remember, for the reason that the road had been carrying an indebtedness that was in excess of the receipts for several years previous and it went in payment of that. It went in payment of the construction debt.

Q. If it, however, had not been so disposed of, then the whole $600,000.00 would have been applicable, and no dividend could have been made to the stockholders, but to the liquidation of the due interest on the second-mortgage bonds unpaid, and also the annual interest on the bonds which were non-accumulative?

A. Yes, sir.

Q. Now, Major, on page five of the Fourth Annual Report you will find a similar table. I will get you to make an explanation about that on the *the* same points.

A. This shows a surplus of $371,181.13 after paying taxes and miscellaneous expenses. The interest on the little floating debt amounted to $16,000.00, the interest on the mortgage bonds making up $754,245.83, which deducted from the reported net earnings of this year, $1,071,426.96, left a surplus of $317,181.13. We spent that year for construction $612,105.80, leaving a deficit of —. That year we spent for the payment of the interest first-mortgage bonds and construction $294,922.67 more than we received from the net earnings of the road from any source.

Q. If that disposition had not been made of the money?

A. It would have been applicable and payable on the interest of the second-mortgage bonds.

Q. And after that the income bonds?

A. Yes, sir.

Q. Well, now, to sum it all up, is it or not true that during your connection with this L., N. O. & T. R'y Co. they were able in any year to pay the interest on the income bonds?

A. They were not able, so far as I remember, to pay the interest on the income bonds.

Q. Or were they able to pay the interest on the second-mortgage bonds?

A. They were not. In respect to this construction, in order that you may understand it correctly, the construction that we are talking about was done by the L., N. O. & T. R'y Co. in the manner that I have stated, and the deficit was carried along in the shape of a floating debt. This does not refer to the construction done by the Financial Improvement Co.

Q. Your testimony about the improvements done in these four annual reports?

A. Yes, sir; that is one thing that the railroad did.

Recross-examination by Mr. BECKETT:

Q. In speaking of the cost of the construction of the L., N.
384 O. & T. R. R. you — the cost of construction of the entire lines — States of Tennessee, Mississippi, and Louisiana?

A. I do.

Q. And the depots and depot grounds in all the States?

A. Yes, sir; but the cost of construction as shown by the books does not embrace what is called the South Port branch or elevators, either.

Redirect examination by Mr. MAYES:

Q. In the construction of the road how did the cost of construction in Mississippi compare with the cost of construction in Louisiana and Tennessee?

A. I think that it was very much more expensive; in fact I know that it was. The average cost per mile in Mississippi was very much more than it was in the other States.

Q. That part that was in the Mississippi delta?

A. Yes, sir; and that through the hills at Vicksburg and in the wilderness.

Q. The portion in Tennessee was very short?

A. Yes, sir; it was very short and it was very easy of construction. It is proper for me to say in connection with it—I don't want to mislead anybody—that the terminals in New Orleans and Memphis were somewhat expensive. I have asked myself this question, as to whether or not, including these terminals, *whether or not* it was not more per mile in those States. I don't think that it would have been including the cost of the terminals. I can make a half dozen items in the State of Mississippi that have cost more than all of the terminals. The cost of the shops in Vicksburg and that terrible Yazoo bridge. It cost us $278,000. It almost knocked me down. The item of the Big Black bridge that washed away from there. It cost us all of $100,000.00, I suppose. Take the item of the terrible big divide that we had so much trouble with. I thought that we could build it for $20,000.00 and it cost us over $100,000.00, to say nothing of the bridges in Mississippi. Take the amount of trestling that we had, amounting to fifty miles of trestle, and I suppose that four-fifths of it was here. I think that cost us $27,000.00 a mile, and you will find that it cost over a million and a half dollars, and it kept washing away, because we had to build it at first out of poor timber. These things all made a terrible impression on me and I remember them.

By agreement of counsel the originals of Exhibits "A," "B," "C," & "D" to deposition of R. T. Wilson are to be used on the trial of this cause and are therefore not copied into this record.

385 EXHIBITS TO WILSON'S DEPOSITION.

Construction Contracts.

Memorandum of an agreement made and entered into this twenty-seventh day of December, eighteen hundred and eighty-two, by and between the Memphis & Vicksburg Railroad Company, a corporation created by and existing under the laws of the State of Mississippi of the first part, and William M. Johnston, of the city, county and State of New York, of the second part.

Whereas the party of the first part is desirous of employing the party of the second part, to build and equip its main line of railroad from the city of Vicksburg in the State of Mississippi to the northern boundary of the said State in the county of De Soto in the direction of the city of Memphis in the State of Tennessee and such branches thereof as taken together with such main line shall not in the aggregate exceed five hundred miles in length of main line and branches or to build and equip so much of such main line and such branches as the party of the second part may elect to build and equip upon the terms and conditions hereinafter mentioned, and whereas the said party of the first part is without the means of paying for the building and equipment of such main line and branches except by the creation and issue of its securities therefor, and,

Whereas the said party of the second part is now the holder of the partially paid capital stock of the party of the first part to the extent of — shares thereof.

Now therefore this agreement witnesseth that in consideration of the premises and of one dollar by each of such persons to the other in hand paid the receipt whereof is hereby acknowledged the said parties have undertaken and agreed and do hereby undertake and agree to and with each other as follows that is to say:

First. The said party of the first part as soon as the same can be conveniently shall create,

(A.) First-mortgage bonds of the said party of the first part having fifty years to run with interest payable semi-annually either
386 at the rate of six per centum per annum or five per centum per annum or partly at the rate of six and partly at the rate of five per centum per annum as may be agreed upon by the parties hereto and such mortgage bonds shall be issued, if and so far as they shall bear interest at the rate of six per centum per annum at and after the rate of twenty thousand dollars per mile and if and so far as they shall bear interest at the rate of five per centum per annum at and after the rate of twenty-four thousand dollars per mile and all such bonds shall be secured by a first mortgage upon the railroad and other property and rights and franchises of the party of the first part whether already acquired or hereafter to be acquired excepting only the lands of said company now or hereafter acquired which are not and shall not be required or convenient for the use of the party of the first part in the construction

or operation of its railroad and branches. The terms and provisions of such first mortgage shall be such as shall be prescribed in that behalf by said party of the second part.

(B.) Non-accumulative income bonds having fifty years to run and bearing interest at the rate of six per centum per annum which shall be issued at and after the rate of twenty thousand dollars per mile of railroad completed ready for operation and which shall be secured by a first mortgage upon all such lands of the said party of the first part as are to be excluded from the effect and operation of the first mortgage as hereinbefore prescribed but suitable provision shall be inserted in the mortgage securing said income bonds permitting the party of the first part by means of its land department or otherwise to sell and dispose of the lands mortgaged thereby or any part thereof upon such terms as may be satisfactory to it and to give title thereto free and discharged from such mortgage provided that the proceeds of such sales or disposition thereof shall be applied to the discharge of such income bonds or shall be held in trust by or under the directions of the trustee of such mort-
387 gage as security for the outstanding income *income* bonds secured thereby. The terms and provisions of such income mortgage shall be agreed by and between the parties hereto.

(C.) Capital stock of the party of the first part at and after the rate of ten thousand dollars per mile.

Second. So much of the railroad and branches of the said party of the first part as shall be built by the party of the second part under this contract (which however is not to exceed in the aggregate five hundred miles in length) shall be built in a good substantial manner and except as to branches, switches, sidings and turnouts and portions constructed over "buckshot" lands (so called) shall be laid with steel rails weighing fifty pounds to the lineal yard and bu-dging ans superstructure shops and equipment therefor shall be provided to such an extent and of such a character as is usual and customary for new railroads in that section of the country and rolling stock shall be furnished for so much of said railroad as may be so constructed at the rate of twenty-five first-class and five second-class hand or second-class locomotives, twenty passenger cars, seven baggage and mail cars, four hundred freight cars and ten stock cars for five hundred miles of main line and branches but it is understood that said party of the second part is not to be bound to ballast the track of said road further than he may elect so to do.

Third. Upon the construction ready for operation or other acquisition as hereinafter expressed of each and every twenty miles of such main line and such branches which may be constructed or acquired under this contract the party of the second part shall be entitled to demand and receive from the said party of the first part such first-mortgage bonds and such income bonds and such stock to the extent per mile to which it is hereinbefore prescribed that they shall be issued respectively, viz:

First-mortgage bonds to the extent of twenty thousand
388 dollars per mile if and so far as they bear interest at the rate of six per centum per annum and to the extent of twenty-

four thousand dollars per mile if and so far as they bear interest at the rate of five per centum per annum. Income bonds at the rate of twenty thousand dollars per mile and stock at the rate of ten thousand dollars per mile; and the said party of the first part will deliver to said party of the second part upon demand all the subsidies which the said party of the first part shall then be entitled to receive whether by exchange of its capital stock for lands of any State or county, town *od* city or otherwise howsoever; provided however that said party of the second part shall elect to *rp*ovide or to authorize the party of the first part to *rp*ovide such capital stock as shall be required for exchange for such bonds, money or other property or thing of value as shall be proposed to be given in exchange therefor.

Fourth. In case the party of second part may be able to make sales of such first-mortgage bonds in advance of the period at which he would be entitled — them under the foregoing provisions hereof then the said party of the second part shall upon demand therefor be entitled to the immediate delivery to him of first-mortgage bonds issued at the rate or rates aforesaid upon the whole of such line of railroad and branches or from time to time to the immediate deliveries of such portions thereof as he may have sold upon condition that the proceeds of the lands so delivered to him in anticipation of his right to receive the same under the foregoing section hereof shall be lodged with the trustee of the first mortgage or with such custodian as may be agreed upon by the parties hereto and shall only be withdrawn by said party of the second part as and when he would otherwise be entitled to receive bonds from the party of the first part under the foregoing section hereof.

Fifth. The party of the first part shall at all times transport the men, materials and supplies of the party of the second part free of charge and shall at all times free of charge furnish all neces-
389 sary or convenient construction trains required in building the road during the pendency of this contract. Provided however, that said party of the second part shall pay all hands employed on the trains exclusively used in the construction of said road.

Sixth. Any line of railroad constructed ready for operation and connected or to be connected with the line of railroad of the party of the first part (whether now constructed in whole or in part or freshly constructed by said party of the second part) which may be tendered to the party of the first part by said party of the second part or shall be in any way acquired by said party of the first part at the cost or expense of the party of the second part shall be accepted on a part of the main line and branches covered by this contract and shall be paid for accordingly upon the terms hereinafter expressed; provided that the parties hereto shall have theretofore agreed that the line of such railroad is one which it is to the interest of the party of the first part to control.

Seventh. When and as any full-paid stock of the party of the first part, shall be delivered to the party of the second part under this contract, the party of the second part shall surrender to the party of

the first part for cancellation so much of the partially paid stock of the party of the first part which he now holds as hereinbefore stated as may be necessary to prevent such delivery of such full-paid stock from causing or producing any overissue of stock beyond the amount which the party of the first part is or shall be authorized to issue under its charter, if any such surrender for cancellation shall be necessary for that purpose.

Upon the fulfilment by said party of the first part of the stipulations on its part hereinbefore contained (if he has not elected to do so before that date) the said party of the second part shall surrender for cancellation the partially paid stock of the party of the first part which he now holds as hereinbefore stated, so far as the same shall not have been theretofore surrendered for cancellation
390 under the foregoing paragraph of this agreement.

Eighth. It is understood and agreed that the said party of the second part shall be at liberty to form or cause to be formed a construction company which shall be substituted in his place in reference to the matters referred to herein, and the rights, privileges and obligations hereinafter expressed.

Ninth. It is understood and agreed between the parties hereto that the party of the second part shall have the right to use the corporate name of the party of the first part in making any contracts in or about the building or acquisition of any of the main line or branches hereinbefore referred to whenever he may deem it best to make such contracts in the name of said party of the first part instead of in his own name.

If and so far as the party of the first part has since the 26th day of April, 1882, made contracts with any persons or parties for the construction of any portions of the line of railroad or branches hereinbefore referred to or for any work or materials relating thereto or connected therewith, the said contracts are hereby assigned and transferred to the party of the second part who hereby assumes the performance thereof and undertakes and agrees to repay to said party of the first part any and all disbursements and expenses in anywise made or incurred by the party of the first part in or about or in connection with such contracts.

In witness whereof the party of the first part hath caused its corporate seal to be hereunto affixed and the same to be attested by its secretary and treasurer and the party of the second part hath hereunto set his hand and seal the day and year first above written.

THE MEMPHIS & VICKSBURG
RAILROAD CO.,
By R. T. WILSON, *Pres't.*
W. M. JOHNSTON. [SEAL.]

[SEAL.]
Attest: C. H. BOSHER,
Sec'ty & Treas.

Signed, sealed, and delivered in presence of—
WILLIAM H. CLARKSON.

391 STATE OF NEW YORK, } ss:
City and County of New York, }

Personally appeared before me, William H. Clarkson, a commissioner of deeds of the State of Mississippi in and for the State of New York and a commissioner of deeds of the State of Tennessee in and for the State of New York, R. T. Wilson, president of the Memphis and Vicksburg Railroad Company aforesaid, the foregoing-named bargainer, with whom I am personally acquainted, who acknowledged that he executed the foregoing instrument for the purposes therein contained; and he also acknowledged that he signed, sealed, and delivered the same on the day and year therein mentioned as his act and deed and the actual deed of said company.

And the said R. T. Wilson, being by me first duly sworn, *he* did depose and say that he, the said R. T. Wilson, was the president of the said The Memphis and Vicksburg Railroad Company, & that the seal affixed to the foregoing instrument was the corporate seal of said company; that it was affixed thereto by order of the board of directors of said company, and he signed *he* name thereto by the like order as the president of said company.

In witness whereof I have hereunto set my hand and affixed my official seals this 5th day of January, A. D. 1883.

[SEAL.]
[SEAL.]

WILLIAM H. CLARKSON,
Commissioner for Mississippi and Tennessee in New York, 117 *Broadway, N. Y. City.*

STATE OF NEW YORK, } ss:
City and County of New York, }

Personally appeared before me, William H. Clarkson, a commissioner of the State of Mississippi in and for the State of New York ans a commissioner of deeds of the State of Tennessee in and for the State of New York, residing in said city of New York, William M. Johnston, the foregoing-named bargainer, with whom
392 I am personally acquainted, who acknowledged that he executed the foregoing instrument for the purposes therein contained, and he also acknowledged that he signed, sealed, and delivered the same on the day and year therein mentioned as his act and deed.

In witness whereof I have hereunto set my hand and affixed my official seals this 30th day of December, A. D. 1883.

[SEAL.]
[SEAL.]

WILLIAM H. CLARKSON,
Commissioner for Mississippi and Tennessee in New York, 117 *Broadway, N. Y. City.*

393 Agreement made and entered into this twenty-seventh day of December, one thousand eight hundred and eighty-two, by and between the New Orleans, Baton Rouge, Vicksburg and Memphis Railroad Company, a corporation created under the laws of the State of Mississippi, of the first part, and the Financial Improvement Company, a corporation created under the laws of the State of Colorado, of the second part.

Whereas, the party of the first part by its charter, approved March 9, 1882, is authorized to locate and construct a single or double standard-*guage* railroad or way, from the city of Vicksburg in the county of Warren, in the State of Mississippi, on or by that route which said company may determine to be the most practicable, towards the city of Memphis in the State of Tennessee, and to such a point on the line dividing the State of Mississippi from the State of Tennessee as the company may determine upon, and also from the city of Vicksburg by or — any route which said company may determine to be the most desirable toward the city of New Orleans in the State of Louisiana, and to such a point on the line dividing the State of Mississippi from the State of Louisiana as the company may determine upon, and also to run a branch from any point on said road, to the city of Natchez in the county of Adams in the said State of Mississippi.

And whereas, it has been agreed by the parties hereto that the said party of the second part, so far as it may elect to do so, is to have the right to construct such line of railroad and branch, or any parts or portions thereof upon the terms and conditions hereinafter stated.

Now therefore this agreement witnesseth, that the parties hereunto have covenanted and agreed, and do hereby covenant and agree, to and with each other as follows, that is to say:

First. The line of said railroad and of such branch shall be located by the party of the first part, and the surveys and profiles thereof shall be furnished to the party of the second part with all needful dispatch so as not to delay the progress of the work.

Second. The party of the first part shall acquire and pay for the rights of way and grounds for depot, station and section
394 houses, machine shops, turn-tables, round-houses, water stations and tanks, sidings, turnouts, yards and all other grounds and ground privileges needful for said line.

Third. If and so far as the party of the second part shall elect to build such line *od* railroad and such branch, or any parts or portions thereof, the same shall be constructed in a good, substantial manner, and the grading and superstructure shall be of the character customary for new railroads in that section of the country and steel rails shall be laid upon the whole of the main line of said railroads and such branch, except so *dar* as, if at all, it may be agreed by the parties hereto that it is expedient that an iron rail should be substituted therefor; and the said railroad shall be equipped with an amount of rollin*f* stock which will enable the sa party of the first part to transact with reasonable facility such

business as may be reasonably expected to be done by it when the same shall be opened for traffic.

Fourth. If, and when, each section of ten miles of such railroad shall be constructed and equipped ready for operation, then the said party of the first part shall deliver to the party of the second part in payment therefor first mortgage bonds of said party of the first part of the character hereinafter mentioned to the amount of twenty thousand dollars ($20,000) per mile and income bonds of said party of the first part of the character hereinafter mentioned to the amount of twenty thousand dollars ($20,000) per mile and full-paid capital stock of said party of the first part to the amount of twenty thousand dollars ($20,000) per mile, but the said party of the second part shall have the right at any time, and from time to time, to demand and receive from said party of the first part, such first-mortgage bonds predicated upon the entire length of such chartered line of railroad of the said party of the first part, with the branch thereof above referred to, or such portions of such bonds as it shall from time to time elect to receive, provided however, that the proceeds of any and all sales of such bonds shall be placed in the hands of some third party to be agreed upon by the parties hereto, to be paid over to the said party of the second part
395 only to the extent to which the said party of the second part would be or shall from time to time become entitled under the foregoing clause of this section of this agreement to the lands of which such moneys are the proceeds.

Fifth. The first-mortgage bonds, hereinbefore referred to, are to have fifty years to run and to bear interest at the rate of six per cent. per annum and to be secured by a first mortgage upon the property and franchises of the said party of the first part. The terms and provisions of such mortgage are to be agreed upon between the parties hereto. The said income bonds are to be non-accumulative and are to have fifty years to run and be entitled to interest at a rate not exceeding six per cent. per annum, if, and so far as, the net earnings of the party of the first part in each year after payment of all charges and expenses of the said company for operating expenses, interest, improvements, further acquisitions or otherwise shall enable it to pay the same.

In case the delivery to the said party of the second part of such full-paid stock would at any time cause or produce an overissue of the stock of the party of the first part beyond the amount which it shall at such time be entitled to have outstanding then and in that event, the party of the first part shall not be bound to deliver such full-paid stock to the said party of the second part unless the said party of the second part shall so arrange as that such delivery of such full-paid stock shall not cause such an issue of the capital stock of the party of the first part.

Sixth. The party of the forst part agrees to transport over its lines for the party of the second part with due dispatch all railway construction and equipment, material for carrying on the work above referred to, without expense to said party of the second part, except for the wages of the men employed in carrying on such

transportation, and the party of the second part shall at all times have the privilege at its own expe*b*se but without charge from the party of the first part in respect thereto of running its construction trains over the line of the party of the first part so far as completed.

396 Seventh. If and whenever the party of the second part shall elect so to do, it shall be at liberty to acquire any rights of way, groun*f*s for depots, station or section houses, machine shops, turn-tables, round-houses, water stations or tanks, sidings, turnouts, yards or any other grounds or ground privileges needful for said line and to use the name of the party of the first part in acquiring the same, and the said party of the forst part will upon demand repay to the party of the second part all expenses and expenditures incurred in or about the acquisition of the same or the payment therefor.

If and so far as the party of the first part has since the first day of September eighteen hundred and eighty-two made contracts with any persons or parties for the construction of any portions of the line of railroad or branches hereinbefore referred to or for any work or material relating thereto or connected therewith, the said contracts are hereby assigned and transferred to the party of the second part who hereby assumes the performance thereof and undertakes and agrees to repay the said party of the first part any and all disbursements and expenses in anywise made or incurred by the party of the first part in or about or in connection with such contracts.

In witness whereof the said parties have hereunto set their hands and seals the day and year first above written.

For the New Orleans, Baton Rouge, Vicksburg & Memphis Railroad Company:

JNO. A. GRANT, *President.*

Attest: [SEAL.] JAS. M. EDWARDS, *Sec't'y.*

THE FINANCIAL IMPROVEMENT CO.,

By JAS. B. HAWES, *President.*

Attest: [SEAL.] F. H. DAVIS, *Sec't'y & Treas.*

Sealed and delivered in presence of—

WILLIAM H. CLARKSON,

As to Jas. B. Hawes, pres't, & F. H. Davis, secretary and treasurer.

L. M. LOWENBERG,

Witness to Jno. A. Grant, pres't, & Jas. M. Edwards, sec't'y.

STATE OF NEW YORK, } ss:
City and County of New York, }

397 Personally appeared before me, William H. Clarkson, a commissioner of deeds of the State of Mississippi in and for the State of New York and a commissioner of deeds of the State of Tennessee in and for the State of New York, residing in said city of New York, James B. Hawes, president of the Financial Improvement Company aforesaid, and F. H. Davis, treasurer and secretary

of the same company, the foregoing-named bargainor, with whom I am personally acquainted, who acknowledged that they executed the foregoing instrument for the purposes therein contained, and they also acknowledged that they signed, sealed, and delivered the same on the day and year therein mentioned as their act and deed and the act and deed of said company; and, being duly sworn, they did depose and say that they were the above-described officers of — company; that the seal affixed to said instrument is the corporate seal of said company; that it was affixed thereto by order of the board of directors of said company, and that they signed their names thereto by the like order as such officers.

In witness whereof I have hereunto set my hand and affixed my official seal this 6th day of January, A. D. 1883.

[SEAL.] WILLIAM H. CLARKSON,
Commissioner for Mississippi and Tennessee in New York,
117 *Broadway, N. Y. City.*

STATE OF MISSISSIPPI, }
County of Warren. }

Personally appeared before me, the undersigned, a justice of the peace and notary public in and for said county & State, Jno. A. Grant, president, and Jas. M. Edwards, sec'ty, who acknowledged that they signed, sealed, and delivered the foregoing contract & instrument on the day and year therein mentioned as their act and deed.

Witness my hand and seal this 19th day of January, 1883.

L. M. LOWENBERG,
Justice of the Peace & Notary Public.

398 Agreement made and entered into this the twenth-seventh day of December, eighteen hundred and eighty-two, by and between the Tennessee Southern Railroad Company, a corporation under the laws of the State of Tennessee, of the first part and the Financial Improvement Company, a corporation created under the laws of the State of Colorado, of the second part.

Whereas, the party of the first part is authorized to locate and construct a railway from a point on the line of Tennessee and Mississippi between the point where the Mississippi and Tennessee railroad crosses said line and the Mississippi river, and in the county of Shelby in said State of Tennessee to Memphis Tennessee and from thence through said county of Shelby to a point in the county of Obion on the line between Tennessee and Kentucky.

And whereas it has been agreed by the parties hereto that the said party of the second part, so far as it may elect to do so, is to have the right to construct such line of railroad, or any parts or portion thereof, upon the terms and conditions hereinafter stated.

Now, therefore, this agreement witnesseth: That the parties hereto covenanted and agree- and do hereby covenant and agree to and with each other as follows: that is to say:

First. The line of said railroad shall be located by the party of the first part and the surveys and profiles thereof shall be furnished to the party of the second part with all needful dispatch, so as not to delay the progress of the work.

Second. The party of the first part shall acquire and pay for the rights of way and grounds for depot, station and section houses, machine shops, turn-table, round-houses, water stations and tanks, sidings, turnouts, yards and all other grounds and ground privileges needful for said line.

Third. If and so far as the party of the second part shall elect to build such line of railroad, or any part or portions thereof, the same shall be constructed in a good, substantial manner and the
399 grading and superstructure shall be of the character customary for new railroads in that section of the country, and steel rails shall be laid upon the whole of the main line od said railroad, except so far as, if at all, it may be agreed by the parties hereto, that it is expedient that an iron rail should be substituted therefor, and the said railroad shall be equipped with an amount of rolling stock which will enable the said party of the first part ti transact with reasonablr facility, such business as may be reasonably expected to be done by it when the same shall be opened for traffic.

Fourth. If, when, each section of ten miles of such railroad shall be constructed and equipped ready for operation, then the said party of the first part shall dekiver to the party of the second part, in payment therefor, first-mortgage bonds of said party of the first part, of the character hereinafter mentioned to the amount of twenty thousand dollars ($20,000) per mile, and income bonds of said party of the first part of the character hereinafter mentioned to the amount of twenty thousand dollars per mile and full paid capital stock of said party of the first part to the amount of twenty thousand dollars (20,000) per mile; but the said party of the second part shall have the right at any time and from time to time, to demand and receive from said party of the first part, such first-mortgage bonds predicated upon the entire length of such chartered line of railroad of the said party of the first part, or such portions of such bonds as it shall from time to time elect to receive, provided, however, that the proceeds of any and all sales of such bonds shall be placed in the hands of some third party to be agreed upon by the parties hereto, to be paid over to said party of the second part only to the extent to which the said party of the second part would be or shall from time to time become entitled under the foregoing clause of this section of this agreement to the bonds of which such moneys are the proceeds:

Fifth. The first-mortgage bonds hereinbefore referred to, are to

have fifty years to run and to bear interest at the rate of six per centum per annum and to be secured by a first mortgage
400 upon the property and franchises of the said party of the first part. The terma and provisions od such mortgage are to be agreed upon between the parties hereto. The said income bonds are to be non-accumulative and are to have fifty years to run and be entitled to interest at a rate not exceeding six per centum per annum, if, and so far as, the net earnings of the party of the first part in each year after payment of all charges and expenses of the said company for operating expenses, interest, improvements, further acquisitions or otherwise shall enable it to pay the same.

In case the delivery to the said party of the second part of such full-paid stock would at any time cause or produce an overissue of the stock of the party of the first part beyond the amount which it shall at such time be entitled to have outstanding then, and in that event, the party of the first part shall not be bound to deliver such full-paid stock to the said party of the second part unless the said party of the second part shall so arrange as that such delivery of such full-paid stock shall not cause such an overissue of the capital stock of the party of the first part.

Sixth. The party of the first part agrees to transport over its own lines for the party of the second part with due dispatch all railway construction and equipment material for carrying on the work above referred to without expense to said party of the second part, except for the wages for the men employed in carrying on such transportation, and the party of the second part shall at all times have the privilege at its own expense but without charge from the party of the first part in respect thereto of running its construction trains over the line of the party of the first part so far as completed.

Seventh. If, and whenever the party of the second part shall elect so to do, it shall be at liberty to acquire any rights of way, grounds for depots, station or section houses, machine shops, turn-tables, round-houses, water stations, or tanks, sidings, turnouts, yards or any other grounds or ground privileges needful for said line and to use the name of the party of the first part in acquiring the same, and the said party of the first part will upon demand repay
401 to the party of the second part all expenses and expenditures incurred in and about the acquisition of the same or the payment therefor.

If and so far as the party of the first part has since the 26th day of April, 1882, made contracts with any persons or parties for the construction of any portions of the line of railroad or branches hereinbefore referred to or for any work or materials relating thereto or connected therewith, the saod contracts are *ehreby* assigned and transferred to the party of the second part who hereby assumes the performance thereof and undertakes and agrees to repay to said party of the first part any and all disbursements and expenses in anywise made or incurred by the party of the first part in or about or in connection with such contracts.

In witness whereof the said parties have hereunto set their corporate seals the day and year first above written.

TENNESSEE SOUTHERN RAILROAD CO.,
[SEAL.] By R. T. WILSON, *President.*
THE FINANCIAL IMPROVEMENT CP.,
By JAS. B. HAWES, *President.*
[SEAL.]

Attest: F. H. DAVIS,
Sec'l'y & Treas.

Sealed and delivered in the presence of—
WILLIAM H. CLARKSON,
As to James B. Hawes, pres't, and F. H. Davis, sec. & treas.

STATE OF NEW YORK,
City and County of New York, } ss:

Personally appeared before me, William H. Clarkson, a commissioner of deeds of the State of Mississippi in and for the State of New York, a commissioner of deeds of the State of Tennessee in and for the State of New York, residing in said city of New York, James B. Hawes, president of the Financial Improvement Company aforesaid, and F. H. Davis, secretary and treasurer of said company, the foregoing-named bargainor, with whom I am personally acquainted, who acknowledged that they signed, sealed and delivered the same on the day and year therein mentioned, as their act and deed and the act and deed of said company.

And the said James B. Hawes and F. H. Davis being by me first duly sworn, they did depose and say: That he, the said James
402 B. Hawes, was the president of the said The Financial Improvemebt Company; that he, the said F. H. Davis, was the treasurer and secretary of the same company; that the seal affixed to the foregoing instrument was the corporate seal of said company; that it was affixed thereto by order of the board of directors of said company, and that they signed their names thereto by the like order as the president and treasurer and secretary of said company respectively.

In witness whereof, I have hereunto set my hand and affixed my official seals, this 6th day of January, A. D. 1883.

[SEAL.]
[SEAL.] WILLIAM H. CLARKSON,
Commissioner for Mississippi and Tennessee in New York, 117 *Broadway, N. Y. City.*

403 Memorandum of an agreement made and entered into this twenty-seventh of December eighteen hundred and eighty-two, by and between the New Orleans and Mississippi Valley Railroad Company, a corporation created, organized and existing under and by virtue of the laws of the State of Louisiana of the first part and the Financial Improvement Company, a corporation created, organized and existing under and by virture of the laws of the State of Colorado of the second part.

Whereas, the parties hereto have made an agreement bearing even date herewith in respect to the construction of the whole or part of the line of railroad of said party of the first part and branches,

And whereas, the promotion of the best interests of the party of the first part will require considerable expenditures to be made, and many acts and things to be done from time to time for the purpose of maintaining its corporate organization and paying salaries and expenses of its officers, agents and servants, and locating its line and preparing surveys and profiles thereof and paying the general engineering expenses of the company, and of procuring rights of way and grounds for depots, station and section houses, machine shops, turn-tables, round-houses, water stations and tanks, sidings, turnouts, yards and other grounds and ground privileges needful for the line of railroad of said party of the first part and branches, and for ballasting such line of railroad and branches and for procuring additional equipment not required to be provided by the contractor under the agreement above mentioned, and for the cost of constructing or maintaining levees for the protection of such line of railroad and branches and the cost of operation of the said railroad and branches and generally in respect of the maintenance of the corporate organization of the party of the first part and the expenses connected therewith, and the location and surveying of and the acquisition of rights of way and lands for, and the construction, completion, equipment, maintenance and protection of the line of railroad of said party of the first part and branches and the
404 payment of expenses or damages incurred or suffered in connection therewith or with the operation of said line of railroad and branches and for other purposes which the contractor under the said agreement has not undertaken or agreed or become bound or obliged to provide for.

And whereas, the party of the first part is without means or resources wherewith to provide or pay for the matters and things above mentioned or referred to.

Now, therefore, in consideration of the premises and the mutual undertakings and agreements hereinafter contained, the parties hereto have undertaken and agreed and do hereby undertake and agree to and with each other as follows:

First. The party of the second part may from time to time at its election advance to the party of the first part or its successors or for its or their benefit any and all sums of money which may be in anywise requisite or suitable for providing for any of the matters and things hereinbefore mentioned or referred to and may furnish and

provide for or for the benefit of the *the* party of the first part or its successors any such matters or things, and the party of the first part and its successors will repay to the party of the second part upon demand the amount of all such advances with interest thereon and will pay to the party of the second part upon demand the fair and reasonable value of all matters and things in anywise provided or furnished for or for the benefit of said party of the first part or its successors by the said party of the second part hereunder with interest upon such value thereof from the time when the same were so furnished and provided respectively; and the part- of the first part and its successors shall be so bound and obliged for the repayment with interest of any *any* and all advances made to it or them or for its or their benefit by the party of the second part and for the payment with interest of the fair and reasonable value of all matters and things in anywise provided for or for the benefit of said party of the first part or its successors by the party of the second
405 part hereunder in whos-oever name such advances or the disbursements for such matters and things may have been made, or the vouchers therefor may have been taken.

Second. There shall be credited to said party of the first part or its successors as against the amount *of* any time due from it or them under the foregoing article hereof, such net profits, if any as may have theretofore accrued to the party of the second part from its operation of the line of railroad of the party of the first part or branches.

In witness whereof the parties hereto have caused these presents to be signed by their presidents and their corporate seals to be hereunto affixed the day and year first above written.

THE NEW ORLEANS & MISSISSIPPI VALLEY RAILROAD CO.,
[SEAL.] By R. T. WILSON, *Pres't.*
FINANCIAL IMPROVEMENT CO.,
[SEAL.] By JAS. B. HAWES, *Pres't.*

(Here follows map marked p. 406.)

407 *First Annual Report of the Louisville, New Orleans & Texas Railway Company for the Year Ending December* 31, 1887.

408 Directors and officers.

Directors:

R. T. Wilson, New York.
C. P. Huntington, "
I. E. Gates, "
W. M. Johnston, "
E. H. Pardee, "
Wm. Mahl, "
J. M. Edwards, Memphis, Tenn.
E. Martin, Vicksburg, Miss.
A. C. Hutchinson, New Orleans, La.

MISSISSIPPI.

No. 756
Y. & M. V. R.R. Co. et al
v.
Adams,

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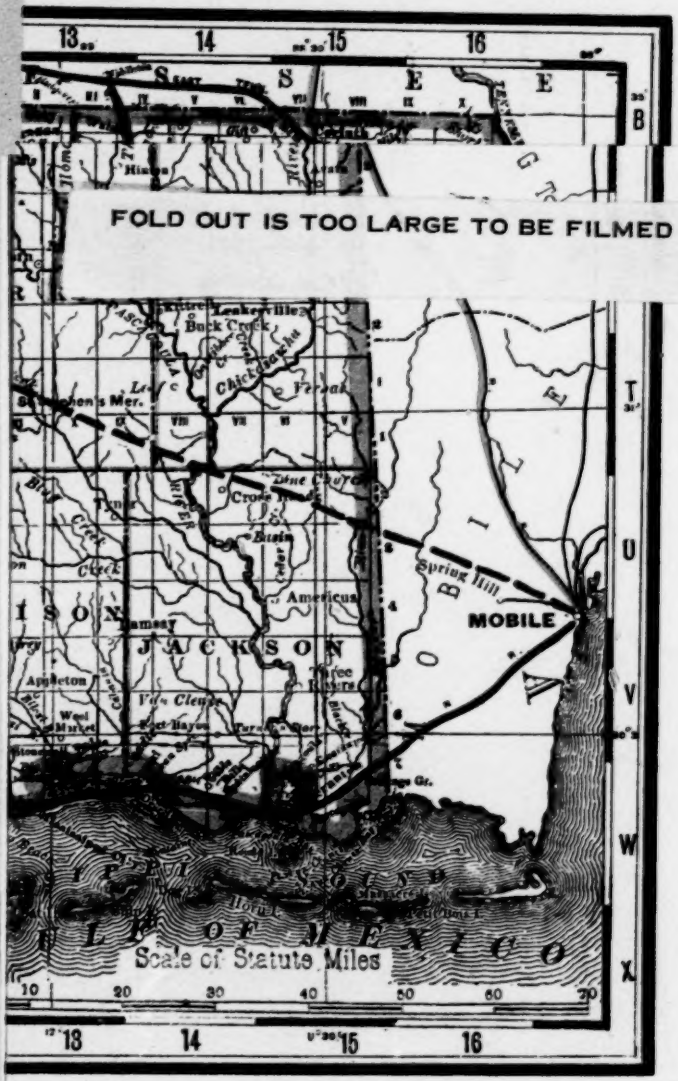
406



Officers:

R. T. Wilson, president, New York.
J. M. Edwards, vice-president and general manager, Memphis, Tenn.
C. H. Bosher, secretary, New York.
F. H. Davis, treasurer, "
Wm. Mahl, controller, "
Holmes Cummins, attorney, Memphis, Tenn.
A. M. Cooke, assistant to general manager, "
B. Wilson, general superintendent, "
Jos. T. Penton, auditor, "
Rob't Hazlehurst, assistant treasurer, "

409 Louisville, New Orleans and Texas Railway Company.

ANNUAL REPORT.

NEW YORK, *March*, 1888.

The president and board of directors submit herewith their report of the operations of the road for the year ending December 31st, 1887, showing the physical condition of the property and the financial condition of the company at that date.

Miles of Road Owned.

The company owns and operates the following lines of road:

		Miles.
Main line—Memphis to New Orleans		456.18
Branches—	Leland to Huntington	22.88
	Wilczinski to Glen Allen	34.10
	Hampton to Issaquena	1.37
Total main line and branches		514.53
Sidings		65.53
Total miles of track		580.06

Earnings and Expenses.

The transportation earnings for the year have been:

From freight	$1,418,626 31	
Passenger	677,256 19	
Express	54,871 86	
Mail	43,310 36	
Telegraph	12,000 00	
Miscellaneous	37,147 15	
		$2,243,211 87
Operating expenses		1,521,128 63
Earnings over operating expenses		$722,083 24

410 The yearly, fixed and other charges against the above are as follows:

State and municipal taxes	$64,505 24	
Miscellaneous expenses	33,220 29	
Rental Clinton and Port Hudson R. R.	5,500 00	
Interest on bonded debt	445,600 00	
		548,825 53
Leaving		$173,257 71

The item of rental for Clinton and Port Hudson R. R. is for a short branch line connecting our road with Clinton, and for which we pay an annual rental of $5,500. Its earnings and operating expenses are included in the operations of this road.

There were hauled during the year 237,489 tons of local freight, earning $706,556.68; and 309,324 tons of through freight, earning $712,069.63. The total number of tons of freight hauled was 546,813. The average length of haul was 247.96 miles, and the average receipts per ton per mile were 1.043 cents.

During the year we carried 650,182 local passengers, earning therefrom $575,978.20, and 23,233 through passengers, earning therefrom $101,277.99. The total number of passengers carried was 673,415; the average length of haul was 44.52 miles, and the average receipts per passenger per mile was 2.259 cents.

The gross earnings per mile of road were $4,368.90; the operating expenses $2,962.56; taxes and miscellaneous expenses $201.14; total expenses, $3,163.70, leaving net earnings per mile of road of $1,205.20, against which there is an interest charge per mile of $867.85.

The operating expenses have absorbed 67.81 per cent. of the gross earnings, and have been as follows:

Conducting transportation	$584,481 38
Motive power	419,801 72
Maintenance of cars	143,223 58
Maintenance of way	327,909 15
General expenses	45,712 80
Total	$1,521,128 63

The operating expenses have been increased about $60,000 by payments for personal injury and cotton burned on open cars in 1886, before the company had provided itself with sufficient box cars; and they have also been increased by about $38,000 for stock killed,
411 which item will be very much reduced in future by the fencing of the road, which is now being done.

The physical condition of the road has been well maintained in all its departments, the cost of which has been charged in the operating expenses.

Conclusion.

The equipment owned by the company is shown on table No. 4. Five hundred box cars and twenty engines have been added during the current year by the Financial Improvement Company, and which the road is using under a provisional arrangement with that company pending the final adjustment.

There was expended for construction and improvement to December 31st, 1887, on the main line and branches, the sum of $522,193.94, the details of which are shown on table No. 5.

The company owns about 750,000 acres of land in the Yazoo delta, the proceeds of which are to be applied to the retirement of the income bonds, as provided for in the mortgage.

The company has been placed at a serious disadvantage in New Orleans, by not having a connection of its own with the important shipping interests located along the river front. This has been remedied by the purchase of extensive water front on the river, in the suburbs of the city, upon which a large and commodious warehouse has been erected, and connected with the main line by a branch road. The expenditures for the construction of this branch line and improvements appear in the general account under the title of Southport branch.

For general information, we submit herewith a comparison of the earnings and expenses for two years during which the same miles of road were operated:

	1886.	1887.	Increase.	Per cent.
Freight earnings	$1,129,841 57	$1,418,626 31	$288,784 74	25.6
Passenger "	577,713 59	677,256 19	99,542 60	17.23
Other "	96,229 57	147,329 37	51,099 80	53.12
Total	$1,803,784 73	$2,243,211 87	$439,427 14	24.3
Operating expenses	1,252,562 91	1,521,128 63	268,565 72	21.4
Earnings over operating expenses	$551,221 82	$722,083 24	$170,861 42	31.

412 From the above it will be seen that there has been a remarkable development in the space of one year; and the first two months of the year 1888 show an increase of $70,194.86 in the gross earnings over the corresponding period of the year 1887.

For statements showing the financial condition and other details appertaining to the physical operation of the road, you are referred to the accompanying report of the controller.

The board desires to express its thanks to Maj. J. M. Edwards, vice-president and general manager, who has had the immediate supervision of its local management, and to the other department officers and employés who have assisted him in its administration, for the gratifying results of the year's operations.

By order of the board:

R. T. WILSON, *President.*

413 *Controller's Report.*

NEW YORK, *March*, 1888.

To the president and directors of the Louisville, New Orleans and Texas Railway Co.

SIRS: I submit herewith tables showing the financial condition of the company, December 31st, 1887, and other details pertaining to the physical operation of the road.

Table No. 1, showing cost of road, resources, and liabilities.

Table No. 2, showing income account.

Table No. 3, showing monthly earnings and operating expenses.

Table No. 4, showing rolling stock owned.

Table No. 5, showing expenditures for construction and improvement.

TABLE No. 1.

Cost, Resources, and Liabilities of the Louisville, New Orleans and Texas Railway Company, December 31st, 1887.

Assets:			Liabilities:		
Cost of road and franchises		$34,257,000 00	First-mortgage 4% gold bonds	$11,140,000 00	
Construction and improvement	$522,193 94		Second-mortgage income 5% currency bonds	8,117,000 00	
Real estate	3,030 00		Income 6% currency bonds	10,000,000 00	
Southport branch	77,307 23				$29,257,000 00
		602,531 17	Capital stock		5,000,000 00
Cash	$29,522 13		Unpaid vouchers and pay-rolls	417,722 09	
Paymaster	1,279 48		Due on traffic balances	98,207 79	
Remittances in transit	41,182 10		Due sundry parties	128,713 29	
Due by agents and conductors	160,716 18		Interest accrued on coupons maturing March 1st, 1888	148,533 33	
" " roads for overcharging	48,637 35		Land & town-site account	277,631 31	
" " sundry parties	145,241 63				1,070,807 81
Stock of supplies	86,662 97				
Unadjusted open accounts	70,375 66				
Land and town-site notes	269,186 07				
		852,803 57	Balance from income acc't		384,526 93
Total		$35,712,334 74	Total		$35,712,334 74

NOTE.—The first-mortgage bonds are 50-year 4% gold bonds, dated 1886, interest payable March and September 1st.
The second-mortgage income bonds are 50-year 5% currency bonds, dated 1886, interest cumulative, payable March and September 1st, commencing with September 1st, 1888, and payable only when earned.
The income bonds are 50-year 6% currency bonds, dated 1884, interest non-cumulative and payable March and September 1st, if earned.

WIRT ADAMS, STATE REVENUE AGENT.
235

TABLE No. 2.

Income Account of the Louisville, New Orleans and Texas Railway Company, December 31st, 1887.

Disbursements:			Receipts:		
Conducting transportation	$584,481 38		Balance from last year		$195,813 90
Motive power	419,801 72		Freight earnings	$1,418,626 31	
Maintenance of cars	143,223 58		Passenger "	677,256 19	
Maintenance of way	327,909 15		Mail "	43,310 36	
General expenses	45,712 80	$1,521,128 63	Express "	54,871 86	
Miscellaneous expenses	$33,220 29		Telegraph "	12,000 00	
State and municipal taxes	64,505 24		Miscellaneous earnings	37,147 15	
Interest on 1st-mortgage bonds	445,600 00				2,243,211 87
Rental C. & P. H. R. R.	5,500 00		Other receipts		15,455 32
		548,825 53			
Balance to credit of gen'l acc't		384,526 93			
Total		$2,454,481 09	Total		$2,454,481 09

TABLE No. 3.

Statement of Monthly Earnings and Operating Expenses for the Year Ending December 31st, 1887.

Months.	Freight.	Passenger.	Mail.	Express.	Telegraph.	Miscellaneous.	Total.	Operating expenses.	Earnings over operating expenses.
January.....	$147,290 07	$61,284 13	$3,536 20	$3,361 37	$1,000 00	$1,590 66	$218,062 43	$133,695 71	$84,366 72
February.....	113,522 36	54,241 95	3,649 20	5,586 16	1,000 00	1,230 10	179,229 77	125,666 46	53,563 31
March.....	106,498 47	50,854 77	3,691 76	4,630 39	1,000 00	1,176 84	167,852 23	124,212 17	43,640 06
April.....	69,028 04	45,892 21	3,344 44	4,500 00	1,000 00	1,177 39	124,942 08	112,498 49	12,443 59
May.....	62,988 17	45,546 43	3,653 92	4,693 94	1,000 00	1,002 56	118,885 02	94,844 00	24,041 02
June.....	58,242 62	43,288 46	3,589 69	4,500 00	1,000 00	1,201 36	111,822 13	101,775 46	10,046 67
July.....	57,178 75	47,492 80	3,653 92	4,650 00	1,000 00	1,399 36	115,284 83	97,974 14	17,310 69
August.....	71,395 98	52,181 32	3,653 92	4,650 00	1,000 00	1,292 59	134,173 81	103,367 87	30,805 94
September....	115,506 03	55,739 66	3,575 55	4,500 00	1,000 00	1,212 45	181,533 69	122,851 76	58,681 93
October.....	189,356 39	64,522 66	3,653 92	4,650 00	1,000 00	1,629 91	264,812 88	148,799 88	116,013 00
November....	217,023 88	68,344 12	3,653 92	4,500 00	1,000 00	1,705 66	296,227 58	171,608 45	124,619 13
December.....	210,595 55	87,867 68	3,653 92	4,650 00	1,000 00	22,618 27	330,385 42	183,834 24	146,551 18
Total...	$1,418,626 31	$677,256 19	$43,310 36	$54,871 86	$12,000 00	$37,147 15	$2,243,211 87	$1,521,128 63	$722,083 24

TABLE No. 4.

Schedule of Rolling Stock Owned at the Close of the Year.

Locomotives.

Class.	On hand Jan. 1, 1887.	Added during the year.	On hand Dec. 31, 1887.	Condition.			Size of cylinder.					
				Thorough order.	Fair order.	In shop and requiring repairs.	12 x 22	15 x 22	16 x 24	17 x 24	18 x 24	C. & P. H. R. R.
Shifting	4	3	7	4	1	2	.....	.....	.....	6	1	.....
8-wheel passenger	19	2	21	6	9	6	.....	.....	4	17	.....	.....
4-wheel freight	2	.....	2	.....	2	.....	.....	.....	.....	.....	.....	2
8-wheel freight	27	10	37	13	10	14	1	2	1	33	.....	.....
10-wheel freight	6	5	11	5	3	3	.....	.....	.....	.....	11	.....
Total	58	20	78	28	25	25	1	2	5	56	12	2

TABLE No. 4—(Continued).

Cars.

Passenger.	On hand Jan. 1, 1887.	Added and charged to equip.	Changed from another class.	Changed to another class.	On hand Dec. 31, 1887.	Freight.	On hand Jan. 1, 1887.	Added during the year.	Added and charged to repairs.	Changed from another class.	Changed to another class.	Condemned and destroyed.	On hand Dec. 31, 1887.
Passenger	29	.....	.....	.....	29	Box	644	350	.....	.....	22	16	956
Official	1	.....	.....	.....	1	Fruit	.....	100	.....	.....	.....	.....	100
Pay	1	.....	.....	.....	1	Stock	.....	50	.....	.....	.....	.....	50
Combination	5	.....	.....	.....	5	Flat	446	.....	.....	2	25	13	410
Mail	6	2	.....	2	6	Gondolas	117	.....	.....	.....	.....	1	116
Baggage	.....	1	2	.....	3	Caboose	30	.....	.....	10	.....	2	38
						Camp	18	.....	.....	37	2	3	50
						Tool	15	.....	.....	1	.....	.....	16
						Derrick	2	.....	.....	.....	.....	.....	2
						Pile-driver	2	.....	1	.....	1	.....	2
Total	42	3	2	2	45	Total	1,274	500	1	50	50	35	1,740

419 TABLE No. 5.

Expenditures Chargeable to "Construction" and "Improvement" to December 31, 1887.

Accounts.	Main line.	Branches.	Total.
Ballast	$94,315 45		$94,315 45
Bridge and culvert masonry	12,578 73		12,578 73
Bridge superstructure	497 57		497 57
Car shops and sheds	5,918 65		5,918 65
Cattle-guards and fencing	31,959 87	$158 34	32,118 21
Cross and switch ties	1,870 70		1,870 70
Engine-houses	15,210 61		15,210 61
Engineering expenses	8,032 36	75 75	8,108 11
Fuel stations	10,842 48		10,842 48
Graduation	22,051 67	301 50	22,353 17
Incidentals	945 20		945 20
Machine shops	6,459 22		6,459 22
Machinery and shop tools	15,176 72		15,176 72
Right of way	23,511 32	150 00	23,661 32
Station, warehouses and stock pens	27,756 49	460 80	28,217 29
Section, tool and watch houses	4,308 12	1,372 68	5,680 80
Sidings	89,743 17	3,501 50	93,244 67
Splices, bolts and spikes	1,868 87	167 50	2,036 37
Smith shops	1,197 25		1,197 25
Track—labor laying	1,160 35		1,160 35
" superstructure	6 80		6 80
Telegraph		159 20	159 20
Timber trestles	1,698 81	103 30	1,802 11
Turn-tables	2,917 85	355 60	3,273 45
Water stations	4,259 72	1,221 79	5,481 51
Huntington transfer		19,248 88	19,248 88
Terminal additions, Memphis	12,660 96		12,660 96
" " Vicksburg	16,385 52		16,385 52
" " Baton Rouge	2,030 52		2,030 52
" " New Orleans	5,005 54		5,005 54
Vicksburg tunnel	32,068 35		32,068 35
Surveys, Woodville branch		898 78	898 78
Levees	125 00		125 00
Transfer	16,112 48		16,112 48
		28,175 62	496,851 97
Less credit Longwood levee		2,173 26	2,173 26
Total	$468,676 35	$26,002 36	$494,678 71

Cars, passenger	$6 50	Brought forward	$25,240 88
Cars, B., M. & Ex.	8,111 05	Pile-driver	1,396 51
" freight	690 35	Transfer	877 84
" road	9,416 58		
Locomotives	7,016 40	Total	$27,515 23
	$25,240 88	Total	$522,193 94

420 *Freight Traffic.*

The freight traffic and earnings therefrom have been:

	Local.	Through.	Total.
Number of tons carried.	237,489	309,324	546,813
Tons carried one mile..	30,773,724	105,237,298	136,011,022
Average length of haul.	127.81	340.21	247.96
Earnings	$706,556 68	$712,069 63	$1,418,626 31
Earnings per ton mile..	2.296	.676	1.043

Passenger Traffic.

The passenger travel and earnings therefrom have been:

	Local.	Through.	Total.
Number of passengers carried	650,182	23,233	673,415
Passengers carried one mile	24,470,974	5,508,927	29,979,901
Average length of haul.	37.64	237.11	44.52
Earnings...	$575,978 20	$101,277 99	$677,256 19
Earnings per passenger mile	2.353	1.838	2.259

Train Mileage.

The revenue train miles, earnings, operating expenses and earnings over operating expenses, per train mile, have been:

	Freight.	Passenger.	Total.
Number of miles run...	803,707	846,640	1,650,347
Earnings per mile run..	$1.76.49	91.59	$1.35.92
Expenses per mile run .	1.15.46	70.05	92.17
Earnings over operating expenses.....	61.03	21.54	43.75

The number of cars in freight trains averaged 17.89 loaded and 8.40 empty, a total of 26.29 cars per train. The average load per loaded car was 9.46 tons, making a total of 169.23 tons of freight

per train. The number of trains daily in both directions over the entire length of road was 2.50.

421 The passenger trains averaged 2.42 passengers, .82 B., M. & E., and .79 sleeping cars, a total of 4.03 cars per train, carrying an average of 11.03 passengers per car, or 35.41 passengers per train. The number of trains daily in each direction over the entire length of road averaged 2.26 trains.

Locomotive Mileage and Expenses.

The mileage and expenses of locomotives has been as follows:

Mileage and expenses.	Amount.	Cost per mile.
		Cents.
Total miles run	2,323,610	
Average per engine	32,272	
Repairs	$59,895 46	2.57
Engineering and firing	128,050 90	5.51
Watching and cleaning	15,653 30	.67
Fuel	165,391 04	7.12
Oil and waste	6,973 69	.30
Water-station attendance	13,111 64	.56
All other M. P. department expenses	30,815 69	1.33
Total	$419,801 72	18.06

Of the above mileage 874,593 miles, or 37.64 per cent. were run by freight trains; 872,836 miles, or 37.56 per cent., by passenger trains; 257,185 miles, or 11.07 per cent., in switching service; and 318,996 miles, or 13.73 per cent., with work and other service trains.

Car Mileage and Expenses.

The mileage of the company's cars on its own and foreign roads, repairs and cost of repairs per car mile, were:

Class of car.	Mileage.	Av. mileage per car.	Repairs.	Cost per car mile.
				Cents.
Passenger	2,034,353	61,647	$23,139 65	1.137
Bag. mail & express	683,445	75,938	4,903 48	.717
Foreign passenger	38,761		46 09	.119
Pullman	657,413		23,726 47	3.609
Freight and caboose	18,830,891	10,323	28,737 95	.153
Foreign freight	7,810,233		9,397 54	.120

422 And other car expenses per car mile have been:

Cars running in—	Cleaning, oiling and inspecting.	Fuel and light.	Oil & waste for lubricating	Total.
	Cents.	*Cents.*	*Cents.*	*Cents.*
Freight trains	.0277	.0072	.0144	.0493
Passenger trains	.4345	.0970	.0541	.5856

The mileage of freight cars on this road amounted to 23,021,470 car miles, of which 7,810,233, or 33.92 per cent., were made by cars of other companies. 31.97 per cent. of the total mileage was empty. There was run by cars in passenger trains a total of 2,756.083 miles.

Road-bed and Track.

There was used in the repairs of the road-bed and track during the year the following material: 107,572 cross-ties; 5,772 feet B. M. switch-ties; 11.5 tons of steel rails; 80,500 lbs. spikes; 5,036 angle plates; 1,767 fish-plates; 38,220 track bolts and 9,900 nut locks.

Respectfully, WM. MAHL, *Controller.*

423 *Second Annual Report of the Louisville, New Orleans & Texas Railway Company for the Year Ending December* 31, 1888.

424 Directors and officers.

Directors:

R. T. Wilson, New York.
C. P. Huntington, "
I. E. Gates, "
W. M. Johnston, "
E. H. Pardee, "
Wm. Mahl, "
J. M. Edwards, Memphis, Tenn.
E. Martin, Vicksburg, Miss.
A. C. Hutchinson, New Orleans, La.

Officers:

R. T. Wilson, president, New York.
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C. H. Bosher, secretary, New York.
F. H. Davis, treasurer, "
Wm. Mahl, controller, "
Holmes Cummins, attorney, Memphis, Tenn.
A. M. Cooke, assistant to general manager, "
Jos. T. Penton, auditor, "
Rob't Hazlehurst, assistant treasurer, "

425 Louisville, New Orleans and Texas Railway Company.

ANNUAL REPORT.

NEW YORK, *March*, 1889.

The president and board of directors submit herewith their report of the operations of the road for the year ending December 31st, 1888, showing the physical condition of the property and the financial condition of the company at that date.

Miles of Road Owned.

The company owns and operates the following lines of road:

		Miles.
Main line—Memphis to New Orleans		456.18
Branches—	Leland to Huntington	22.88
	Wilczinski to Glen Allen	34.10
	Hampton to Issaquena	1.37
Total main line and branches		514.53
Sidings, main line	69.28	
" branches	5.37	
		74.65
Total miles of track		589.18

426 *Earnings and Expenses.*

The transportation earnings and expenses for the year have been as follows:

	1888.	1887.	Increase or decrease.	Per cent.
Freight	$1,566,207 93	$1,418,626 31	I. 147,581 62	10.43
Passenger	713,516 95	677,256 19	I. 36,260 76	5.35
Express	54,450 00	54,871 86	D. 421 86	.76
Mail	49,195 27	43,310 36	I. 5,884 91	13.58
Telegraph	12,000 00	12,000 00		
Miscellaneous	30,946 57	37,147 15	D. 6,200 58	16.69
Total	$2,426,316 72	$2,243,211 87	I. 183,104 85	8.16
Operating expenses	1,781,892 30	1,521,128 63	I. 260,763 67	17.14
Surplus	$644,424 42	$722,083 24	D. 77,658 82	10.75

Earnings over operating expenses have been	$644,424 42	
Other receipts	8,017 17	
		$652,441 59
The fixed and other charges for the year are:		
State and municipal taxes	$64,684 12	
Miscellaneous expenses	29,986 11	
Huntington transfer	5,430 33	
Rentals	7,137 00	
Interest and discount	3,951 80	
Interest on 1st-mortgage bonds	445,600 00	
		556,789 36
Which leaves from the transportation operations of the road		$95,652 23

The item of rental includes $5,500 paid to the Clinton and Port Hudson R. R., a short branch line connecting our road with Clinton. Its earnings and operating expenses are included in the operations of this road.

The earnings from local freight were $719,204.65, and from through freight $847,003.28. This is an increase of $12,647.97, or 1.79 per cent., in earnings from local freight, with an increase of 12.31 per cent. in tonnage, and an increase of $134,933.65 or 18.90 per cent., in earnings from through freight, with an increase of 30.40 per cent. in tonnage.

The earnings from local passengers were $608,765.00, and from through passengers $104,751.95. This is an increase of $32,786.80, or 5.69 per cent., in the local travel, with but a slight increase in the number of passengers carried, and of $3,473.96, or 3.43 per cent., in the earnings from through travel, with an increase of 5.44 per cent. in the number of passengers carried.

427 The tonnage, ton miles and average receipts per ton per mile are as follows:

Tons.	1888.	1887.	Increase.	Decrease.	Per cent.
Local	266,736	237,489	29,247		12.31
Through	403,566	309,324	94,242		30.40
Total	670,302	546,813	123,489		22.58
Ton miles	171,990,366	136,011,022	35,979,344		26.45
Av. receipts per ton mile	.917	1.043		.126	1.18

As shown above, there is an increase in the total tonnage of 22.58 per cent., and in the ton miles of 26.45 per cent., which was carried with an increase in the train miles of 61.556, or 7.65 per cent.

The number of passengers carried, mileage and average receipts per passenger per mile have been as follows:

Passengers.	1888.	1887.	Increase.	Decrease.	Per cent.
Local	651,247	650,182	1,065		.163
Through	24,498	23,233	1,265		5.44
Total	675,745	673,415	2,330		3.46
Passenger mile	29,653,025	29,979,901		326,876	2.24
Av. receipts per passenger mile	2.40	2.26	.14		6.19

Although there was an increase of $36,260.76, or 5.35 per cent., in the passenger earnings, there was a decrease in the miles run by passenger trains of 44,552 miles, or 5.26 per cent.

The gross earnings per mile of road were $4,715.59, the operating expenses $3,463.14. Taxes and miscellaneous expenses, $216.09. Total expenses, $3,679.23, leaving net earnings per mile of road of $1,036.36, against which there is an interest charge per mile of $866.03.

The earnings and expenses per revenue train mile have been as follows:

428 Earnings.	1888.	1887.
Per freight train mile	$1.81.01	$1.76.49
Per passenger train mile	1.01.88	91.59
Average all trains	$1.45.51	$1.35.92
Operating expenses	1.06.86	92.17
Earnings over operating expenses	38.65	43.75

Operating Expenses.

The operating expenses have absorbed 73.44 per cent. of the gross earnings, and were $260,763.67, or 17.14 per cent. greater than in 1887. They compare with the previous year as follows:

Expenses.	1888.	1887.	Increase.	Per cent. increase.
Fixed	$402,339 24	$284,898 41	$117,440 83	41.22
Terminal	299,323 39	276,054 87	23,268 52	8.42
Train mileage	491,090 69	451,568 77	39,521 92	8.75
Car mileage	180,445 87	170,218 31	10,227 56	6.00
Gross tonnage	408,693 11	338,388 27	70,304 84	20.77
Total	$1,781,892 30	$1,521,128 63	$260,763 67	17.14

Of the increase in the fixed expenses $8,147.40 is in administration, and $109,293.43 in maintenance of the roadway and buildings. Of the latter sum $77,630.74 is for renewal of ties and timber trestling, 223,489 cross-ties and 239,538 feet B. M. switch-ties having been put in the track. Extensive renewals have been made upon timber trestling greatly in excess of the ordinary annual depreciation.

Of the increase in terminal expenses $4,514.61 is chargeable to advertising and foreign agencies, and the remaining $18,753.91 has been incurred in the care and handling of the additional tonnage.

Of the increase in expenses contingent upon train mileage $39,647.79 is for repairs to locomotives; extensive repairs covering depreciation since the opening of the road, have been made, and $18,125.13 is due to the additional freight train mileage; but there is a decrease in the payments for account of casualties of $18,251.00, which leaves a net increase of $39,521.92.

429 Of the increase in expenses contingent upon car mileage $21,885.42 is due to repairs of our own and foreign freight cars; reductions in other directions, principally car hire and sleeping-car expenses amounting to $11,657.86, leave a net increase of $10,227.56.

Of the expenses contingent upon gross tonnage $24,913.37 is due to increased train mileage and additional tonnage, and $45,391.47 for maintenance of road-bed and track, frogs, switch-stands and rail fastenings.

There *was* used in repairs of track superstructure 145,500 pounds of spikes, 15,987 angle plates, 42,997 track bolts, and 57,050 nut locks.

Our payments for account of loss and damage to stock have been quite large. They amounted to $52,483.75 and cover 1,769 head of stock of all kinds. This item will be very much reduced in the future by the fencing of the road which is now being done.

The physical condition of the road-bed, track and buildings has been fully maintained, and the rolling stock has been maintained in thoroughly efficient condition.

Conclusion.

There was expended for construction and improvement on main line and branches during the year the sum of $278,872.04, all of which has been charged to the capital account of the company. Principal among these items is $45,939.91 for ballasting 27.8 miles of the main line, 48,059 cubic yards of gravel having been put under the track; $14,543.93 for iron caisson piers at Big Black and Hushpuckena rivers; $79,311.63 for filling in trestles, about 4 miles of lineal feet of trestling having been filled; and $32,189.00 for 8.10 miles of sidings added during the year. Engine-houses have been erected at Memphis, Wilson and New Orleans; a number of new station platforms and stock pens were built, a number of the older ones enlarged, and two of them provided with track scales. There

have been additions in other directions, all of which are shown on table No. 6.

The rolling stock owned by the company is shown on table No. 7; this includes 23 locomotives, 800 box, 100 fruit and 100 flat cars added by the Financial Improvement Co., which the road is using under a provisional agreement with that company, pending a final adjustment.

The company owns about 750,000 acres of land in the Yazoo delta, the proceeds of which are to be applied to the retirement of the income bonds, as provided for in the mortgage. About 100,000 acres have been sold.

430 The company has been placed at a serious disadvantage in New Orleans by not having a connection of its own with the important shipping interests located along the river front. This has been remedied by the purchase of extensive water front on the river, in the suburbs of the city, upon which a large and commodious warehouse has been erected, and connected with the main line by a branch road.

For general information we submit a comparative statement of the earnings and expenses for three years, during which time the same number of miles of road were operated:

	1888.	1887.	1886.
Freight earnings	$1,566,207 93	$1,418,626 31	$1,129,841 57
Passenger "	713,516 95	677,256 19	577,713 59
Other "	146,591 84	147,329 37	96,229 57
Total	$2,426,316 72	$2,243,211 87	$1,803,784 73
Operating expenses	1,781,892 30	1,521,128 63	1,252,562 91
Earnings over operating expenses.	$644,424 42	$722,083 24	$551,221 82

From the above it will be seen that the gross earnings of the road have been increasing at quite an encouraging rate, and we may confidently expect a steady increase in our gross earnings from the increasing material development and prosperity of the country served by this road.

The operating expenses for 1888 are about at their maximum, and it is not likely that they will be exceeded except by a decided increase in business, and we may therefore expect greater net earnings in the near future.

For statements showing the financial condition and other details appertaining to the physical operation of the road, you are referred to the accompanying report of the controller.

The board desires to express its thanks to Maj. J. M. Edwards, vice-president and general manager, who has had the immediate supervision of its local management, and to the other department officers and employés who have assisted him in its administration.

By order of the board:

R. T. WILSON, *President.*

431 *Controller's Report.*

NEW YORK, *March*, 1889.

To the president and directors of the Louisville, New Orleans and Texas Railway Co.

SIRS: I submit herewith tables showing the financial condition of the company, December 31st, 1888, and other details pertaining to the physical operation of the road.

Table No. 1. Cost of road, resources and liabilities.
Table No. 2. Income account.
Table No. 3. Monthly earnings and operating expenses.
Table No. 4. Freight tonnage and statistics.
Table No. 5. Passenger travel and statistics.
Table No. 6. Expenditures charged to capital account.
Table No. 7. Locomotives and cars owned.

Respectfully, WILLIAM MAHL, *Controller.*

TABLE No. 1.

Cost, Resources, and Liabilities of the Louisville, New Orleans and Texas Railway Company, December 31st, 1888.

Assets:			Liabilities:		
Cost of road and franchises		$34,257,000 00	First-mortgage 4% gold bonds	$11,140,000 00	
Construction and improvement	$773,550 75		Second-mortgage income 5% currency bonds	8,117,000 00	
Real estate	731 50		Income 6% currency bonds	10,000,000 00	
		774,282 25			$29,257,000 00
Cash	$2,520 60		Capital stock		5,000,000 00
Paymaster	3,642 62		Unpaid vouchers and pay-rolls	$566,408 37	
Remittances in transit	83,833 02		Due on traffic balances	53,420 89	
Agents and conductors	109,447 02		Due sundry parties	99,490 93	
Sundry parties	332,588 76		Unadjusted open accounts	119,058 77	
P. O. department	12,462 54		Interest accrued on coupons maturing March 1st, 1889	148,533 33	
Stock of supplies	138,237 46		Land & town-site account	463,774 96	
Unadjusted open accounts	25,766 58				1,450,687 25
Land and town-site notes	448,085 56		Balance from income acc't		480,179 16
		1,156,584 16			
Total		$36,187,866 41	Total		$36,187,866 41

NOTE.—The first-mortgage bonds are 50-year 4% gold bonds, dated 1886, interest payable March and September 1st.
The second-mortgage income bonds are 50 year 5% currency bonds, dated 1886, interest cumulative, payable March and September 1st, commencing September 1st, 1888, and payable only when earned.
The income bonds are 50-year 6% currency bonds, dated 1884, interest non-cumulative and payable March and September 1st, if earned.

TABLE No. 2.

Income Account of the Louisville, New Orleans and Texas Railway Company December 31st, 1888.

Disbursements:			Receipts:		
Conducting transportation	$597,160 54		Balance from last year		$384,526 93
Motive power	502,139 70		Freight earnings	$1,566,207 93	
Maintenance of cars	153,870 08		Passenger "	713,516 95	
Maintenance of way	483,892 88		Mail "	49,195 27	
General expenses	44,829 10	$1,781,892 30	Express "	54,450 00	
			Telegraph "	12,000 00	
Miscellaneous expenses	$29,986 11		Miscellaneous earnings	30,946 57	
State and municipal taxes	64,684 12				2,426,316 72
Huntington transfer	5,430 33		Other receipts		8,017 17
Interest on 1st-mortgage bonds	445,600 00				
Interest on other debts	3,951 80				
Rentals	7,137 00				
		556.789 36			
Balance to credit of gen'l acc't		480,179 16			
Total		$2,818,860 82	Total		$2,818,860 82

WIRT ADAMS, STATE REVENUE AGENT.
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TABLE No. 3.

Monthly Statement of Earnings and Expenses for the Year Ending December 31st, 1888.

Months.	Freight.	Passenger.	Mail.	Express.	Telegraph.	Miscellaneous.	Total earnings.	Operating expenses.	Earnings over operating expenses.
January	$156,048 44	$74,896 47	$3,498 38	$4,650 00	$1,000 00	$1,434 32	$241,527 61	$160,447 04	$81,080 57
February	146,407 01	67,446 56	3,653 92	4,350 00	1,000 00	2,801 96	225,659 45	154,011 81	71,647 64
March	114,225 44	57,608 71	3,589 69	4,650 00	1,000 00	1,384 06	182,457 90	147,041 06	35,416 84
April	95,233 32	54,199 62	3,653 92	4,500 00	1,000 00	1,186 78	159,773 64	135,413 49	24,360 15
May	101,053 07	55,000 38	3,653 92	4,650 00	1,000 00	1,538 37	166,895 74	135,044 87	31,850 87
June	81,155 63	52,050 75	3,434 59	4,500 00	1,000 00	2,502 60	144,643 57	121,908 58	22,734 99
July	86,648 63	56,236 26	4,453 92	4,650 00	1,000 00	1,172 65	154,161 46	126,654 46	27,507 00
August	91,341 38	54,326 05	4,453 92	4,650 00	1,000 00	1,157 66	156,929 01	132,410 10	24,518 91
September	94,240 62	43,753 94	5,375 15	4,500 00	1,000 00	1,072 45	149,942 16	129,886 36	20,055 80
October	174,576 15	54,604 55	4,911 98	4,350 00	1,000 00	1,206 10	240,648 78	160,313 90	80,334 88
November	214,285 81	61,183 19	4,560 14	4,350 00	1,000 00	1,817 02	287,196 16	176,834 29	110,361 87
December	210,992 43	82,210 47	3,955 74	4,650 00	1,000 00	13,672 60	316,481 24	201,926 34	114,554 90
Total, 1888	$1,566,207 93	$713,516 95	$49,195 27	$54,450 00	$12,000 00	$30,946 57	$2,426,316 72	$1,781,892 30	$644,424 42
Total, 1887	1,418,626 30	677,256 19	43,310 36	54,871 86	12,000 00	37,147 15	2,243,211 86	1,521,128 63	722,083 24
Increase	147,581 63	36,260 76	5,884 91	.....	.....	.....	183,104 86	260,763 67	.....
Decrease	.....	.....	.....	421 86	.....	6,200 58	.....	.....	77,658 82

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WIRT ADAMS, STATE REVENUE AGENT.

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TABLE No. 4.

Statement of Freight Tonnage, Ton Miles, Train and Car Mileage.

	North.	South.	Total, 1888.	Total, 1887.	Increase.	Decrease.	Per cent.
Tons carried	226,979	443,323	670,302	546,813	123,489	.....	22.58
Tons carried one mile	52,253,726	119,736,640	171,990,366	136,011,022	35,979,344	.....	26.45
Average length of haul	230.22	272.57	256.58	247.96	8.62	.....	3.47
Freight-train mileage	.....	.....	865,263	803,707	61,556	.....	7.65
Total freight-car mileage	11,620,859	12,724,661	24,345,520	21,132,864	3,212,656	.....	15.20
Loaded " "	5,540,421	11,607,334	17,147,755	14,376,560	2,771,195	.....	19.27
Percentage of loaded-car mileage	47.67	91.21	70.43	68.03	2.40	.....	3.52
Average tons per loaded car	9.43	10.32	10.03	9.46	.....	.....	
" loaded cars per train	12.80	26.82	19.81	17.89	1.92	.....	10.73
" empty " "	14.06	2.58	8.32	8 40	.....	.08	.95
" tons per train	120.78	276.76	198.77	169.23	.....	.....	
Mileage of L., N. O. & T. cars on this road	7,346,352	7,403,291	14,749,643	13,322,851	1,426,792	.....	10.71
" foreign " "	4,274,507	5,321,370	9,595,877	7,810,013	1,785,864	.....	22.86
Percentage of foreign mileage	36.78	41.82	39.41	31.97	7.44	.....	23.27
Mil'ge of L., N. O. & T. cars on foreign r'ds	.....	.....	4,308,533	3,626,654	681,879	.....	18.80

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TABLE No. 5.

Statement of Passengers Carried, Passenger Miles, Train and Car Mileage.

	North.	South.	Total, 1888.	Total, 1887.	Increase.	Decrease.	Per cent.
Passengers carried	337,484	338,261	675,745	673,415	2,330	.....	.34
Passengers carried one mile	14,140,198	15,512,827	29,653,025	29,979,901	.....	326,876	1.09
Average length of haul	41.89	45.86	43.88	44.52	.....	.64	1.43
Passenger train miles	.....	.....	802,088	846,640	.....	44,552	5.26
Total mileage of cars in train	.....	.....	3,213,913	2,756,083	357,830	.....	12.98
Average number of cars in train	.....	.....	40.06	4.03	.....	0.24	5.95
Average number of passengers in train	35.25	38.68	36.96	35.41	1.55	.....	4.38

437 TABLE No. 6.

Expenditures Chargeable to "Construction" and "Improvement."

Accounts.	Main line.	Branches.	Total.
Ballast	$45,939 91		$45,939 91
Bridge and culvert masonry	14,543 93		14,543 93
Bridge superstructure	6,898 75		6,898 75
Car shops and sheds	742 24		742 24
Cattle-guards and fencing	7,245 95	$248 97	7,494 92
Engine-houses	10,475 41		10,475 41
Engineering expenses	3,698 51		3,698 51
Frogs and switches	940 43		940 43
Fuel stations	7,406 65		7,406 65
Graduation	79,280 83	30 80	79,311 63
General officers—salaries & expenses	3,955 80		3,955 80
Incidentals	383 55	99 90	483 45
Machine shops	584 51		584 51
Machinery and shop tools	3,086 93		3,086 93
Rails	509 70	*649 50	*139 80
Right of way	3,710 52	775 00	4,485 52
Stations, warehouses, and stock pens	8,315 46	2,189 79	10,505 25
Section, tool and watch houses	857 22	415 66	1,272 88
Sidings	28,600 75	3,588 25	32,189 00
Splices, bolts and spikes	22 20	209 00	231 20
Track—labor laying	5,364 83		5,364 83
Timber trestles	42 80	68 55	111 35
Turn-tables	548 50		548 50
Water stations	2,261 31	31 95	2,293 26
Terminal additions, Memphis	8,115 96		8,115 96
" " Vicksburg	8,532 32		8,532 32
" " Baton Rouge	1,572 30		1,572 30
" " New Orleans	11,009 70		11,009 70
Vicksburg tunnel	811 46		811 46
Longwood levee		6,405 24	6,405 24
Total	$265,458 43	$13,413 61	$278,872 04

* Credit.

TABLE No. 7.

Schedule of Rolling Stock Owned at the Close of the Year.

Locomotives.

Class.	On hand Jan. 1, 1888.	Added during the year.	Condemned as unserviceable.	On hand Dec. 31, 1888.	Condition.			Size of cylinder.				
					Thorough order.	Fair order.	In shop and requiring repairs.	12 x 22.	15 x 22.	16 x 24.	17 x 24.	18 x 24.
Shifting	7	.....	.....	7	5	1	1	.....	.....	.....	6	1
8-wheel passenger	21	.....	.....	21	8	4	9	.....	.....	4	17	.....
8-wheel freight	35	3	2	36	15	12	9	1	.....	.....	32	3
10-wheel freight	9	2	1	10	7	2	1	.....	.....	.....	.....	10
* Total	72	5	3	74	35	19	20	1	.....	4	55	14

Miles run.	Freight trains.	Pass. trains.	Work-trains.	Switching.	Total.
1888	865,263	802,088	422,337	464,817	2,554,505
1887	803,707	846,640	318,996	354,267	2,323,610
Increase	61,556	.....	103,341	110,550	230,895
Decrease	.....	44,552			

* Does not include two four-wheel freight running on Clinton & Port Hudson branch.

TABLE No. 7—(Continued).

Cars.

Passenger.	On hand Jan. 1, 1888.	Added and charged to equip.	Changed to another class.	On hand Dec. 31, 1888.	Freight.	On hand Jan. 1, 1888.	Added and charged to equip.	Added and charged to repairs.	Changed from another class.	Changed to another class.	Condemned and destroyed.	On hand Dec. 31, 1888.
Baggage, mail & ex...	6	.....	.....	6	Box	956	300	.....	.....	13	11	1,232
Baggage & express...	3	.....	.....	3	Stock	50	.....	.....	.....	.....	.....	50
Official.....	2	.....	.....	2	Flat	410	150	.....	.....	31	30	499
Sleeping	.....	.....	.....	.....	Gondola.....	116	.....	.....	.....	.....	1	115
Passenger	29	.....	.....	29	Fruit.....	100	100	.....	.....	.....	2	198
" comb	5	.....	.....	5	H. B. gondola ...	.....	.....	.....	.....	.....	.....	.....
					D. B. gondola....	.....	.....	.....	.....	.....	.....	.....
					Caboose	38	.....	.....	3	.....	.....	41
					Road.....	50	.....	.....	41	.....	.....	91
					Tool	16	.....	.....	.....	.....	1	15
					Derrick.....	2	.....	.....	.....	.....	.....	2
					Pile-driver	2	.....	.....	.....	.....	.....	2
Total	45	.....	.....	45	Total.....	1,740	550	.....	44	44	45	2,245

Miles run.	B., M. & E.	Passenger.	Freight.	Pullman.
1888	770,071	1,839,047	21,096,927	537,120
1887	683,445	2,034,353	18,830,891	657,413
Increase.	86,626	.....	2,266,036	.....
Decrease.	.....	195,306	.....	120,293

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440 *Third Annual Report of the Louisville, New Orleans & Texas Railway Company for the Year Ending December* 31, 1889.

441 Directors and officers.

Directors:

R. T. Wilson, New York.
C. P. Huntington, "
I. E. Gates, "
W. M. Johnston, "
E. H. Pardee, "
Wm. Mahl, "
J. M. Edwards, Memphis, Tenn.
E. Martin, Vicksburg, Miss.
A. C. Hutchinson, New Orleans, La.

Officers:

R. T. Wilson, president, New York.
J. M. Edwards, vice-president and general manager, Memphis, Tenn.
C. H. Bosher, secretary, New York.
F. H. Davis, treasurer, "
Wm. Mahl, controller, "
Holmes Cummins, attorney, Memphis, Tenn.
A. M. Cooke, assistant to general manager, "
Jos. T. Penton, auditor, "
Rob't Hazlehurst, assistant treasurer, "

442 Louisville, New Orleans and Texas Railway Company.

ANNUAL REPORT.

NEW YORK, *March*, 1890.

The president and board of directors submit herewith their report of the operations of the road for the year ending December 31st, 1889, showing the physical condition of the property and the financial condition of the company at that date.

Miles of Road Owned.

The company owns and operates the following lines of road:

		Miles.
Main line—Memphis to New Orleans		456.18
River division—Lula to Glendale	7.20 miles	
Coahoma to Lamont	75.41 "	
Wilczinski to Riverside Junction	42.50 "	
Hampton to Glen Allen	1.80 "	
Clinton to Ethel	8.12 "	

Slaughter to Bayou Sara.....	16.40 miles	
Bayou Sara to Woodville....	25.10 "	
Leland to Huntington.....	24.27 "	
		200.80
Total main line and branches.....		656.98
Sidings—Main line	72.94 "	
River division	15.63 "	
		88.57
Total miles of track		745.55

443 The company constructed during the year a line of road from Coahoma to Lamont, Hampton to Riverside Junction, and Slaughter to Bayou Sara, a total of 102.01 miles; and in October, 1889, acquired by purchase a line of road from Lula to Glendale, Bayou Sara to Woodville, and Clinton to Ethel, a total of 40.42 miles, making a total of 142.43 miles of road added to the former mileage of the company. The average mileage operated for the year is 570.06 miles.

Funded Debt.

There were issued during the year, $2,901,000 first-mortgage four per cent. bonds, and $517,000 second-mortgage income five per cent. bonds, for the cost and construction of the above 142.43 miles of road, and in payment for 38 locomotives, 10 passenger, 2 combined passenger, and 3 baggage cars; and 650 box, 200 fruit, 50 stock, 150 coal, and 300 flat cars, a total of 1,350 freight cars, formerly owned by the Financial Improvement Company, and which the road had been using under a provisional agreement with that company.

The transportation earnings and expenses for the year have been as follows:

	1889.	1888.	Increase.	Per cent.
Freight.....	$2,037,887 14	$1,566,207 93	$471,679 21	30.11
Passenger	823,490 32	713,516 95	109,973 37	15.41
Express	55,500 00	54,450 00	1,050 00	1.92
Mail	56,227 57	49,195 27	7,032 30	14.29
Telegraph	12,000 00	12,000 00		
Miscellaneous.....	42,366 49	30,946 57	11,419 92	36.90
Total.....	$3,027,471 52	$2,426,316 72	$601,154 80	24.74
Operating expenses.....	1,990,458 26	1,781,892 30	208,565 96	11.70
Earnings over operating expenses	$1,037,013 26	$644,424 42	$392,588 84	60.92

Earnings over operating expenses have been	$1,037,013 26	
Other transportation receipts	3,644 25	
		$1,040,657 51
The fixed and other charges for the year are:		
Taxes	$67,504 00	
Miscellaneous expenses	24,164 85	
Rentals	4,387 00	
Interest and discount	5,602 61	
Interest on 1st-mortgage bonds	500,980 00	
		602,638 46
Which leaves from the transportation operations of the road		$438,019 05
444 Brought forward		$438,019 05
Add receipts from other sources as follows:		
Sale of Bolivar County bonds	$105,000 00	
Proceeds from operations of following roads pending their purchase:		
Mobile & Northwestern R. R.	50,130 95	
West Feliciana R. R.	21,873 78	
		177,004 73
Leaving a surplus from the year's business of		$615,023 78

The earnings from local freight were $1,011,785.02, an increase of $292,580.37 or 40.68 per cent. over the preceding year, but there was a decrease of 5.26 per cent. in the average receipts per ton per mile. The earnings from through freight were $1,026,102.12, an increase of $179,098.84 or 21.14 per cent., the average receipts per ton per mile were slightly less than in the preceding year, being .613 in 1889 against .616 in 1888.

The earnings from local passengers were $711,169.36, an increase of $102,404.36 or 16.82 per cent., and those from through passengers were $112,320.96, an increase of $7,569.01 or 7.22 per cent. over the preceding year. The average receipts per passenger per mile varied but slightly, being 2.61 cents per mile from local passengers and 1.94 cents per mile from through passengers.

The tonnage, ton miles and average receipts per ton per mile are:

Tons.	1889.	1888.	Increase.	Decrease.	Per cent.
Local	397,679	266,736	130,943	.....	49.09
Through	477,659	403,566	74,093	.....	18.35
Total	875,338	670,302	205,036	.....	30.57
Ton miles	218,601,002	171,990,366	46,610,636	.....	27.08
Av. receipts per ton mile.	.932	.917	.015	.....	1.63

As will be seen from the above, there is an increase in the total tonnage of 30.57 per cent. and in the ton miles of 27.08 per cent., which was moved with an increase in the train miles of 182,503 or 21.09 per cent.

The number of passengers carried, mileage and average receipts per passenger per mile are:

Passengers.	1889.	1888.	Increase.	Decrease.	Per cent.
Local	782,377	651,247	131,130		20.13
Through	27,720	24,498	3,222		13.15
Total	810,097	675,745	134,352		19.88
Passenger miles	33,029,274	29,653,025	3,376,249		11.96
Av. receipts per passenger mile	2.46	2.40	.06		2.50

445 Although there was an increase of $109,973.37 or 15.41 per cent. in the earnings from passengers, there was an increase of only 20,118 miles or 2.50 per cent. in the miles run by passenger trains.

The gross earnings per mile of road were $5,310.79; operating expenses $3,491.66, taxes and other charges $178.32. Total, $3,669.98, leaving net earnings per mile of road of $1,640.81, against which there is an interest charge per mile of $854.88.

The earnings and expenses per revenue train mile have been as follows:

	1889.	1888.
Per freight-train mile	$1.94.48	$1.81.01
Per passenger-train mile	1.06.99	1.01.88
Average all trains	$1.61.89	$1.45.51
Operating expenses	1.06.44	1.06.86
Earnings over operating expenses	55.45	38.65

Operating Expenses.

The operating expenses have absorbed 65.74 per cent. of the gross earnings, and were $208,565.96 or 11.70 per cent. greater than in 1888. They compare with the previous year as follows:

Expenses.	1889.	1888.	Increase or decrease.	Per cent.
Conducting transportation	$688,732 09	$559,248 18	I. $129,483 91	23.15
Motive power	528,277 83	502,139 70	I. 26,138 13	5.19
Maintenance of cars	232,732 95	180,706 36	I. 52,026 59	28.79
Maintenance of way	469,503 14	483,892 88	D. 14,389 74	2.97
General expenses	71,212 25	55,905 18	I. 15,307 07	27.38
Total	$1,990,458 26	$1,781,892 30	I. $208,565 96	11.70

Of the increase of $129,483.91 in conducting transportation, $13,283.66 is for repairs of station buildings and platforms, more than the usual amount of work having been done upon them during the year; $25,416.25 is for wages of trainmen incident to the increased train mileage; $46,985.37 is for station and other terminal expenses incident to the increased traffic, and the remaining $43,798.63 is for other expenses contingent upon the increased volume of business handled.

446 The increase of $26,138.13 in motive power is entirely due to the increased train mileage above referred to. There is a decrease in the item of locomotive repairs of $9,124.01, but this is principally due to the fact that the locomotives were so constantly in use that we were unable to make the repairs necessary to maintain them in thoroughly efficient order. There have been 39 locomotives generally overhauled, 20 have received arch pipes and brick arches, 4 have received extension fronts, and 8 have received new flues.

Of the increase of $52,026.59 in maintenance of cars, $23,088.29 is for mileage of other companies' cars upon this road; $6,131.53 is for sleeping-car service, and the remaining $22,806.77 is for repairs of the company's passenger and freight equipment. Of the passenger equipment, 10 passenger, 2 combination, and 10 baggage cars have been overhauled during the year; and of the freight equipment, 789 cars have received general repairs, 1,811 cars received ordinary repairs, and 113 box cars received new roofs. The repairs to foreign freight cars amounted to $16,119.54 for the year.

The reduction of $14,389.74 in maintenance of way has been effected by a decrease of $28,402.43 in the item of track repairs resulting from the ballasting which has been steadily progressing since the opening of the road, 215 miles of the main line having been ballasted with gravel to the close of the year 1889. The remainder of the main line with the exception of about 100 miles from Baton Rouge is ballasted with sand, and on the 100 miles re-

ferred to the character of the soil is such as not to require ballasting for some time. There was also a reduction of $12,594.25 in the item of repairs of timber trestling, resulting from the filling in of a number of such trestles which was commenced in 1888, and there have been filled in 9.68 miles entirely, and 2.15 miles partly to the close of the year 1889.

There have been used in the repairs of the road-bed and track, 252,420 cross-ties, 18,784 angle plates, 64,811 track bolts, 202,200 pounds of spikes, and 44,500 nut locks. The greater part of the above rail fastenings were used in relaying 133 miles of main line with the heavier standard steel rail, the light rail being used on the branch lines. There were used in the repairs of timber trestling, 80,808 lineal feet of piling, and 613,630 feet, B. M., other lumber; 10,846 cedar poles of standard size have been used in the repairs of the telegraph line, 224 bents have been renewed in the Vicksburg tunnel, and new water tanks have been erected at Shaws, Clarksdale, and Cleveland.

The physical condition of the road-bed, track and buildings have been considerably improved during the year, and we expect to bring the rolling stock up to the standard of efficiency during the year 1890.

The increase of $15,307.07 in the general expenses arises mainly from an increase in insurance, and in legal expenses attending the settlement of various suits.

447 *General Remarks.*

There was expended for construction and improvement on the main line and the Leland and Lake Washington branches, the sum of $357,615.05, the details of which are shown on table No. 6, and which has been charged to the capital account of the company. Principal among these expenditures is, for ballasting 36.68 miles of road with gravel $60,160.45; for one 20-foot arch culvert at Cold Spur, one 12-foot arch culvert at Monticeno, and 8 iron caissons aggregating 528 lineal feet at Big Black river $41,108.62; for one 150-foot girder draw over Big Black river $14,425.81; for filling 5.73 miles of tresting $79,881.43; for 13 miles of additional sidings $77,402.78; for additional station buildings, and platforms and additions to the same $11,931.51; and for a new single telegraph wire, strung between Memphis and New Orleans $13,520.15.

The rolling stock owned by the company is shown on table No. 8. While, by its constant use we were enabled to handle so great a volume of business as was moved, we could not handle all that was offered, and in order to provide for such additional business as well as to enable us to maintain the equipment up to its highest standard of efficiency, additional locomotives and passenger and freight cars should be purchased during the ensuing year.

The company owns about 750,000 acres of land in the Yazoo delta, the proceeds of which are to be applied to the retirement of the income bonds as provided for in the mortgage. About 142,000 acres have been sold.

The company has been placed at a disadvantage in New Orleans by not having a connection of its own with the important shipping interests located along the river front. This has been remedied by the purchase of extensive water front on the river at Southport, in the suburbs of the city, upon which a large and commodious warehouse and elevator has been erected, and connected with the main line by a branch road 1.19 miles in length.

For general information we submit a comparative statement of the earnings and expenses for the past four years.

Years.	Miles.	Gross earnings.	Operating expenses.	Earnings over operating expenses.
1889	570.06	$3,027,471 52	$1,990,458 26	$1,037,013 26
1888	514.53	2,426,316 72	1,781,892 30	644,424 42
1887	514.53	2,243,211 87	1,521,128 63	722,083 24
1886	514.53	1,803,784 73	1,252,562 91	551,221 82

448 From the above, it will be seen that the gross earnings of the road have been increasing at quite an encouraging rate, and the earnings over operating expenses for the year just closed show a very gratifying increase. The gross earnings for January, 1890, are $118,292.52 greater than in 1889, and the estimated earnings for February, 1890, show an increase of $39,342.72. This fully confirms our prediction of the increasing material development and prosperity of the country served by the lines of this company.

For statements showing the financial condition and other details appertaining to the physical operation of the road, you are referred to the accompanying report of the controller.

The board desires to express its thanks to Maj. J. M. Edwards, vice-president and general manager, who has had the immediate supervision of its local management, and to the other department officers and employés who have assisted him in its administration.

By order of the board:

R. T. WILSON, *President.*

449 *Controller's Report.*

NEW YORK, *March*, 1890.

To the president and directors of the Louisville, New Orleans and Texas Railway Co.

SIRS: I submit herewith tables showing the financial condition of the company, December 31st, 1889, and other details pertaining to the physical operation of the road.

Table No. 1. Cost of road, resources and liabilities.
Table No. 2. Income account.
Table No. 3. Receipts and disbursements from all sources.
Table No. 4. Monthly earnings and operating expenses.
Table No. 5. Freight tonnage and statistics.
Table No. 6. Passenger travel and statistics.
Table No. 7. Expenditures charged to capital account.
Table No. 8. Locomotives and cars owned.

Respectfully, WILLIAM MAHL, *Controller.*

TABLE No. 1.

Cost, Resources and Liabilities, December 31st, 1889.

Assets:			Liabilities:		
Cost of road and franchises		$37,632,856 86	First-mortgage 4 % gold bonds	$14,041,000 00	
Construction and improvement	$1,131,165 80		Second-mortgage income 5 % currency bonds	8,634,000 00	
Real estate	11,670 50		Income 6 % currency bonds	10,000,000 00	
		1,142,836 30			$32,675,000 00
Cash	$15,055 34		Capital stock		5,000,000 00
Paymaster	9,523 25		Unpaid vouchers and pay-rolls	$659,365 19	
Remittances in transit	101,225 24		Due on traffic balances	121,085 21	
Agents and conductors	287,929 54		Due sundry parties	145,525 47	
Sundry parties	38,398 24		Unadjusted open accounts	86,568 32	
P. O. Department	13,655 09		Interest accrued on coupons maturing March 1st, 1889	187,213 33	
Stock of supplies	206,682 29		Land and town-site account	615,754 45	
Unadjusted open accounts	48,380 97				1,815,511 97
Land and town-site notes	593,541 48		Balance from income account		1,095,202 94
Due for lines under construction	405,530 31				
		1,810,021 75			
Total		$40,585,714 91	Total		$40,585,714 91

NOTE.—The first-mortgage bonds are 50-year 4 % gold bonds, dated 1886, interest payable March and September 1st.

The second-mortgage income bonds are 50-year 5 % currency bonds, dated 1886, interest cumulative, payable March and September 1st, commencing September 1st, 1888, and payable only when earned.

The income bonds are 50-year 6 % currency bonds, dated 1884, interest non-cumulative and payable March and September 1st, if earned.

WIRT ADAMS, STATE REVENUE AGENT.

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TABLE No. 2.

Income Account, December 31st, 1889.

Disbursements:			Receipts:		
Conducting transportation	$688,732 09		Balance from last year		$480,179 16
Motive power	528,277 83		Freight earnings	$2,037,887 14	
Maintenance of cars	232,732 95		Passenger "	823,490 32	
Maintenance of way	469,503 14		Express "	55,500 00	
General expenses	71,212 25		Mail "	56,227 57	
		$1,990,458 26	Telegraph "	12,000 00	
Miscellaneous expenses	$24,164 85		Miscellaneous earnings	42,366 49	
Taxes	67,504 00				3,027,471 52
Interest on 1st-mortgage bonds	500,980 00		Other receipts	$3,644 25	
Interest on other debt	5,602 61		Operations M. & N. W. R. R	50,130 95	
Rentals	4,387 00		Operations W. F. R. R.	21,873 78	
		602,638 46	Bolivar County bonds	105,000 00	
Balance to credit of gen'l acc't		1,095,202 94			180,648 98
Total		$3,688,299 66	Total		$3,688,299 66

TABLE No. 3.

Receipts and Disbursements from All Sources During the Year.

Disbursements:			Receipts:		
Cost of road	$2,118,112 42		First-mortgage bonds sold	$2,901,000 00	
Equipment	1,257,744 44		Second " " "	517,000 00	
Construction and improvement	357,615 05				$3,418,000 00
Real estate	10,939 00		Earnings over operat'g expenses	$1,037,013 26	
		$3,744,410 91	Other receipts	3,644 25	
Expenses, taxes and rentals	$96,055 85		Operations M. & N. W. R. R.	50,130 95	
Interest on mortgage debt	500,980 00		Operations W. F. R. R.	21,873 78	
Interest on other debt	5,602 61		Bolivar county bonds	105,000 00	
		602,638 46			1,217,662 24
Increase in cash on hand	$35,807 59		Increase in liabilities	$241,213 40	
Increase in cash assets	291,114 86		Sale of lands	123,611 32	
Increase in stock of supplies	158,444 83				364,824 72
Increase in other assets	168,070 31				
		653,437 59			
Total		$5,000,486 96	Total		$5,000,486 96

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TABLE No. 4.

Monthly Statement of Earnings and Expenses.

Months.	Freight.	Passenger.	Express.	Mail.	Telegraph.	Miscellaneous.	Total earnings.	Operating expenses.	Earnings over operating expenses.
January.....	$169,980 44	$73,906 18	$4,650 00	$4,560 14	$1,000 00	$2,512 51	$256,609 27	$175,574 89	$81,034 38
February.....	147,051 83	58,710 62	4,200 00	4,560 14	1,000 00	1,430 95	216,953 54	158,167 09	58,786 45
March.....	137,431 24	71,444 65	4,650 00	4,321 16	1,000 00	1,665 00	220,512 05	157,976 90	62,535 15
April.....	122,146 11	55,622 08	4,500 00	4,560 14	1,000 00	1,366 20	189,194 53	145,512 16	43,682 37
May.....	122,719 50	54,892 48	4,650 00	4,699 53	1,000 00	1,412 87	189,374 38	143,095 69	46,278 69
June.....	115,331 88	54,195 06	4,500 00	4,495 91	1,000 00	1,499 31	181,022 16	136,203 99	44,818 17
July.....	97,119 53	59,340 00	4,650 00	4,560 14	1,000 00	1,566 56	168,236 23	138,877 19	29,359 04
August.....	122,078 37	64,027 65	4,650 00	4,630 04	1,000 00	1,462 27	197,848 33	153,053 34	44,794 99
September....	159,953 23	65,874 57	4,500 00	4,615 42	1,000 00	1,452 12	237,395 34	165,313 64	72,081 70
October.....	262,847 43	74,693 99	4,650 00	5,229 24	1,000 00	4,151 76	352,548 42	185,513 92	167,034 50
November....	279,952 72	78,684 97	4,750 00	5,475 50	1,000 00	2,039 40	371,902 59	219,855 57	152,047 02
December.....	301,274 86	112,122 07	5,150 00	4,520 21	1,000 00	21,807 54	445,874 68	211,313 88	234,560 80
Total 1889.	$2,037,887 14	$823,490 32	$55,500 00	$56,227 57	$12,000 00	$42,366 49	$3,027,471 52	$1,990,458 26	$1,037,013 26
" 1888.	1,566,207 93	713,516 95	54,450 00	49,195 27	12,000 00	30,946 57	2,426,316 72	1,781,892 30	644,424 42
Increase.....	$471,679 21	$109,973 37	$1,050 00	$7,032 30	.....	$11,419 92	$601,154 80	$208,565 96	$392,588 84
Decrease.....	.....	.....	.....	.....	.....	.....	.....	.....	.....

TABLE No. 5.

Statement of Freight Tonnage, Ton Miles, Train and Car Mileage.

	North.	South.	Total, 1889.	Total, 1888.	Increase.	Decrease.	Per cent.
Tons carried	262,691	612,647	875,338	670,302	205,036		30.57
Tons carried one mile	53,333,437	165,267,565	218,601,002	171,990,366	46,610,636		27.08
Average length of haul	203.02	269.76	249.73	256.58		6.85	2.67
Freight-train mileage			1,047,766	865,263	182,503		21.09
Total freight-car mileage	14,569,511	15,868,707	30,438,218	24,345,520	6,092,698		25.02
Loaded " " "	6,258,990	14,711,583	20,970,573	17,147,755	3,822,818		22.30
Percentage of loaded-car mileage	42.96	92.71	68.89	70.43		1.54	2.18
Average tons per loaded car	8.52	11.23	10.42	10.03	0.39		3.88
" loaded cars per train	11.94	28.08	20.01	19.81	0.20		1.01
" empty " " "	15.86	2.20	9.03	8.32	0.71		8.53
" tons per train	101.80	315.46	208.63	198.77	9.86		4.96
Mileage of L., N. O. & T. cars on this road	8,431,124	8,379,453	16,810,577	14,749,643	2,060,934		13.97
Mileage of foreign cars on this road	6,138,387	7,489,254	13,627,641	9,595,877	4,031,764		42.01
Percentage of foreign mileage	42.13	47.13	44.77	39.41	5.36		13.60
Mileage of L., N. O. & T. cars on foreign roads			4,165,145	4,308,533		143,388	3.33

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TABLE No. 6.

Statement of Passengers Carried, Passenger Miles, Train and Car Mileage.

	North.	South.	Total, 1889.	Total, 1888.	Increase.	Decrease.	Per cent.
Passengers carried	411,441	398,656	810,097	675,745	134,352	.....	19.88
Passengers carried one mile	16,795,569	16,233,705	33,029,274	29,653,025	3,376,249	.....	11.96
Average length of haul	48.21	40.72	40.77	43.88	.....	3.11	7.08
Passenger train mileage	.....	.....	822,206	802,088	20,118	.....	2.50
Total mileage of cars in train	.....	.....	3,742,933	3,213,913	529,020	.....	16.46
Average number of cars in train	.....	.....	4.55	4.06	0.49	.....	12.06
Average number of passengers in train	40.85	39.49	40.17	36.96	3.21	.....	8.68

456 TABLE No. 7.

Expenditures Chargeable to "Construction" and "Improvement."

Accounts.	Total.
Ballast	$60,160 45
Bridge and culvert masonry	41,108 62
Bridge superstructure	14,425 81
Car shops and sheds	2,120 27
Cattle-guards and fencing	9,861 09
Cross and switch ties	852 41
Engine-houses	3,756 74
Engineering expenses	4,266 80
Frogs and switches	848 01
Fuel stations	1,136 61
Graduation	79,881 43
General officers—salaries & expenses	1,525 40
Machine shops	1,459 47
Right of way	4,418 17
Stationery and printing	11 25
Stations, warehouses and stock pens	11,931 51
Section, tool, and watch houses	1,507 96
Sidings	77,402 78
Track—labor laying	22,028 41
Track superstructure	80 68
Telegraph	13,520 15
Timber trestles	245 67
Turn-tables	423 23
Water stations	4,117 13
Longwood levee	525 00
Total	$357,615 05

TABLE No. 8.

Schedule of Rolling Stock Owned at the Close of the Year.

Locomotives.

Class.	On hand Jan. 1, 1889.	Added during the year.	Condemned as unserviceable.	On hand Dec. 31, 1889.	Condition.			Size of cylinders.				
					Thorough order.	Fair order.	In shop and re-quiring repair.	12 x 22.	15 x 22.	16 x 24.	17 x 24.	18 x 24.
Shifting	7	5	.....	12	5	3	4	.....	.....	.....	.....	.....
8-wheel passenger	21	.....	.....	21	10	6	5	.....	.....	.....	11	1
8-wheel freight	36	7	2	41	29	5	7	.....	.....	4	17	.....
10-wheel freight	10	6	.....	16	7	5	4	.....	1	.....	32	8
*Total	74	18	2	90	51	19	20	.....	.....	.....	.....	16
								.....	1	.....	4	60	25

Miles run.		Cost per mile run.		Miles run to.	
			Cents.		
Freight	1,047,766	Repairs	3.05	Ton of coal (2,000 lbs)	33.66
Passenger	822,206	Engineering and firing	5.45	Pint of lubricating oil	10.76
Switching	614,965	Watching and cleaning	.63	Pound of waste	104.71
Work	474,949	Fuel	6.53	Pounds of coal consumed per passenger mile	3.24
		Oil and waste	.31	Pounds of coal consumed per freight-car mile	11.55
		Water supply	1.24		
		All other M. P. d'p't expenses	.64		
Total	2,959,886	Total	17.85		

*Does not include two four-wheel freight running on Clinton & Port Hudson branch.

TABLE No. 8—(Continued).

Cars.

Passenger.	On hand Jan. 1, 1889.	Added and changed to equip.	Changed to another class.	On hand Dec. 31, 1889.
Bag., E., & M.	6	.....	.....	6
Bag. & exp.	3	3	.....	6
Official	21	.....	.....	21
Passenger	29	10	.....	39
" comb.	6	2	.....	7
Total	45	15	.....	60

Freight.	On hand Jan. 1, 1889.	Added and changed to equip.	Added and changed to repairs.	Changed from an- other class.	Changed to another class.	Condemned and de- stroyed.	On hand Dec. 31, 1889.
Box	1,232	1	.....	.....	.....	22	1,211
Stock	59	.....	.....	.....	.....	.....	59
Flat	499	150	3	19	.....	25	646
Gondola	115	151	.....	.....	.....	3	263
Fruit	198	.....	.....	13	.....	13	185
Caboose	41	.....	.....	.....	20	.....	54
Road	91	.....	.....	.....	12	.....	71
Tool	15	.....	.....	.....	.....	.....	3
Derrick	2	2	.....	.....	.....	.....	2
Pile-driver	2	2	.....	.....	.....	.....	2
Total	2,245	302	3	32	32	63	2,487

Cost per mile run.

Miles run to.

Class of cars.	Miles run.	Repairs.	Clean., oil and insp.	Fuel and light.	Oil and waste.	Total.	Gallon of oil.	Pound of waste.
Baggage, express and mail	717,786	.654	.403	.063	.057	1.177	172	659
Passenger	2,287,887	1.344	.403	.063	.057	1.867	172	659
Pullman	669,755	.....	.....	.....	.....	3.908	172	659
Freight	23,342,447	.206	.027	.005	.013	.251	889	2,804
Foreign freight	13,659,461	.118	.027	.005	.013	.163	889	2,804

459 1891.

Fourth Annual Report of the Louisville, New Orleans & Texas Railway Company for the Fiscal Year Ending June 30th, 1891.

460 Directors and officers of the Louisville, New Orleans and Texas Railway Company.

Directors:

R. T. Wilson, New York.
C. P. Huntington, "
I. E. Gates, "
W. M. Johnston, "
E. H. Pardee, "
Wm. Mahl, "
J. M. Edwards, Memphis, Tenn.
E. Martin, Vicksburg, Miss.
A. C. Hutchinson, New Orleans, La.

Officers:

R. T. Wilson, president, New York.
J. M. Edwards, vice-president and general manager, Memphis, Tenn.
C. H. Bosher, secretary, New York.
F. H. Davis, treasurer, "
Wm. Mahl, controller, "
Holmes Cummins, attorney, Memphis, Tenn.
A. M. Cooke, assistant to general manager, "
Jos. T. Penton, auditor, "
Rob't Hazelhurst, assistant treasurer, "

The annual meeting of the stockholders is held on the first Monday in October.
New York office, No. 33 Wall street.

461 *The Fourth Annual Report of the Directors of the Louisville, New Orleans & Texas Railway Company to the Stockholders for the Fiscal Year Ending June 30th*, 1891.

NEW YORK, *September*, 1891.

The president and board of directors deeming it best to change the fiscal year of the company from December 31st to June 30th so as to conform to the fiscal year fixed by the Interstate Commerce Commission, and that of the several States to which this company renders annual reports of its transactions, now present their report of the operations of the road for the year ending June 30th, 1891, showing the physical condition of the property, and the financial condition of the company at the close of said year.

462 *Miles of Road Owned and Operated.*

The company owned at the close of the year and operates the following miles of road:

Main line:		
Memphis to New Orleans		456.18 miles.
West Side division:		
Coahoma to Lamont	75.41 miles.	
Wilczinski to Riverside Junction	42.50 "	
Leland to Huntington	23.00 "	
Lula to Trotters Point	10.05 "	
Hampton to Glen Allen	2.00 "	
Slaughter to Bayou Sara	16.44 "	
Bayou Sara to Woodville	25.10 "	
		194.50 "
East Side division:		
Clarksdale to Minter City	39.58 miles.	
Clinton to Ethel	8.62 "	
		48.20 "
N. J. & C. division:		
Natchez to Harriston	28.20 miles.	
Harriston to Jackson	* 70.70 "	
		98.90 "
Total, main line and branches		797.78 miles.
Sidings		122.78 "
Total miles of track		920.56 miles.

The average miles of road operated for the year were 790.13 miles against an average in the preceding year of 666.68 miles, an increase of 123.45 miles or 18.5 per cent.

The company built and commenced operating on September 1st, 1890, a branch from Clarksdale to Minter City, a distance of 39.58 miles. It also acquired by purchase in November, 1890, a line of railroad from Natchez, Miss., to Jackson, Miss., a distance of 98.90 miles, and changed to standard gauge that part of the road running from Natchez to Harriston, where it connects with the main line.

463 *Funded Debt.*

There were issued during the year $2,091,000 first-mortgage and $470,000 second-mortgage bonds for the payment of the above-mentioned properties, and for 10 locomotives, 2 baggage, express and mail, 13 passenger and 400 freight cars. There are reserved in the treasury of the company, $700,000 first-mortgage bonds for widen-

* 3 ft. 6 in. gauge.

ing the gauge between Harriston and Jackson, and for other purposes.

Earnings.

The transportation earnings and expenses for the year have been as follows:

	This year.	Last year.	Increase or decrease.	Per cent.
Freight	$2,426,792 69	$2,027,243 79	I $399,548 90	19.71
Passenger	1,001,411 64	839,551 76	I 161,859 88	19.27
Express	66,251 91	56,725 46	I 9,526 45	16.79
Mail	77,317 90	60,783 46	I 16,534 44	27.20
Telegraph	3,909 29	11,000 00	D 7,090 71	64.46
Miscellaneous	140,746 29	44,368 69	I 96,377 60	217.22
Total	$3,716,429 72	$3,039,673 16	I $676,756 56	22.26
Operating expenses	2,656,516 97	2,171,060 72	I 485,456 25	22.36
Earnings over operating expenses	$1,059,912 75	$868,612 44	I $191,300 31	22.02

Earnings over operating expenses as above	$1,059,912 75	
Other receipts	11,514 21	
		$1,071,426 96
Less fixed and other charges, viz:		
Taxes	$90,250 77	
Rental	1,637 00	
Miscellaneous expenses	11,814 75	
Operating Huntington transfer	2,751 54	
Interest and discount	16,451 77	
Interest on 1st-mortgage bonds	631,340 00	
		754,245 83
Leaving from transportation operations a surplus of		$317,181 13

464 The gross earnings of the road were the largest of any year since its opening in 1886, and were $4,703.56 per mile of road against $3,505.68 per mile of road in 1886. In this gratifying result is reflected the rapid development of the local interests, both agricultural and commercial, in the section of country traversed by this road, which needed only the stimulus of these arteries of commerce to develop a great country, unexcelled for the fertility of its soil.

The earnings from local freight were $1,405,830.10, an increase of $343,831.34, or 32.38 per cent. over the preceding year; and those from through freight were $1,020,962.59, an increase of $55,717.56, or 5.77 per cent. over the preceding year. The total earnings from freight show an increase of $399,548.90, or 19.71 per cent.

The tonnage, ton miles, and average receipts per ton per mile are:

Tons.	This year.	Last year.	Increase.	Decrease.	Per cent.
Local	515,845	407,609	108,236		26.55
Through	478,482	441,637	36,845		8.34
Total	994,327	849,246	145,081		17.08
Ton miles	224,146,200	204,849,089	19,297,111		9.42
Av. receipts per ton mile	1.082	.945	.137		1.43

The increase in the average receipts per ton per mile arises from increased rates of transportation on through traffic.

The earnings from local passengers were $904.621.84, an increase of $174,423.37, or 23.89 per cent., and those from through passengers were $96,789.80, a decrease of $12,563.49, or 11.49 per cent. The total earnings show an increase of $161,859.88, or 19.8 per cent.

465 The number of passengers carried, mileage, and average receipts per passenger per mile are:

Passengers.	This year.	Last year.	Increase.	Decrease.	Per cent.
Local	1,022,181	796,154	226,027		28.39
Through	22,799	28,364		5,565	19.62
Total	1,044,980	824,518	220,462		26.73
Passenger miles	40,863,850	33,368,396	7,495,454		22.46
Av. receipts per passenger mile	2.450	2.516		.066	2.38

There has been a decrease in the average receipts per passenger per mile of 3.79 per cent. in local passengers, and 3.68 per cent. in through passengers.

The gross earnings per mile of road were $4,703.56; operating expenses $3,362.12, taxes, fixed and other charges $943.98, total $4,306.10; leaving net earnings per mile of road of $397.46.

The earnings and expenses per revenue train mile have been as follows:

Earnings.	This year.	Last year.
Per freight-train mile	$1.67.02	$2.22.90
Per passenger-train mile	.96.82	1.01.58
Average all trains	$1.49.42	$1.75.10
Operating expenses	1.06.80	1.25.06
Earnings over operating expenses.	.42.62	.50.04

The decrease in earnings per mile, of both passenger and freight trains, arises from the running of trains on the recently built branch lines, where the volume of business is at present at its minimum. It is expected, however, that the additional facilities afforded to the public by these trains, will result in an improvement of the local resources along these lines, which will be reflected in the earnings of the trains.

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Operating Expenses.

The operating expenses have absorbed 71.48 per cent. of the gross earnings; they were $485,456.25 or 22.36 per cent. greater than in the previous year, and have been as follows:

For—	This year.	Last year.	Increase.	Per cent.
Conducting transportation....	$979,699 69	$802,051 39	$177,648 30	22.15
Motive power.....	608,460 60	531,269 43	77,191 17	14.53
Maintenance of cars.	296,151 73	274,044 18	22,107 55	8.06
Maintenance of way.....	686,398 48	480,366 54	206,031 94	42.89
General expenses.....	85,806 47	83,329 18	2,477 29	2.97
Total	$2,656,516 97	$2,171,060 72	$485,456 25	22.36

The increase in the operating expenses arises from the following causes:

Conducting Transportation: There has been an increase in the revenue train miles of 601,144 miles or 31.87 per cent., and to this fact in the main is attributable an increase of $50,232.58 in the wages of trainmen, $7,236.48 in train expenses, and for injuries to persons and for stock injured or killed, $32,545.72. There has been an increase in the expenses of soliciting traffic of $22,165.97, in station expenses appertaining to the same of $28,287.53; in superintendence, dispatchers and clerks $32,197.68 and for damages freight of $22,261.95 nearly all of which has been occasioned by the increase in the freight tonnage amounting to 17.08 per cent., and in passenger travel to 26.73 per cent. There has been a decrease in repairs of buildings and wharves of $7,995.58, and in other minor items of $9,284.03, leaving a net increase of $177,648.30 or 22.15 per cent., over last year.

Motive Power: To the above-mentioned increase in train mileage of 31.87 per cent. is attributable the increase of $36,410.64 in the wages of engineers and firemen, $28,777.75 for fuel for locomotives, and $6,682.00 for water-supply and water-station attend-
467 ance. The erection of several new tanks and pump-houses has increased the item of water-station repairs $6,758.16. There has been an increase of $705.69 in minor items, but a decrease in the repairs of locomotives of $2,143.07, leaving a net increase of $77,191.17 or 14.53 per cent. over last year. The increased traffic of the year necessitated the almost constant service of the locomotives, and we have therefore been unable to make repairs as

thoroughly as desired. The new shops at Vicksburg are nearing completion and we shall then be in position to repair our equipment promptly, thoroughly and economically. The company owns 101 standard and 4 narrow gauge locomotives. Their capacity, condition, performance during the year, and work done in the locomotive department is more fully shown on table No. 7.

Maintenance of Cars: There has been an increase of 650,402 miles or 16.92 per cent. in the mileage of cars in passenger trains, and of 4,527,952 miles or 15.59 per cent. in the mileage of cars in freight trains. To this increase is attributable an increase of $4,181.96 in cleaning, inspecting, lubricating and heating cars, $4,664.27 in repairs of foreign freight cars, and $2,738.65 in repairs and expenses of sleeping cars. There has also been an increase in repairs of passenger equipment of $6,130.97, in freight cars of $9,291.88 and in the other minor items of $2,130.67, but there was a decrease in payments of mileage of cars of $7,030.85 leaving a net increase of $22,107.55 or 8.06 per cent. over last year. The company's passenger equipment consists of 68 standard and 8 narrow gauge cars, and its freight equipment of 2,810 standard and 68 narrow gauge cars. Their character, condition and work done upon them during the year is more fully shown on table No. 8.

Maintenance of Way: There has been an increase of 123.45 miles in the miles of track maintained and to this is attributable a large part of the increase of $46,986.21 in repairs of road-bed and track, and $27,631.74 in removing grass and weeds. There have been put in the track during the year 2,378 (164,042 feet B. M.) switch-ties, and 327,789 cross-ties, which is equal to 117.24 miles of track relaid or 14.83 per cent. of the total number of ties in the track, and which has increased this item of expense $28,789.31. The expenditures for repairs of timber trestles have been largely in excess of the average annual requirements and amounted to $135,618.79 against $46,099.13 in the preceding year, an increase of $89,519.66. There was used in these repairs 2,334,012 feet B. M. lumber, and 5,072 piles aggregating 152,158 lineal feet, and it equaled the entire renewal of about five and one-half miles of trestling. There has been an increase of $6,058.48 in repairs of roadway buildings, of $3,263.52 in rail fastenings and spikes and $3,783.02 in other minor items making an increase of $206,031.94 or 42.89 per cent. over last year.

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General Expenses: There is an increase in insurance of $1,209.63, in legal services and expenses of $5,229.31, and $3,933.46 in repairs of official cars, one of them being seriously damaged in a derailment, but there has been a decrease in other items leaving a net increase of only $2,477.29 or 2.97 per cent.

Construction and Improvement.

There was expended for the above account the sum of $612,105.80 on the main line and branches, and which has been charged to the capital account of the company. As the details of these expendi-

tures are more fully shown on table No. 6, reference is here made to the principal items only.

Main Line: During the year 28 miles of unballasted track have been ballasted with gravel, 15 miles have been regravelled, and on 24 miles of the road additional gravel has been added, costing $86,690.87. Arch and barrel culverts aggregating 879 feet in length have been built (replacing 789 lineal feet of trestles) at a cost of $15,355.06. A new all-iron span consisting of one 150′ and two 75′ spans has been erected at Bogue Phalia at a cost of $11,820.08 for the piers and $12,635.73 for the superstructure. New coal
469 bins have been erected at Harriston and Coahoma, costing $3,893.50, and those at Cleveland and Leland have been extended at a cost of $769.95. The grade at Hamburg hill was lowered to the ruling grade on that division at a cost of $4,435.74, and $46,012.33 was expended in filling timber trestles aggregating 6.25 miles in length. There was expended for right of way at Vicksburg $42,475.00 and $3,129.95 at other points along the line of the road. For station buildings and warehouses there was expended the sum of $18,691.98, of which $3,099.13 is for new stations at Renovo and Lula; $7,602.15 for extensions of stations at Rolling Fork, Shelby, Hollandale, Cleveland, Tunica, Coahoma, Robinsonville and Duncan, which were made by direction of the railroad commission; $2,236.09 for semaphore and train order signals along the line of the road; $1,326.56 for the erection of new platforms at Bibbs, Shaw, Carnesville, Gayden, Whittaker, Clayton, Lula and Vicksburg; $1,638.72 for extension of cotton platform at Memphis, and $2,788.43 for other miscellaneous items. New tool-houses were erected at Wilson and Gloster, costing $127.52, and extensions and improvements were made to other section-houses at a cost of $974.05. There were added during the year 12 miles of additional sidings, costing $100,020.22. New water tanks were erected at Clayton, Harriston and Cleveland, costing $2,115.06 and extensions and additions have been made to others, costing $3,193.48. There was expended for terminal facilities, at Memphis $22,858.18, increasing the sidings in said yards by 3.44 miles; at Vicksburg $2,800.00 for additional right of way, and $3,423.77 for filling around passenger depot and $\frac{1}{10}$ mile of new track; and at New Orleans $26,100.00 for warehouse on Poydras, Claiborne, Lafayette and Clara streets; for street-crossing gates $995.70, and $4,013.77 for increase of $\frac{6}{10}$ mile in new tracks. There was expended for account of Vicksburg shops $121,743.39, of which $74,745.73 is for buildings and $46,997.66 for machinery.

Branches: A large amount of sand ballast was distributed at various points at a cost of $23,292.52, for iron caissons at
470 Thompson's creek there was expended $5,435.73; for grading new line at Trotter's point and Glendale $1,760.01. A new station building and platform were erected at Round Lake, costing $2,144.00, and one at Turnbull, costing $727.72. A new station building has also been erected at Natchez and one at Stampley. There has been an increase in length of sidings of 1.4 miles.

Equipment: There has also been added to the equipment of the

road, 10 locomotives, 2 baggage express and mail cars, 13 passenger cars and 401 freight cars, costing $333,725.60, and which has been charged to the capital account of the company.

General.

The company owned 774,634 acres of land in the Yazoo delta, the proceeds of which are to be applied from time to time in the redemption of the income bonds, as provided for in the mortgage. Of this amount 194,989 acres have been sold.

A tolerably correct estimate of the exceptional resources and material prosperity of the section of country traversed by these lines can be formed by the following statement of the earnings since the road was opened:

Years.	Av. miles operated.	Gross earnings.	Operating expenses.	Net earnings.
1890-'91	790.13	$3,716,429 72	$2,656,516 97	$1,059,912 75
1889-'90	666.68	3,039,673 16	2,171,060 72	868,612 44
1888-'89	527.09	2,559,024 74	1,844,556 17	714,468 57
1887-'88	514.53	2,443,376 12	1,682,303 19	761,072 93
1886-'87	514.53	1,993,101 04	1,346,151 45	646,949 59

The rapid development of the local interests, principally agricultural, which resulted from the opening of these lines, may be measured by the increase in the local traffic, which shows a gain of 117.2 per cent. in three and one-half years, and during which time the earnings of the branches, added in the last two years, have been at their minimum.

471 The improvement in the physical condition of the road-bed, track and structures is constantly progressing, and since the road was opened large sums of money have been expended annually for this purpose. On the main line 232.7 miles are now laid with steel rails weighing 62 pounds per yard, 220.4 miles are laid with steel rails weighing 56 pounds per yard, and only 2.5 miles of the 50-pound steel rails originally laid now remain in the track. When the road was opened there were 25.60 miles of timber trestling in the main line, of this 10.60 miles have been wholly filled, and 1.45 miles partially filled, substituting a permanent road-bed for a class of structures which require constant care and attention, and whose maintenance and renewal form a considerable item in the expenses of operation. Of the main line, 222 miles have been ballasted with gravel since the opening of the road, and on the branches considerable sand ballast has been distributed. The sidings on the main line have been increased by 35.42 miles, and there are now 95.32 miles of sidings on the main line, which is nearly 21 per cent. of the entire distance.

The completion of the repair shops at Vicksburg materially improves our condition in the repairs of our rolling stock, both as to time required to make repairs and cost of making them. These

shops are the main repair shops of the company, and embrace the following buildings which are of brick; engine-house of 20 stalls, sand-house, 70 ft. by 36 ft., oil-house, 60 ft. by 20 ft., machine shop, two story, 90 ft. by 190 ft., planing mill, 79 ft. by 100 ft., and car shop, 60 ft. by 150 ft., smith shop, 60 ft. by 106 ft., and boiler shop, 60 ft. by 56 ft., stationary boiler-house, 35 ft. by 50 ft., store-room and office, two story, 46 ft. by 88 ft., also paint shop of galvanized iron, 42 ft. by 130 ft., one all-iron locomotive-transfer table, 32 ft. in length, and one car-transfer table, 60 ft. in length. The roofs of all buildings are either of slate or galvanized iron, the buildings are all well lighted, are ample in their accommodations, and have been equipped with all necessary machinery and appliances to do work promptly and economically.

These improvements will increase the efficiency of the com-
472 pany's service to the public, and enable it to handle its increasing business at less cost than in the past. This has become a necessity to all railroads, as the constant tendency towards lower rates of transportation and the increasing compensation from year to year to its operatives, as well as the greater price for all materials used, require that the railroads employ every means to reduce the cost of operation so that there may remain a margin of profit, between the charges and expenses, sufficient to leave a fair rate of interest upon the capital invested in them.

For statements showing the financial condition and other details appertaining to the physical operation of the road, you are referred to the accompanying report of the controller.

The board desires to express its thanks to Maj. J. M. Edwards, vice-president and general manager, who has had the immediate supervision of its local management, and to the other department officers and employés who have assisted him in its administration.

By order of the board:

R. T. WILSON, *President.*

473 *Controller's Report.*

NEW YORK, *September*, 1891.

To the president and directors of the Louisville, New Orleans and Texas Railway Co.

SIRS: I submit herewith tables showing the financial condition of the company, June 30th, 1891, and other details pertaining to the physical operations of the road.

Table No. 1. Cost of road, resources and liabilities.
Table No. 2. Income account.
Table No. 3. Monthly earnings and operating expenses.
Table No. 4. Freight tonnage and statistics.
Table No. 5. Passenger travel and statistics.
Table No. 6. Expenditures charged to capital account.
Table No. 7. Locomotives owned and mileage.
Table No. 8. Cars owned and mileage.

Respectfully,

WM. MAHL, *Controller.*

TABLE No. 1.

Cost, Resources, and Liabilities, June 30th, 1891.

Assets:			Liabilities:		
Cost of road and franchises		$40,154,666 45	First-mortgage 4% gold bonds	$16,832,000 00	
Construction and improvement	$1,912,848 87		In company's treasury	700,000 00	
Real estate	30,132 82				$16,132,000 00
		1,942,981 69	Second-mortgage income 5% currency bonds		9,104,000 00
Cash	$6,278 84		Income 6% currency bonds		10,000,000 00
Remittances in transit	49,245 94		Capital stock		5,000,000 00
Agents and conductors	92,083 90		Bills payable	$344,739 29	
Sundry parties	130,414 73		Unpaid vouchers and pay-rolls	602,271 95	
U. S. P. O. Department	20,652 89		Due on traffic balances	53,652 85	
Stock of supplies	217,469 75		Due sundry parties	286,169 51	
Unadjusted open accounts	117,779 46		Unadjusted open accounts	71,828 16	
Land and town-site notes	758,783 51		Land — town-site account	867,735 12	
N. J. and C. R. R.	141,272 03		Interest accrued on coupons maturing Sept. 1st, 1891	215,093 84	
Southport branch and elevator	194,155 02				2,441,490 72
L., N. O. & T. of Ark	48,336 91				1,277,904 64
Financial Improvement Co.	81,274 24		Balance from income account		
		1,857,747 22			
Total		$43,955,395 36	Total		$43,955,395 36

NOTE.—The first-mortgage bonds are 50-year 4% gold bonds, dated 1886, interest payable March and September 1st.
The second-mortgage income bonds are 50-year 5% currency bonds, dated 1886, interest cumulative, payable March and September 1st, commencing September, 1888, and payable only when earned.
The income bonds are 50-year 6% currency bonds, dated 1884, interest non-cumulative and payable March and September 1st, if earned.

TABLE No. 2.

Income Account, June 30th, 1891.

Disbursements:			Receipts:		
Conducting transportation	$979,699 69		Balance from last year		$960,723 51
Motive power	608,460 60				
Maintenance of cars	296,151 73		Freight earnings	$2,426,792 69	
Maintenance of way	686,398 48		Passenger "	1,001,411 64	
General expenses	85,806 47		Express "	66,251 91	
			Mail "	77,317 90	
Miscellaneous expenses	$11,814 75	$2,656,516 97	Telegraph "	3,909 29	
Taxes	90,250 77		Miscellaneous	140,746 29	
Interest on 1st-mortgage bonds	631,340 00				
Interest on other debt	16,451 77		Operations Tennessee St. tracks	$1,772 29	3,716,429 72
Rentals	1,637 00		Operations M. & N. W. R. R.	6,010 42	
Operations Huntington transfer	2,751 54		Miscellaneous collections	3,731 50	
		754,245 83			11,514 21
Balance to credit of gen'l acc't		1,277,904 64			
Total		4,688,667 44	Total		$4,688,667 44

TABLE No. 3.

Monthly Statement of Earnings and Expenses.

Months.	Freight.	Passenger.	Express.	Mail.	Telegraph.	Miscellaneous.	Total earnings.	Operating expenses.	Earnings over operating expenses.
July, 1890	$115,897 05	$79,864 41	$5,504 84	$5,719 57	.....	$3,487 09	$210,472 96	$170,030 95	$40,442 01
August, "	133,457 52	84,511 70	5,465 90	5,719 57	.....	2,151 50	231,306 19	192,356 27	38,949 92
September, "	178,529 80	77,277 97	5,305 02	5,719 57	.....	1,789 80	268,622 16	208,553 63	60,068 53
October, "	250,939 40	80,950 14	5,528 23	10,449 69	$886 16	1,803 79	350,557 41	229,791 15	120,766 26
November, "	275,154 31	87,281 01	5,361 62	6,218 30	.....	2,489 33	376,504 57	236,742 16	139,762 41
December, "	312,031 97	116,271 70	6,028 01	6,218 30	.....	92,685 99	533,235 97	268,173 81	265,062 16
January, 1891	264,175 22	98,814 57	5,638 48	6,066 85	.....	3,016 42	377,711 54	252,965 84	124,745 70
February, "	199,279 76	87,112 83	5,166 23	5,975 96	.....	11,183 66	308,718 44	236,898 21	71,820 23
March, "	205,061 52	74,204 68	5,648 40	6,873 66	.....	2,912 66	294,700 92	240,077 95	54,622 97
April, "	179,796 61	69,449 58	5,469 98	5,981 96	3,023 13	4,551 99	268,273 25	227,919 39	40,353 86
May, "	167,871 09	72,499 92	5,642 88	6,033 87	.....	2,978 61	255,026 37	201,272 30	53,754 07
June, "	144,598 44	73,173 13	5,492 32	6,340 60	.....	11,695 45	241,299 94	191,735 31	49,564 63
Total 1890,'91.	$2,426,792 69	$1,001,411 64	$66,251 91	$77,317 90	$3,909 29	$140,746 29	$3,716,429 72	$2,656,516 97	$1,059,912 75
" 1889,'90.	2,027,243 79	839,551 76	56,725 46	60,783 46	11,000 00	44,368 69	3,039,673 16	2,171,060 72	868,612 44
Increase	$399,548 90	$161,859 88	$9,526 45	$16,534 44	.....	$96,377 60	$676,756 56	$485,456 25	$191,300 31
Decrease	.....	.....	.....	.....	$7,090 71	.....	.....	.....	.....

TABLE No. 4.

Statement of Freight Tonnage, Ton Miles, Train and Car Mileage.

	North.	South.	Total 1890–1891.	Total 1889–1890.	Increase.	Decrease.	Per cent.
Tons carried	335,408	658,919	994,327	849,246	145,081		17.08
Tons carried one mile	62,598,321	161,547,879	224,146,200	204,849,089	19,297,111		9.42
Average length of haul	186.63	245.17	225.42	241.21		15.79	6.54
Freight-train mileage			1,496,464	1,082,955	413,509		38.18
Total freight-car mileage	16,992,317	16,573,641	33,565,958	29,038,006	4,527,952		15.59
Loaded " " "	7,584,877	15,236,970	22,821,847	19,448,404	3,373,443		17.34
Percentage of loaded-car mileage	44.63	91.93	67.99	66.97	1.02		1.52
Average tons per loaded car	8.25	10.60	9.82	10.53		.71	6.74
" loaded cars per train	10.14	20.30	15.25	17.95		2.70	15.04
" empty " " "	12.56	1.80	7.17	8.85		1.68	18.98
" tons per train	83.66	215.90	149.78	189.15		39.37	20.81
Mileage of L., N. O. & T. cars on this road	9,432,534	9,377,173	18,809,707	13,668,055	5,141,652		36.61
Mileage of foreign cars on this road	7,559,783	7,196,468	14,756,251	15,369,951		613,700	3.99
Percentage of foreign mileage	44.49	43.42	43.96	52.93		8.97	16.94
Mileage of L., N. O. & T. cars on foreign roads			7,181,966	4,932,553	2,249,413		45.60

TABLE No. 5.

Statement of Passengers Carried, Passenger Miles, Train and Car Mileage.

	North.	South.	Total 1890–1891.	Total 1889–1890.	Increase.	Decrease.	Per cent.
Passengers carried	528,603	516,377	1,044,980	824,518	220,462	.....	26.73
" " one mile	20,872,255	19,991,595	40,863,850	33,368,396	7,495,454	.....	22.46
Average length of haul	39.48	38.71	39.10	40.47	.....	1.37	3.38
Passenger-train mileage	.....	.....	990,734	803,099	187,635	.....	23.36
Total mileage of cars in train	.....	.....	4,498,944	3,843,542	650,402	.....	16.92
Average number of cars in train	.....	.....	4.53	4.78	.....	.25	5.23
Average number of passengers in train	42.13	40.35	41.24	41.54	.....	.30	.72

WIRT ADAMS, STATE REVENUE AGENT.
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TABLE No. 6.

Expenditures Chargeable to "Construction" and "Improvement."

Accounts.	Main line.	Branch lines.			Total.
		West Side Div.	East Side Div.	N. J. & C. Div.	
Ballast	$86,690 87	$8,457 99	$14,834 53		$109,983 39
Bridge and culvert masonry	15,355 06	5,435 73		$1,044 76	21,835 55
Bridge superstructure	12,625 73	3 65		3 50	12,642 88
Car shops and sheds	163 04				163 04
Cattle guards and crossings	1,868 56	1,136 97	467 33	25 33	3,498 19
Cross and switch ties			89 00		89 00
Engine-houses	1,074 18	142 76			1,216 94
Engineering expenses	8,617 81	192 30	1,221 65	76 30	10,108 06
Fencing	1,305 62	282 92	95 43	253 62	1,937 59
Fuel stations	4,663 45				4,663 45
Graduation	50,448 07	1,906 40	115 60		52,470 07
General offices, salaries and expenses			500 00		500 00
Incidentals			585 00		585 00
Rails			702 05		702 05
Right of way	45,604 95	1,782 67	46 25	909 29	48,343 16
Stations, warehouses and stock pens	18,691 08	1,442 13	674 11	1,397 80	22,205 12
Section, tool and watch houses	1,101 57	322 53	1,626 73	237 09	3,287 92
Sidings	100,020 22	5,507 33		175 67	105,703 22
Track—labor laying	8,079 92				8,079 92
" superstructure			27 50		27 50
Telegraph		227 59			227 59
Timber trestling	12,180 80	788 57		83 80	13,053 17
Turn-tables	326 48	457 65			784 13
Water stations	5,308 54		33 81		5,342 35
Yards, Memphis	22,858 18				22,858 18
" Vicksburg	6,223 77				6,223 77
" Natchez				158 79	158 79
" Wilson	626 14				626 14
New Orleans terminals	31,109 47				31,109 47
Vicksburg shops	121,743 79				121,743 79
Inclines, Helena and Minter City		1,385 61	550 76		1,936 37
Total	$556,697 30	$29,472 80	$21,569 75	$4,365 95	$612,105 80

TABLE No. 7.

Statement of Locomotives Owned, Mileage, and Expenses.

Standard gauge.	On hand June 30, 1891.	Condition.			Size of cylinders.						Work done on locomotives.	
		Thorough order.	Good order.	Requiring repairs.	10 x 16	12 x 16	12 x 22	16 x 24	17 x 24	18 x 24		
6-wheel switching	14	9	3	2	.....	.....	.....	.....	11	3	Received thorough repairs	11
8-wheel passenger	21	17	2	2	.....	.....	.....	4	17	.....	Received general repairs	31
8-wheel freight	42	21	16	5	.....	.....	1	.....	33	8	Received light repairs	24
10-wheel freight	24	17	3	4	.....	.....	.....	.....	.....	24	Extension fronts and brick arches	9
											New ties	8
											New cylinders and steam chests	4
											New tanks	1
Total	101	64	24	13	.....	....	1	4	61	35		
Narrow gauge	4	.....	3	1	2	2	.....	.....	.....	.....		

Miles run with—		Cost per mile run.		Miles run to.	
			Cents.		
Freight trains	1,623,827	Repairs	2.63	Ton of coal (2,000 lbs.)	37.65
Passenger trains	1,085,672	Engineering and firing	5.99		
Switching	634,074	Watching and cleaning	.63	Pint of lubricating oil	11.84
Work-trains	620,162	Fuel	6.35		
		Oil and waste	.31	Pound of waste	107.97
		Fuel station attendance	.52		
		Water supply	.97		
		All other M. P. department expenses	.51	Pounds of coal consumed.	
		Total	17.91	Per passenger-car mile	12.06
Total	3,963,736	Average cost of repairs per locomotive per annum	$953.74	Per freight-car mile	3.03

TABLE No. 8.

Statement of Cars Owned, Mileage, and Expenses.

Standard-gauge cars.	Passenger equipment.						Freight equipment.								
	M., B. & E.	B. & E.	Pass.	Pass. comb.	Official.	Total.	Fruit.	Box.	Stock.	Gond.	Flat.	Caboose.	Road.	Tool.	Other.	Total.
On hand July 1st, 1890	4	6	35	5	2	52	181	1,206	50	261	640	55	68	3	4	2,468
Added and charged to equipment	2	.....	9	4	1	15	.....	401	.....	.....	.....	.....	.....	.....	.....	401
Added and charged to repairs	.....	.....	.....	.....	.....	1	.....	.....	.....	.....	39	.....	.....	.....	.....	39
Condemned and destroyed	.....	.....	.....	.....	.....	.....	2	31	.....	2	62	1	.....	.....	.....	98
On hand June 30th, 1891	6	6	44	9	3	68	179	1,576	50	259	617	54	68	3	4	2,810
Condition:																
In thorough order	3	3	30	5	3	44	.....	1,045	37	182	.....	36	.....	.....	1	1,301
In good order	2	2	10	3	.....	17	179	481	13	2	258	14	68	3	2	1,020
Requiring repairs	1	1	4	1	.....	7	.....	50	.....	75	359	4	.....	.....	1	489
Work done:																
Bodies rebuilt	.....	.....	.....	.....	1	1	.....	.....	.....	.....	39	.....	.....	.....	1	40
Trucks rebuilt	.....	.....	.....	.....	1	1	.....	.....	.....	.....	39	.....	.....	.....	.....	39
Received thorough repair	2	2	.....	2	.....	6	18	645	9	5	403	.....	.....	.....	.....	1,080
" general "	2	2	22	2	.....	28	26	382	18	42	.....	.....	.....	.....	.....	468
Painted	4	3	22	4	.....	33	18	165	9	.....	129	.....	.....	.....	.....	312
Varnished	4	3	22	4	.....	33	5	153	.....	.....	.....	.....	.....	.....	.....	158
New roof	4	3	.....	.....	.....	7	.....	.....	.....	.....	91	.....	.....	.....	.....	91
Changed to cane cars	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	6	.....	.....	.....	.....	6
" to excursion cars	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	2	.....	.....	.....	.....	2
" to incline "	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	23	.....	2	.....	1	68
Narrow-gauge cars on hand June 30th, 1891	2	.....	4	2	.....	8	.....	39	3	.....						

TABLE No. 8.

Statement of Cars Owned, Mileage, and Expenses—Continued.

Class of cars.	Miles run.		Cost per mile run.					Miles run to—		Average repairs per car per annum.
	Total.	Average per car.	Repairs.	Fuel and light.	Oil and waste.	Clean oil and insp.	Total.	Gallon of oil.	Pound of waste.	
Baggage, mail and express	840,970	60,055	1.2290	.0370	.0840	.4280	1.7780	214	399	$738 27
Passenger	2,955,843	50,099	1.1480	.0370	.0840	.4280	1.6970	214	399	576 39
Pullman	630,977						4.4130	214	399	
Freight	25,991,673	9,687	.2987	.0018	.0172	.0270	.3447	608	2,868	28 15
Foreign freight	15,352,890		.2446	.0018	.0172	.0270	.2906	808	2,860	

483 *Johnston Assignment.*

This agreement made and entered into this the 27th day of December eighteen hundred and eighty-two, by and between William M. Johnston of the city, county and State of New York of the first part and the Mississippi Valley Construction Company a corporation created, organized and existing under and by virtue of the laws of the State of New Jersey of the second part.

Whereas heretofore and under the date of the twenty-seventh day of December eighteen hundred and eighty-two, the party of the first part hereto entered into an agreement with the Memphis and Vicksburg Railroad Company to which agreement reference is hereby made with the like effect as if the same were here fully set forth, and

Whereas it has been agreed by and between the parties hereto that the said agreement should be assigned by the party of the forst part hereto to the party of the second part hereto, and that the party of the second part hereto should assume the performance of said contract and indemnify and save harmless the party of the first part hereto in respect of the same.

Now therefore this agreement witnesseth, that in consideration of the premises and the mutual unde-takings and agreements hereinafter contained and of one dollar by each of the parties hereto in hand paid at or before the ensealing of these presents, the receipt whereof is hereby acknowledged the party of the first part has assigned, transferred and set over and does hereby assign transfer and set over unto the party of the second part and its successors the said contract between the said party of the first part and the said Memphis and Vicksburg Railroad Company hereinbefore referred to and all rights and privileges under said contract or in anywise appertaining thereto and the said party of the second part has assumed and hereby assumes the performance of the said contract and has undertaken and agreed and does hereby undertake and agree to indemnify and save harmless the said party of the first part in respect of the said contract and all the undertakings and
484 obligations on his part therein contained and the said party of the second part is hereby substituted in the place of the said party of the first part in reference to the matters referred to in said contract and the rights, privileges, and obligations therein expressed.

In witness whereof the party of the first part has hereunto set his hand and seal and the corporate seal of the party of the second part has been attached hereto the day and year first above written.

J. M. EDWARDS, a witness for defendant, being duly sworn, testified as follows:

Q. You are Major J. M. Edwards, are you not?
A. Yes.
Q. Where do you live now?
A. New York city.

Q. When did you go to New York?

A. January, 1894.

Q. Where did you live previous to that?

A. For the ten years previous to that I lived in Memphis. For two years previous to that time, in 1882 and 1884, I lived in Vicksburg, Miss.

Q. Are you in the employment of the Y. & M. V. R. R. Co.?

A. No.

Q. Are you in the employment of the Illinois Central R. R. Co.?

A. No, sir.

Q. If you are in the employment of any person or corporation or partnership, I will get you to tell it to the jury.

A. I am at present employed with R. T. Wilson & Co., of New York city.

Q. Have you any interest in the result of this suit?

A. None at all in the world.

Q. Neither direct or indirect?

A. Not a dollar in the world.

485 Q. So far as you know, has R. T. Wilson any interest in the result of this suit?

A. Not a dollar, so far as I know.

Q. Or R. T. Wilson & Co.?

A. Not a dollar.

Q. I will get you to state whether you had any official relation with the L., N. O. & T. R. R. Co. at any time; and, if so, what that relation was, when it began, and when it terminated.

A. Yes, sir; I began with the L., N. O. & T. R. R. Co. in May, 1882, with the constituent companies, before the L., N. O. & T. R. R. Co. was formed, and I continued with that corporation until its merge or consolidation with the Y. & M. V. R. R. Co., and then I remained until January, 1894, when I went to New York.

Q. In what capacity were you with the L., N. O. & T. R. R. Co.?

A. I was its vice-president and gen. mgr. and supt. of construction of its line.

Q. I was just about to ask, did you have anything actively to do with the construction of that railroad?

A. Yes; I was supt. of construction of its line.

Q. In order that the jury may understand it clearly, I will get you to tell them when this railroad was built.

A. As far as our connection with it began, it was begun in 1882. I went to Vicksburg in 1882 to look after it. There had been some small portions of the line upon which construction had been begun before we went there. The Mississippi Valley and Ship Island R. R., I think, was built from Memphis down about 25 miles. There had been some grading on the Memphis & Vicksburg R. R. north of Vicksburg in 1872.

Q. In your capacity as vice-president, or in any other capacity, had you anything to do with the financial affairs of the company?

A. I had charge of its finances as far as they referred to the construction of the road in the country here, and its payments for constructions were made under my supervision.

Q. State now, Major, whether the L., N. O. & T. R. R. Co. built that portion of the road which is known in this controversy and generally as the special charter part of the Riverside division?

A. No, sir; the L., N. O. & T. did not build that. It was built by what is known as the Levee Company charter. The Memphis and New Orleans Railroad and Levee Company.

Q. They built that special charter road?

A. Yes, sir.

Q. What company built the remaining portion of the Riverside division?

A. The L., N. O. & T. R. R. Co. built the remaining portion.

Q. Did the L., N. O. & T. R. R. Co. build the branch which is known as the Helena branch?

A. No, sir; not originally. That was built by the Mobile & Northwestern Co. originally.

Q. How did the L., N. O. & T. acquire that branch?

A. By purchase. The road was sold and they acquired it. I think they purchased it from Chas. M. Calhoun.

Q. Did it or did it not construct that portion or branch which runs from Lula southeast down to Eagles Nest?

A. No, sir; that was originally a narrow-*guage* road. It ran originally from Helena, and they, after acquiring it, broadened the *guage* to a standard *guage* track.

Q. What company built the Tallahatchie branch?

A. The L., N. O. & T. R. R. Co.

Q. The Bayou Sara branch?

A. The L., N. O. & T. did—at least that portion which was extended from Bayou Sara to Slaughter. The old portion of the line from Woodville to Bayou Sara was built by the West Feliciana R. R. Co. forty or fifty years ago.

Q. That part which the L., N. O. & T. built ran from Bayou Sara to Slaughter and brings that Feliciana R. R. in touch with the L., N. O. & T.?

A. Yes, sir; it makes connection with the main line at Slaughter.

Q. And all that portion constructed by the L., N. O. & T. from Bayou Sara to Slaughter runs in the State of Louisiana?

486 A. Yes, sir; the L., N. O. & T. did a great deal of reconstructing on the old part of it, but the new construction was in the State of Louisiana.

Q. That portion of the Bayou Sara branch which runs in the State of Mississippi was part of the old West Feliciana road and was purchased by the L., N. O. & T.?

A. Yes, sir; it was purchased by the L., N. O. & T. R. R. Co.

Q. Can you tell me how long that piece of line was from Bayou Sara to Slaughter?

A. I think that was 25 miles, sir, from Bayou Sara to Slaughter.

Q. That was the part built by the L., N. O. & T.?

A. I think it was 18 or 20 miles. I h-ve forgotten the exact mileage. I think the whole distance is 42 or 43 miles from Woodville to Slaughter. The old part was about 25 miles, and the balance was the new part which was built.

Q. Were you aware of the contracts which have been put in evidence here between the Financial Improvement Co. and the L., N. O. & T. R'y Co. for the construction of these roads or the various constituent companies?

A. Yes, sir; I was.

Q. Aware of the making of them?

A. Yes; and aware of the carrying out of them.

Q. Did you have anything to do with the carrying out of them?

A. I acted as the agent of the Financial Improvement Co. in carrying them out.

Q. Now, state to the jury what the L., N. O. & T. R. R. Co. paid to the Financial Improvement Co. for doing that work.

A. The L., N. O. & T. R. R. Co paid in bonds and stocks.

Q. For instance, do you know how much stock it paid to the Financial Improvement Co.?

A. Paid at the rate of $10,000 a mile for the main line from Memphis to New Orleans.

Q. How much did that amount to?

(Witness here turns to pamphlets for information.)

A. $4,547,000.00, which is at the rate of $10,000.00 a mile on 454.7 miles of road.

Q. Was that the length of the road?

A. That is the length of the main line from Memphis to New Orleans at the time of its construction.

Q. What first-mortgage bonds did it pay to that company?

A. It paid 55 first-mortgage bonds at the rate of $24,000.00 per mile, amounting to $10,912,000.00.

Q. At that time was there or was there not any second mortgage?

A. There was no second mortgage at all.

Q. The first-mortgage bonds were secured on what?

A. Secured on the road-bed and track.

Q. Did it pay any other besides these first-mortgage bonds?

A. Paid what is called the land-grant income bonds. Paid at the rate of $20,000.00 per mile, making $9,0-4,000.00.

Q. About what time were these payments authorized by the board of directors?

A. Authorized the 18th Sept., 1884.

Q. Did those payments comprise all the payments which the L., N. O. & T. R. R. Co. made to the Financial Improvement Co. for work done?

A. No, sir.

Q. What other payments of stocks, bonds, etc., were made for construction?

A. Under the construction contract which the Financial Improvement Co. had with the L., N. O. & T. R. R. Co. there was a great deal of work which had to be furnished by the railway company itself. The railway company had no money at all of any kind, and the Financial Improvement Co. made payment for all of this outside and extra work, and on Nov. 21st, 1884, the board of directors paid to the Financial Improvement Co. $1,350,000 of its first-mort-

gage bonds for extra work. These bonds were taken at the price of 75 cts. on the dollar for the cash expended.

Q. Those were the bonds secured by the mortgage of 1884?

A. Yes, sir; those were the bonds secured by the mortgage of 1884.

487 Q. Were there any further payments made?

A. The next payment was made Ap'l 7th, 1886.

Q. What was that?

A. The Financial Improvement Co. had continually done a great deal of work for the continued construction of the L., N. O. & T. road upon its main line, and it was paid $1,379,000 of its first-mortgage bonds for the cash expended by the Financial Improvement Co., taking the bonds at the rate of 75 cts. on the dollar.

Q. I will get you to state whether or not it is the case that the L., N. O. & T. R'y Co. had the money itself with which to do this work and construct the road.

A. The L., N. O. & T. R'y Co. had no money whatever.

Q. Were these bonds and stock saleable on the market?

A. They were not saleable; they were never saleable.

Q. The road was not constructed at that time when these contracts were made?

A. There was no road constructed at the time when these contracts were made. The road had nothing to pay in except its securities.

Q. I will get you to tell the jury when the next payment of stocks and bonds were made—the next bond transaction?

A. The next bond transaction was when what was known as a special charter line; the lines which were built under the special charter were bought by the L., N. O. & T. R. R. Co.

Q. That is a part of the railroad?

A. Yes, sir; the Riverside division, which extends from Leland to Huntington and from Wilczinski to Glen Allen; that was paid for in stocks and bonds.

Q. Please tell the jury what amount.

A. They paid for that $453,000 of stock, $1,140,000 of first-mortgage bonds. Those were of a different series of bonds; bonds of 1886, 4 % bond-, $218,000 of second-mortgage bond-, and $906,000 of the land-grant income bonds.

Q. That was paid to the company that owned the road for the franchise?

A. That road was bought, I think, by an individual at the foreclosure sale. If I am mistaken in that Col. Yerger can correct me. I think it was bought by an individual and sold by the individual to the railroad for these considerations.

Q. Bought under a mortgage sale?

A. Yes, sir.

Q. What is the next bond transaction—bonds or stock, either?

A. It is proper to state that prior to this time these first-mortgage bonds, 5 %, had been converted into a different series of bonds—1886.

Q. Why was that done?

A. Because the interest on the first-mortgage bonds, which were outstanding, were such that the road could not pay the first-mortgage interest, and they wanted to reduce the absolute fixed charges on the property.

Q. That is to say, among other things, the interest on the first-mortgage bond-?

A. Wanted to reduce the interest on the first-mortgage bonds to such an amount that the road could pay its interest on the first-mortgage bond-, and to fund the difference between the 5 % first-mortgage bonds outstanding into the second-mortgage bond-, on which the interest did not begin until 1888.

Q. That is the first thing that brought the second-mortgage bonds into existence?

A. Yes, sir; the road was not able to pay interest on its outstanding 5 % first-mortgage bonds.

Q. Why was it considered desirable to reduce interest on the first-mortgage bonds so the road could pay it?

A. It was to endeavor to get the bonds so they would be marketable. The bonds had no market value. It could not show that it could pay its interest on these bonds and they had no market value.

Q. If the road could not pay its interest on the bonds, it might have led to a foreclosure?

A. It might have led to a foreclosure; yes, sir.

Q. Go ahead.

488 A. Under these considerations there was outstanding at that time $13,641,000. I think the figures are of first-mortgage 5% bonds. They were funded into $10,000,000 of 4% first-mortgage bonds. The remainder of the $3,641,000 and the difference between the 5% and the 4% bonds was funded into a second-mortgage bond, on which interest would begin in 1888 to the amount of $7,899,000.

Q. Was the funding of that $3,000,000 of first-mortgage 4% bonds done arbitrarily?

A. No, sir.

Q. Please explain that.

A. There was a careful and elaborate calculation as to the relative value of a 5% and a 4% bond.

Q. That was based upon what consideration?

A. Based upon the consideration of payment of interest and the relative value of a 4% and a 5% bond.

Q. What I want to get at is whether those considerations were considerations peculiar to the parties to the transaction or whether the calculation was made and the result reached under known financial rules.

A. It was reached by known financial rules as to values between those different classes of bonds, and the object of it, as I stated before, was to reduce the absolute first-mortgage interest to $400,000, whereas before it was $650,000.

Q. That change from $13,000,000 in round numbers of the firsts

to the $10,000,000 of firsts and $7,000,000 of seconds, that gave rise to the mortgage of 1886?

A. Yes, sir; that gave rise to the mortgage of 1886.

Q. Was it the fact that this $10,000,000 of firsts which were issued under the first mortgage of 1884 were issued in addition to the $3,600,000 of firsts?

A. It was not. The other bonds were, I think, canceled. The two sets of bonds were not out together.

Q. All of that thing is explained by these mortgages?

A. Yes, sir.

Q. The effect of that was that the firsts were reduced from $13,000,000 to $10,000,000?

A. If they were not canceled they were filed with the trustees in order that the others might be issued.

Q. As collateral security?

A. Yes, sir; I cannot say whether they were canceled or filed as collateral security.

Q. I will get you to explain the next bond transaction which took place.

A. I will state to the jury here that the amount of stock that had been issued up to this time completed the $5,000,000 of stock, and there was never any additional stock issued.

Q. That is the stock paid to the construction Co.?

A. Yes, sir.

Q. And the stock paid in purchase of the special charter?

A. Yes, sir; and that amounted to $5,000,000; and that completed the amount of capital stock that was ever issued. Also the amount of land-grant bonds and the other income bonds was at that time—the amount of those was up to $10,000,000, and they were never increased after that. The next bond transaction was in payment for the amounts of cash expended by the Financial Improvement Co. for the purchase of the West Feliciana, Clinton & Port Hudson R. R., the Mobile & Northwestern line, and for construction on the line from Ethel to Clinton, and from Lula to Glen Dale, and from Hampton to Riverside junction, and from Coahoma to Lamont. After the main line had been built, and built under the construction contract for stock and bonds of the company at the rates which were mentioned therein and which were paid for the main line, these additional branch lines were paid for in cash by the Financial Improvement Co., and the Financial Improvement Co. received the securities for the cash expended in first and second mortgage bonds in the ratio that each were entitled under this change from four to five, taking the first-mortgage bonds at 97½ on the dollar for cash.

489 Q. They received, then, for these expenditures first-mortgage bonds at 97½ on the dollar?

A. Yes, sir; and such seconds as belonged to them under the distribution of the second after the change from five to four.

Q. I want to ask you a further question about the nature of these bonds. The second-mortgage bond which we have been talking about and into which some of these first mortgages were trans-

mitted, did those second-mortgage bonds draw any absolute interest?

A. No, sir; the interest was payable if earned.

Q. Suppose the company did not have any earnings?

A. Then it did not pay any, but it was accumulative. It was payable when earned only. That was done in order that the road might not be sold out under an absolute obligation.

Q. The holders of the second-mortgage bonds took their chances?

A. On whether the railroad earned it or not.

Q. Now, then, these income bonds, how about them?

A. That was payable if earned, but they were non-cumulative.

Q. What do you mean by the difference between a cumulative and a non-cumulative bond?

A. The difference is if the bond bears 6 % and the road cannot earn it and does not pay it this year, you cannot sell the road put under the obligation, but next year there is the 6 % of this year that is still due, and the 6 % of next year makes 12 % due; and then for the 3rd year, if they still cannot pay, it is 18 %. That accumulates, although you cannot force the payment of it. A non-cumulative bond means if the road earns its interest this year it pays, but if it does not earn it, it does not owe and does not pay. It is only due when it earns it. That is a non-cumulative bond.

Q. Do you know anything about the financial system of the Methodist church? These non-cumulative bonds are like the preacher's salary—if you do not get it this year, you do not get it at all.

A. Yes, sir.

Q. Cumulative bonds; if you don't get it that year, it is due and carried over to the next year?

A. Yes, sir.

Q. Provided the company makes it?

A. Yes, sir.

Q. Let us go on to your next bond transaction. By the way, can you state or did you state how much they paid in these bonds for the purchase of these branches?

A. It was the purchase and the amount of work that had been done on these branches up to that date, Dec. 19th, 1888.

Q. Can you state how much was paid for the purchase, as distinguished from the improvements put on these branches? State approximately, if you cannot do it exactly.

A. I think for the Bayou Sara branch the price which was paid was $40,000 and assumed its mortgage debt which was, maybe, one hundred thousand dollars or $110,000.

Q. About $150,000?

A. Yes, sir; I think the Clinton & Port Hudson road, the amount paid for that was $40,000.

Q. Total of $40,000?

A. Yes, sir.

Q. Making about $190,000 for the two?

A. Yes, sir; but as for the Mobile & Northwestern I cannot tell exactly, because they bought the bonds of that company for what-

ever price they could buy them at, and then the railroad was foreclosed under its bonds and bought in. I have forgotten, but I think I possibly have data which would give that accurately.

Q. Do you remember what the entire bond issue of the Mobile & Northwestern was?

A. My impression is it was about $250,000.

Q. Are none of these things in there?

A. Yes, sir. Then in Nov. 28th, 1890, the outstanding bonds of the N. J. & C. R. R. Co., they had $1,250,000 of their first-mortgage bonds and they were bought by the Financial Improvement Co., and the road paid $800,000 of its 4 % first-mortgage bonds for the $1,250,000 of the N. & C. bonds.

490 Q. Does that item complete the list?

A. No, sir; it does not. In Dec. 19th, 1888, the road had furnished a large amount of equipment.

Q. I mean of roads purchased?

A. No, sir.

Q. The purchase of railroads? You have spoken of the Port Hudson road, and the Bayou Sara branch, and the Mobile & North Western, and the N. J. & C., and that item you were talking about—were there any other railroads purchased?

A. Yes; I have got the Memphis & New Orleans Levee Co. Those were all the lines which were purchased, and on those lines which were purchased there was a great deal of construction done.

Q. For instance, take the N. J. & C., what sort of a road was that?

A. Narrow guage; but it was afterwards made a broad guage from Harrison to Natchez and a great deal of money was expended upon it.

Q. Was or was not that true of the Woodville road?

A. Yes, sir; it was a broad-guage road, but it was a very light rail, it was poorly constructed and a great deal of money was spent on it.

Q. The Mobile & North Western was a narrow guage?

A. Yes, sir.

Q. On its eastern end, from Lula down to Eagles Nest, it was broadened?

A. Both ends were broadened; it is a broad-guage road all the way now.

Q. So now it is the same standard as the main line?

A. Yes, sir.

Q. I will get you to go now to the next bond transaction.

A. That is Dec. 19, 1888, when $1,077,478.00 bonds were issued on account of equipment.

Q. That is for equipment?

A. Yes, sir; cars, engines, etc. That is for the amount of money the Financial Imp. Co. had paid in cash for equipment of the road and the road repaid the Financial Imp. Co. in bonds.

Q. At what rate?

A. 97½ cts. on the dollar.

Q. The next transaction?

A. Dec. 19th, 1888, when for the remaining construction on the Bayou Sara, Clinton, & Port Hudson, Helena, Hampton, Bolivar, and Tallahatchie branches; they were paid for in cash by the Financial Improvement Co., and the Financial Improvement Company received for the cash it had expended $1,291,000 of first-mortgage bonds and $470,000 of seconds, which was the relative value of the first and second, taking the first at 97½ cents on the dollar. That completed the bond transactions.

Q. That construction which you speak of, were those branches built by the L., N. O. & T. R'y Co.?

A. The Financial Improvement Co. furnished the money for building, but they were built under the L., N. O. & T. Company's charter.

Q. That shows how much for these various purposes, and under these various purposes how much stock was issued?

A. Five millions of stock.

Q. How much first-mortgage?

A. $16,132,000 first-mortgage four per cents.

Q. Now, the mortgages of 1886?

A. $9,104,000 of second-mortgage fives.

Q. Those were the accumulative bonds?

A. Yes, sir; cumulative bonds upon which interest was not payable unless it was earned; and ten millions of incomes, which was non-cumulative bonds.

Q. Those were the bonds where no interest was paid?

A. No interest was paid unless it was earned.

Q. During the current year?

A. During the current year.

The statement which the witness used to refresh his memory was here introduced in evidence as Exhibit 1 to the testimony of this witness.

Q. I will ask you to state, if you please, if you know and can state, whether or not during the year 1882 the profits of the
491 L., N. O. & T. R'y Co. were sufficient to enable it to declare and pay an annual dividend of eight per cent. upon its capital stock, after paying its due debts and liabilities which the company had incurred either in the construction of the railway or for money borrowed by the company upon its lands or otherwise to be used in the construction of the railway or for paying debts incurred by said company in constructing the same.

A. It was not.

Plaintiff objects. Objection overruled. Plaintiff excepts.

Q. I will ask you to state whether or not the profits of the company, on the same basis as stated in the first question, would enable it to pay a dividend of eight per cent. to its stockholders in the year 1883.

A. It was not.

Same objection; same ruling and exception.

Q. How about the year 1884?

A. It was not able to pay eight per cent.

Same objection; same ruling and exception.

Q. How as to 1885?
A. It was not.

Same objection; same ruling and exception.

Q. 1886?
A. It was not.

Same objection; same ruling and exception.

Q. 1887?
A. It was not.

Same objection; same ruling and exception.

Q. 1888?
A. It was not.

Same objection; same ruling and exception.

Q. 1889?
A. It was not.

Same objection; same ruling and exception.

Q. 1890?
A. It was not.

Same objection; same ruling and exception.

Q. 1891?
A. It was not able to pay it.

Same objection; same ruling and exception.

Q. Do you know about the year 1892?
A. It was not able to pay it in 1892.

Same objection; same ruling and exception.

Q. I will get you to tell us, if you please and if you can, what the net earnings of the railroad company were in those various years—that is to say, beginning with 1882 and up to and including the year 1891; as far as you know about the year 1892.

A. There was a very small portion of the line operated during the years 1882 and 1884; in fact, the road was under construction and very little done. The total net earnings from the beginning of the construction to the end of 1884 was $61,942.00

Q. How about the year 1885?
A. The net earnings for the year 1885 were $322,721.26.
Q. For 1886?
A. $495,180.09.
Q. For 1887?
A. $635,321.00.
Q. For 1888?
A. $579,660.30.
Q. For 1889?
A. $969,509.26.

Q. For 1890?
A. $742,253.49.
Q. For 1891?
A. $992,394.63.
Q. For 1892, either during the whole year or as far as you know it?
A. Up to May 31st, 1892, was when the net earnings, from January to May 31st—$137,234.66.
Q. When you speak of the net earnings, what do you mean by it?
A. Earnings above its operating expenses and taxes.
492 Q. Does that include expenses for construction and maintenance?
A. It does not include the expenditures for construction; maintenance was always put in operating expenses, but construction was separate and independent.
Q. Was your connection with the L., N. O. & T. the only railroad connection you ever had? Did you have any experience connected with railroads before you went to the L., N. O. & T.?
A. Yes, sir; I have been connected with railroads since I was 21 years old.
Q. I will get you to tell the jury whether or not there were any special or extraordinary difficulties or dangers connected with the construction of the L., N. O. & T. railroad growing out of the character of the country or otherwise.
A. Yes, sir; it was the most difficult piece of construction, I suppose, that has ever been built, I suppose, in this country.
Q. Explain to the jury briefly something about that, what constituted the difficulty and danger, from your personal knowledge and experience, generally there in the supervision and construction of the road.
A. The country from Vicksburg north, except little strips of land which was upon the streams, was almost a wilderness in 1882. It was subject to overflow from the Mississippi river. I think the land was covered almost from Lake View, where the State line began, to Vicksburg. The whole of that country there was overflowed in 1882, before we came there. It was overflowed, I think, in 1883 and 1884, and then again almost every year there were overflows or breaks in the levees at some point from Leland to Clarksdale. I think about 65 miles of it seemed that the foot of man had never trod hardly. It was nothing in the world but a cane brake and a wilderness. The land north of Vicksburg from the Yazoo bridge way up to Rolling Fork was almost the same character of country. We found little stretches of land on Deer creek, and some north of Clarksdale that was better. But it was a most hazardous venture of building a railroad through that country that I have ever seen, and no one would have ever undertaken it if they had known what they had to contend with beforehand.
Q. I will get you to state to the jury the nature of that country and nature of the enterprise and whether or not that had any bearing or effect upon the finances of the concern and the ability to raise money to build it with.

A. It did, sir. The projectors of the road were considered almost as foolish for ever having put their money in there. It was very, very difficult for the securities of the company ever to be marketed. The line south of Vicksburg was extremely difficult to build. Immediately south of Vicksburg there the Mississippi river came in there and cut off the line entirely, and I had to rebuild four miles of the road absolutely new to get around where the river had come in and cut it off. All below Vicksburg in the hills the character of the material was such that the excavations, the cuts which you put in there, would slide in for a distance of 100 feet back, possibly, on to the track, and that material which was put into the road-bed in the beginning, after the rains would set in, it would just go out, and sometimes go 100 feet or more from the track, and leave the embankment which you had built down there just squashed down and gone out. We had to widen these cuts some of them forty feet wide to keep the dirt from coming on to the track. Numbers of them you will find there today. There were numbers of embankments built that went down to such an extent that we had to build trestle works on top of the embankment to hold the trains up, because the embankment would keep going down and squashing out, and we had to drive piles to keep up the embankment. That is below Vicksburg.

Q. How about the Vicksburg tunnel and the big divide?

A. The Vicksburg tunnel was rendered necessary by the river cutting off the line below. It was not originally located through the Vicksburg tunnel at all. We had to cut off and build four miles around to go through the hills through the tunnel. That tunnel was built of solid twelve by twelve timbers laid just as close as you could get them together, both on the ground and up on the sides and on the roof, and in spite of the timbers the material
493 would ooze through the little cracks and ooze through and through until you had to plug it up and calk it just like you would a boat to keep the material from coming on the track. In order to get the road-bed firm enough to lay a track we had to put on top of these bottom timbers a regular bridge structure, with stringers, etc., and ties, just like a railroad bridge, and you will find them in the tunnel there today, because it was so squ-shy and everything it would all go out. The expenses of building the tunnel were enormous. It looked like the whole country would come in from the top, just siping down through the top. He speaks of there the big divide. That is a cut some fifty-three feet deep, not far from Port Gibson. We built the track there, and it would just continually be covering up the track eight or ten feet deep or fifteen feet deep from the stuff on the side. We finally had to take it out and put a double track through that cut, and you will find it there today at Morehead station. The material was taken away out for 100 feet on each side and a fifty-foot cut —. I remember lots of material we took out. We had to shovel it up with buckets and put it in flat cars with side bars, and get it out any way in the world we could get it out. The character of the country was exceedingly difficult.

There was the Yazoo bridge. The railroad company contracted with what they considered the best railroad bridge firm in the country (?), Smith, who had more experience in building deep foundations than anybody else. Smith came there, and on account of the difficulties he found there he failed absolutely. He lost some forty thousand dollars in the venture, and the railroad company had to take the work off his hands and do it themselves.

As you know, the character of the rise and fall of the river there was a fifty-one-foot rise, and in low water when the bridge was built there was thirty-one feet of water, and when the water was high there was eighty-two feet. They had to build these foundations there on that basis.

When the rise came in the fall you had to withdraw your work entirely and let it stay until the next June. About next June it commenced to go down, and there was only, possibly, July, August, September, and October you could work in at all; consequently whatever work was done had to be pushed. The work that we expected would cost about one hundred thousand dollars cost us two hundred and eighty thousand dollars—the bridge there.

On account of the levees all being down there was a large amount of trestle-work, and after the levees were put up we had to go and build permanent embankment where the trestle-work was. Some thirty odd miles of these trestles were filled up, and it was a country you could not get any material in at all scarcely. The prices we had to pay for labor and everything else was enormous, simply because the people would not go in there to work.

Q. I will get you to tell the jury what was the practical condition of the levee system against the Mississippi, and if you know and can state the number, the times, and the effects of the overflows of the Mississippi river, the crevasses, etc., from the Yazoo river northward between 1882 and 1892 on this line of road.

A. In 1882, when I first went down there—in May, 1882—it was just after a big overflow of the river. I cannot exactly remember the years, but my impression is that almost every year, except possibly two or three, after that time there were overflows in the country. The levees on what is known as the Upper district, which ran from north Bolivar county, beginning with Coahoma county on north, there was some sixty-five miles of the levees which were absolutely down, and the waters would come in at the upper end of the district and come right down and flood the whole thing. About the years of 1883 and 1884, I remember, we had part of the track laid from the Yazoo bridge up towards Rolling Fork. We had some thrity miles of road, and the water came and stood some three or four feet over the track; stood there for months; just had to suspend your work, and the when the water went down find miles and miles of track washed up; and I have seen the rails and the cross-ties standing up on the side of the right of way like a picket fence for miles at a time,
494 just washed out and turned up on the edge against the right of way, the track all gone, and the roadway gone. The projectors of the road found that they could never operate the road in that country with the levee system as it was. The next

step that they took was to arrange that these levees should be closed and built. I remember when the first sixty-five miles of the levees were to be closed on the upper end of the district. The levee district had no credit in the world, and our people had to take the securities of that levee board and let the contracts and build these levees themselves. Then I let the contracts myself for the company. Those expenses are not charged in any way in the construction cost of the road, and we had to take charge of the levees and put up the money and build them in order to secure that country against overflows and to make the line which was built in there to some extent remunerative. If it had not been, the best thing to have done would have been to pull clean out and leave it, even after they had spent ten million dollars. They could not operate it unless the levees were put up. I remember about the second issue — this incident. I remember after the second issue of bonds for the upper district they wanted to do additional work at Clarksdale, and the contractors all came in and they wanted to make a corner on the work that was to be done and to charge the levee board an exceedingly high price for the levee work that was to be let, and the Financial Improvement Co. just stepped in and said, "We will furnish the money on a construction basis for building the levees. Now, if these contractors will not take it at a price which is low enough we will take the work and do it ourselves." In that way we had to break the combination and put the price down at a reasonable price. We put down the figures lower than anybody else put it. We said, "We do not want to take the work, but we will do it for these figures." That broke the combination and the breaks were built.

Q. Do you know whether or not these difficulties and dangers and troubles had any influence on the market value of the securities of this company?

A. Every time the floods came you could not sell an L., N. O. & T. stock or bond or anything else. Its line was there, but you could not do anything with it at all. Its securities were not marketable, and if it had not been that the people who built it held the bonds and kept it themselves and raised their own money the road would have gone absolutely into bankruptcy after the year 1884.

Q. Major, I will get you to tell the jury this: Is it or is it not true that after the building of the L., N. O. & T. railway in 1886 that company issued interest-bearing bonds secured by mortgage on its property to the *the* following amounts: $13,805,000 bearing interest at the rate of four per cent.; $8,731,000 bearing interest at the rate of five per cent., and $8,347,000 bearing interest at the rate of six per cent., aggregating $30,873,000, and sold and disposed of the same to non-residents of this State or anybody else for cash, and then mixed and confused the entire proceeds of said bonds in one common fund, and from this common fund paid its construction expenses, and then divided the proceeds, except what was required to construct -aid road, amongst the officers and stockholders of said company? Is that true?

Objected to as leading. Overruled. Plaintiff excepts.

A. No, sir; that is not true.

Q. I will ask you to state whether or not it is true that it took or required not more than four million of dollars to construct said road as contemplated by its charter.

A. It is not true.

Q. I will get you to state, if you please, whether or not it is true that previous to January 1st, 1891, the L., N. O. & T. Railway Company issued and disposed of to its incorporators and other stockholders 48,242 shares of stock for little or no consideration.

A. It is not true.

Question and answer objected to. Objection overruled. Plaintiff excepts.

495 Cross-examination:

Q. Major Edwards, this is a map which is a part of the fourth annual report of the L., N. O. & T. Railroad Company, 1891, filed as Exhibit 2, the map itself being marked Exhibit 1 to the deposition of R. T. Wilson. That is a substantially correct map and diagram of the L., N. O. & T. Railroad Company's system as it existed in 1891?

A. That is substantially correct, the dotted line from Minter City through Yazoo City to Redwood meaning that that line was never constructed—contemplated line.

Q. Where it is made in blocks there it was not built?

A. No, sir.

Q. The Riverside division on this map runs down from Coahoma station on the north side to Riverside junction on the south side. Will you please state to the jury how the trains were run on the Riverside division? Whether the trains ran clean through from Coahoma to Riverside junction, or how they were run? Whether they came in off the main line or whether they ran from Coahoma to Riverside junction and stopped? How were the trains operated?

Defendant objects. Objection overruled. Defendant excepts.

A. At different times there were different schedules. What trains do you mean; freight or passenger?

Q. Either one.

A. The freight trains generally run from Coahoma to Riverside junction; the passenger trains also at times ran from Coahoma to Riverside junction, but there were different times. There were times when the freight and passenger trains would start from Memphis and the train would be divided at Coahoma. One part would go around by Greenville and the other part go down the main line and they would join at Riverside junction and come on to Vicksburg. That is frequently the case. The lines were operated under different schedules at different times.

Q. The trains north didn't go off the main line? The trains then ran, both the freight and passenger trains, from Coahoma straight on down to the Riverside junction?

A. Sometimes they ran to Riverside junction and sometimes to

Greenville. Sometimes they came in to the main line. It was owing to circumstances how the trains would run. Great many years and different schedules at different times.

Q. Was there a separate train run? There seems to be a cross-section here from Huntington to Leland.

A. Yes, sir; there was — section from Huntington to Leland.

Q. How did the trains run there—through from Huntington to Leland or stop at Leland?

A. I think there was a schedule from Huntington to Leland. During what period of years? There was a good long part of the time when the Riverside division was not completed.

Q. I mean after it was completed, like it stands here in 1890 and 1891?

A. I think there was a schedule that went in from Leland to Greenville and on from Greenville up to Huntington. They were operated under various schedules at various times.

Q. There is a little road here from Glen Allen to Hampton—little branch out there. State how the trains ran on that. Did they run from this Riverside junction out on that, or was there a separate train?

A. No, sir; there was no separate train. The train would back up to Glen Allen about two miles and come out. Afterwards the passenger train did not run out there at all. The freight would run out there and come out.

Q. How were the trains run on the Helena branch?

A. Well, some of them run from Lula to Helena, and others would run from Eagle's Nest to Helena. I think there was one schedule on the Eagle's Nest end of the line, which was the eastern end of the line and back. Possibly an additional schedule from Lula to Helena and back in a day.

Q. Did the trains from Helena have any schedule from Helena running down to Greenville or any trains from Helena to Greenville?

A. No, sir; I think not; I don't remember any schedule ever running from Helena to Greenville.

Q. Or anything else except from Helena to Eagle's Nest?

496 A. I think the Helena branch ran from Helena and Lula and beyond to Eagles Nest.

Q. Now, on the Tallahatchie branch how did the trains run?

A. From Clarksdale to Minter City and back or from Minter City to Clarksdale and back, as circumstances occurred.

Q. Were they separate trains?

A. Yes, sir.

Q. On the Natchez, Jackson & Columbus railroad how did the trains run?

A. There was a time when a part of it was narrow *guage* and part of it broad *guage*. Trains would run from Harriston to Jackson and return, both freight and passenger. Then there were other trains from Harriston to Natchez and return. I think there was a while there when trains ran from Vicksburg to Natchez and back.

There were various schedules operated at various times on the road.

Q. Did the trains on the N., J. & C. railroad run on the main line at all?

A. Sometimes they would come to Vicksburg. I think there was a schedule from Vicksburg direct to Natchez. That is my recollection, that there was a time when the trains ran in that direction, but generally they stopped at Harriston.

Q. Until they broadened the guage and went through to Jackson?

A. Yes, sir.

Q. How were the trains from Woodville down to Slaughter, on that branch?

A. They ran from Woodville to Slaughter and return, leaving Woodville in the morning, generally down to Slaughter and back.

Q. They never went on the main line?

A. I don't think there was ever any schedule on the main line.

Q. How as to the branch from Ethel to Clinton?

A. That generally went from Ethel to Clinton and return. There was a while when the trains—I don't know how it is operating now—it went from Clinton to Ethel and down the main line over to Bayou Sara and Woodville. I think there was a while when the schedule went all the way around from Clinton to Woodville, taking in a part of the main line.

Q. From Ethel down to Slaughter?

A. I think so, sir.

Q. The freight trains in running from Memphis to New Orleans, you have stated that the passenger trains sometimes stopped at Coahoma, split at Coahoma and united again at Riverside junction. Did the freight trains always run through on what is called the main line or sometimes run——

A. Freight trains sometimes ran on the main line; sometimes they would run around the other way, but not often.

Q. On the Riverside division?

A. Sometimes, but not often.

Defendant objects to the examination as to the method of running trains. Objection overruled, and defendants except.

Mr. CRITZ: Was not the whole of this L., N. O. & T. railroad, from Memphis, Tenn., through the State of Mississippi, to New Orleans, La., built as one enterprise?

A. Well, there were several constituent companies which composed the L., N. O. & T. railroad. They were consolidated into the L., N. O. & T. railroad.

Q. But it was built from Memphis, Tenn., to New Orleans, La., as one enterprise, one business scheme?

A. It was one business scheme to get a line from Memphis to New Orleans.

Q. That was in the contemplation of the projectors of the road when they started the first work to build from New Orleans to Memphis?

—. They wanted to get a continuous line from Memphis to New Orleans.

Q. You say you were the general manager in charge of the construction of this work?

A. I was vice-president and general manager and superintendent of construction.

Q. Vice-president of what?

A. Of the L., N. O. & T.

Q. But what were you before the consolidation was made which created the L., N. O. & T.?

A. I think I was vice-president of the constituent companies.

497 Q. You were vice-president of the Tennessee company and of the two Mississippi companies and the New Orleans company?

A. I do not exactly recollect, but my impression is that I was.

Q. Didn't you have charge of the whole work before the consolidation?

A. Yes, sir; I was superintendent of construction from Memphis to New Orleans.

Q. You were superintendent of construction from Memphis to New Orleans before the L., N. O. & T. Co. was formed?

A. Yes, sir.

Q. Was the work of Tennessee, Mississippi, and Louisiana all kept together, or was the work in each State kept separate from that in each other State?

A. It was all kept together, just in one continuous line.

Q. You have made no note of whether the work was in Tenn., Miss., or La.?

A. There was no distinction as to whether the work was done in Tenn., Miss., or La.

Q. At what date was the first work done and where on the line?

A. There was some work done in 1872 north of Vicksburg. A part of the line south of Vicksburg was a narrow-guage road, south of Vicksburg, when we went there, in 1882.

Q. What work was done north of Vicksburg in 1872?

A. I think there was some grading done north of the Yazoo river, running off about ten miles, partially graded.

Q. Was that grading used in the construction of the L., N. O. & T. road?

A. Partially. A good deal of it was washed away, but it was partially used as far as we could utilize it.

Q. Is the grading of that work which was done in 1872 included in your estimate of the L., N. O. & T. work?

A. Not in our estimate of the work which we did, but it was put in the estimate of the original cost of the property.

Q. Bonds and stock were issued for that just as for the balance?

A. Bonds and stock were not issued for that. There was no bonds and stock issued at the time that work was done.

Q. Didn't you allow the construction company the same amount per mile on that that you did on the balance of the road?

A. The construction company was paid so much per mile right through from Memphis to New Orleans.

Q. That included this part which was graded in 1872?

A. Included what of the grading was left there.

Q. There is nothing charged up to the construction company on account of this grading which was already there? They got the same per mile on that they did on the balance, which had not been touched?

A. Yes, sir. I will state in this connection that the grading was scarcely noticeable at the time we went there. You could hardly see that there had been a right of way cut out.

Q. Under what charter was that work done in 1872?

A. I think it was done under the charter of the Memphis & Vicksburg R. R. Co.

Q. What work did you say that was which was done just below Memphis in 1882?

A. I said below Vicksburg. There was a little narrow-*guage* railroad—the Miss. Valley & Ship Island R. R.

Q. That was done under the Miss. Valley & Ship Island R. R. charter?

A. Yes, sir.

Q. Part of the grade of that was also used in this work?

A. Very little of that could be used. It was as crooked as a ram's horn and had grades 112 feet. It was just running around the edge of the hills, and we had just to split through.

Q. You used part of it?

A. Very little.

Q. You allowed the same per mile there?

A. The road was paid the same per mile right through.

Q. You issued the same amount of bonds and stock on each mile of the road from Memphis to New Orleans, regardless of the cost of the particular mile?

498 A. Issued the same amount of bonds and stock. I will state in connection with this, the construction companies bought those little pieces of road which they partly used. They were as much entitled to the use of them in their construction as any of the rest of the line. They paid the money for them.

Q. Which construction company bought them?

A. The Financial Improvement Co.

Q. Did the Financial Imp. Co. and the Miss. Valley Constr. Co., together?

* * * * * * *

Q. Did the Financial Imp. Co. do all the work from Memphis to New Orleans?

A. The Financial Imp. Co. and the Miss. Valley Constr. Co., together.

Q. When and where did the Miss. Valley Constr. Co. do work?

A. They did part of the work from Vicksburg to Leland.

Q. What year was that work done?

A. Begun in 1882

Q. Is that on the main line?

A. Yes, sir.

Q. What improvement Co. was that?

A. The Miss. Valley Constr. Co.

Q. Now, you allowed the same amount on this big divide per mile that you did on the cheapest mile on the road? You just averaged it up all the way through?

A. Yes, sir; so much per mile of road and they took what came.

Q. What relation did you and R. T. Wilson hold to the Memphis & Vicksburg R. R. Co.?

A. I think Mr. Wilson was the president. Whether I was the vice-president or not I cannot say.

Q. What relation did you bear to the New Orleans, Baton Rouge, Vicksburg & Memphis R. R. Co.?

A. I think Capt. Jno. A. Grant was pres't of that company, and I think I was secretary. The record will show.

Q. You have mentioned Capt. Jno. A. Grant. Who was he?

A. Chief engineer of the road.

Q. Chief engineer of the whole road?

A. Yes, sir.

Q. He was employed from the beginning of construction to the end?

A. Not to the end.

Q. Up to what time was he employed?

A. I think he left the road in 1884, possibly in 1885; I do not know which.

Q. What interest did he have in the construction of the road?

A. None in the world except as an officer.

Q. As president of that company of chief engineers?

A. Chief engineer.

Q. Was he chief engineer and president, too?

A. I think he was president of the New Orleans, Baton Rouge, Memphis & Vicksburg R. R.

Q. How was it you started to build this road from Memphis to New Orleans as one common enterprise before you had any organization under which to build it?

A. They built it under the charter of the constituent companies. Each company had its charter and they built it under its constituent companies, and after the track was through, or about that time, I think we consolidated into one company, the L., N. O. & T. We had to get our charters from each State.

Q. What time did you go into business with Mr. R. T. Wilson?

A. I had charge of a railroad in Georgia for him some four or five years prior to my connection with this road in 1882.

Q. What position did you hold over there?

A. I was vice-president and general manager of the Macon & Brunswick road.

Q. You had charge of that for Mr. Wilson?

A. Mr. Wilson was the chief owner of the road; I do not know whether he was president or not.

499 Q. Were you not brought over here to this road by Mr. Wilson?

A. Yes, sir.

Q. And your connection with this road here was in the interest of Mr. Wilson?

A. Mr. Wilson brought me over here from the line. I was with him over on the other road.

Q. What year did you first go with Mr. Wilson?

A. It was possibly in 1878 or 1879; I have forgotten exactly the year.

Q. Have not you been in the relation of Mr. Wilson's confidential man ever since 1878?

A. No, sir. When he sold the Macon & Brunswick road to the E. T., V. & G. I remained there for a year or more as the general superintendent of that part of the line which Mr. Wilson owned.

Q. But when you came over here you came in the interest of Mr. Wilson?

A. I came over here to build a road.

Q. You came over here at his solicitation?

A. Yes, sir; I came at his solicitation.

Q. Tell us what interest has R. T. Wilson in the Illinois Central R. R. bonds.

A. He has none that I know of in the world.

Q. What interest has he in the L., N. O. & T. R. R. bonds?

A. I do not know that he has any interest now at all.

Q. Do you know that he does not have?

A. I do not think he has.

Q. What interest has he in the Y. & M. V. R. R. bonds?

A. None at all.

Q. State, if you know, what became of the $25,000,000 bonds of the Illinois Central R. R. Co. issued under the mortgage of Sept. 1st, 1892.

A. I do not know.

Q. I notice here by the minutes of the Y. & M. V. R. R. Co. on the 4th Oct., 1893, the Financial Improvement Co. owned 479 shares of the Y. & M. V. R. R. Co. What became of those 479 shares so owned by the Financial Improvement Co. at that date?

A. I do not know.

Q. On the 4th Oct., 1893, after the consolidation of the L., N. O. & T.?

A. I do not know; I had no knowledge of that.

Q. Is not R. T. Wilson a member of the Financial Improvement Co.?

A. If he ever was I do not know it.

Q. You do not know what connection he ever had with that?

A. The Financial Improvement Co.? No, sir.

Q. Are you not the J. M. Edwards who was called to the chair to preside over a meeting on the 4th Oct., 1893, of the stockholders of the Y. & M. V. R. R. Co. as shown in this minute?

A. I have forgotten whether I was or not. (Witness, after read-

ing a document to refresh his memory, continued:) Yes, sir; I was the same person.

Q. Did not R. T. Wilson, at the time of the meeting just referred to, have an interest in the Financial Improvement Co., to your knowledge?

A. Not to my knowledge. I do not know what exactly were his relations to the Financial Imp. Co. I never knew.

Q. You knew he had some connection with it?

A. I knew he put up the money for the Financial Imp. Co.—a portion of it—but what were his exact relations to them I do not know. Whether he was either a stockholder or an officer I do not know. I do not think he was ever an officer, but whether he was a stockholder I do not know.

Q. He put up 40 % of the money and C. P. Huntington 60 %?

A. The Pacific Improvement Co. put up 60 %.

Q. Who composed the Pacific Improvement Co.?

A. I do not know.

Q. Was it not C. P. Huntington?

A. I do not know, sir; I never had any connection with it whatever.

Q. Was not the Financial Improvement Co. owned, or owned in part, by R. T. Wilson?

A. I think so. I think it was.

Objected to. Objection overruled. Defendant- excepts.

Q. Look at that contract between the Memphis & Vicksburg R. R. Co. and Wm. M. Johnson on Dec. 27th, 1882, which has been
500 introduced in evidence in this case, at the following words at the bottom of said contract: "Attest: C. H. Bosher, sec't'y and treas." Of what was said C. H. Bosher secretary & treasurer by that transaction?

A. Secretary and treasurer of this railroad, the Memphis & Vicksburg R. R. Co.

Q. Is he the same C. H. Bosher that was the book-keeper and confidential man of R. T. Wilson up to the time of his death?

A. The same.

Q. Did he have any means invested in this enterprise, or was he simply there as an employé of R. T. Wilson?

A. He was the partner of R. T. Wilson & Co.

Q. He was the partner of R. T. Wilson & Co.?

A. Yes, sir.

Q. Is this Wm. M. Johnson, who signed said contract which is referred to, the Wm. M. Johnson that was also a partner in the firm of R. T. Wilson & Co.?

A. I don't know whether he was a partner at the time that paper was executed; I don't think he was.

Q. Was he afterwards?

A. I think he was afterwards; he is not now.

Q. He was the partner of R. T. Wilson during the construction of this L., N. O. & T. R'y Co., was he not?

A. Not originally; I don't think he was.

Q. What time did he come into partnership?

A. I could not tell you what time, but I don't think he was a partner at the time that the lines were being built originally; he has no connection with the firm whatever at present, but lives in Macon, Ga.

Q. Now, did you not state in your direct examination that a part of this railroad was built from Memphis south about 25 miles prior to the time you went in charge of it in 1882?

A. No, sir; I said from Vicksburg south. It was a narrow-gauge road, the Miss. Valley & Ship Island road.

Q. There was no part built then just south of Memphis?

A. None at all. There was a little narrow-gauge road that was bought by the Financial Improvement Co. and used to a very small extent.

Q. About what time was the first train run through on the main line of the L., N. O. & T. R. R. Co. from Memphis to New Orleans?

A. I think it was about the 1st of October, 1884.

Q. What time did you commence using any part of the railroad for traffic?

A. Well, as we got the lines built 25 or 30 miles, we would in a small way do a little business on it.

Q. What part of the railroad did you build at first?

A. We built from Memphis south, from Vicksburg north, and from Vicksburg south, and New Orleans north, all about the same time. We built from four different ways.

Q. What time was the road completed from Vicksburg south to the Louisiana line?

A. The road was never completed.

Q. What time *the* was the track laid from Vicksburg south to the Louisiana line?

A. The track was laid; I think it was joined in 1884. Possibly the junction was about August, 1884. I think it was in July or August.

Q. What time was the earthwork and wood-work from Vicksburg south to the Louisiana line completed?

A. Well, there was a sufficient amount of it done to permit the track to be laid on it as it was done. The work was ahead of the track.

Q. What time did you begin work on that part from Vicksburg south to the Louisiana line?

A. I think it was possibly June or July, 1882.

Q. Did you work on that regularly until the time it was finished and until the time the track was laid?

A. Yes, sir; regularly and for ten years afterwards.

Q. Does the work on a railroad ever become finished? Don't you have to work on railroads all the time to keep the track up?

A. To some extent; yes, sir.

Q. What company was it that built that part of the track
501 which is north of Vicksburg, in 1872?

A. In 1872 they threw up a little embankment from the

Yazoo river, running north about ten miles. I think it was done by the Memphis & Vicksburg road.

Q. Was the earthwork and the wood-work south of Vicksburg done prior to or after the similar work north of Vicksburg, or was it all in a process of construction at the same time?

A. It was all in process of construction at the same time.

Q. What time did you commence laying the first track?

A. That would be in 1882, I would judge.

Q. What part of the track was laid in the fall of 1882?

A. It is very difficult to remember what track was laid at different periods of the year. My impression is we began in the fall of 1882 and laid a little track from Vicksburg south.

Q. Do you remember how many miles south, Mr. Edwards?

A. I could not tell you.

Q. Did it go as far as Port Gibson?

A. Not in 1882. We did not get to Port Gibson until 1883 or 1884; possibly in the fall of 1883.

Q. How far is it from Vicksburg to Port Gibson?

A. About 28 miles, I think.

Q. Did the railroad begin to run from Vicksburg to Port Gibson in 1883?

A. I could not tell you exactly when it began running there. My impression is that in the latter part of 1883 we might have been running to Port Gibson. I could not tell you. I can't remember exactly.

Q. How far is it from Port Gibson to the Louisiana line along the line of the L., N. O. & T. R. R.?

A. I could not tell you without getting closer figures than I have. I don't remember.

Q. Do you remember when the track was first laid from Port Gibson south?

A. I think the track was joined from Port Gibson south in about July or August, 1884. I think the point of junction was somewhere near the Homochitto river.

Q. The track-laying from the south——

A. Met the track-laying from the north. I think it was in July or August, 1884.

Q. Is that river in Louisiana or Mississippi?

A. It is in Mississippi.

Q. How far from the Louisiana line?

A. I could not tell you that. I used to know, but I have forgotten. I don't keep those figures in my head.

Q. Who is R. H. Elliott and what did he have to do with the construction of this railroad?

A. Mr. Elliott was the principal ass't engineer of the line.

Q. Did not Mr. Elliott have control of the construction as engineer from Memphis down to Port Gibson?

A. Mr. Elliott located and had charge of the construction as far as the contractors went. From Memphis to Port Gibson, I think, was the part of the line.

Q. What contractors?

A. The subcontractors who did the grading, etc.

Q. What time did Mr. Elliott come there?

A. I think it was in the summer of 1882. I have forgotten the date.

Q. What time did he leave the employ of the L., N. O. & T. R'y Co.?

A. I could not tell you exactly. I think it was in 1885 or 1886.

Q. Was not Mr. Elliott a competent engineer?

A. He is a very good engineer for some things. He is an excellent locating engineer and a very competent man in a great many things.

Q. Are you a civil engineer?

A. Yes, sir.

Q. When you were giving your answers as to the issuance of stock and bonds and the amount thereof did not you read all the answers from Exhibit 1 to your deposition?

A. I think so.

Q. You did not make the statement from memory, but from Exhibit 1?

A. I made them from the exhibit; yes, sir.

502 Q. You spoke about the change of certain bonds so as to reduce the interest and mentioned the difference in value in the first and second mortgage bonds. What was the difference in value, according to your estimation, of the first and second mortgage bonds which you have mentioned?

A. That is a financial calculation that I have never made. They make them in New York in banks, etc. That was made at the time on the regular basis of difference between the four and five per cent bonds.

Q. After you made this change, what was the interest per annum on the first-mortgage bonds?

A. The interest on the first mortgage at the time the change was made? It was $400,000.00.

Q. For what years was this?

A. It was in 1886. I think the statement will show when the change was made.

By the COURT:

Q. Is that a five or a four per cent.?

A. Four per cent; ten million four per cent. bonds. It was in 1886 that the change was made. I think it was in September. The mortgage will show.

Q. You say the first-mortgage bonds were cancelled at the time this change was made?

A. I think they were cancelled. I think the original files were cancelled and these new bonds were issued.

Q. Were they cancelled or deposited with the trust company?

A. I could not tell whether they were cancelled or deposited with the trust company. The company would not issue the new bonds until the old ones were deposited with them or cancelled.

Q. Well, is that the rules with these trust companies, that when

new bonds are substituted for the old bonds they would require the old bonds to be deposited with them?

A. They are deposited or cancelled before they will issue new bonds.

Q. When these bonds were deposited with the trust company they were no longer on the market, were they?

A. I don't know what the trust company does with them, sir. I never dealt with the trust company. I don't think they were on the market after they were deposited with the trust company in exchange for new bonds.

Q. That is the reason they are deposited with the trust company?

A. Yes, sir; they are not put on the market then, but they remain as a lien upon the property until they are cancelled.

Q. Not as a lien on the new bonds?

A. It is a lien upon the property as collateral security as it was. It is like holding an original note as collateral for a new note that is given.

Q. Who are Latham, Alexander & Co., No. 16 7 18 Wall St., New York?

A. They are bankers and brokers there.

Q. Don't they belong to the stock exchange of Wall street, New York?

A. I could not tell you anything about that.

Q. Is not the hand book of railroad securities of Latham, Alexander & Co. standard authority as to railroad stock and railroad bonds?

Objected to, and the objection is overruled for the present, and the defense excepts.

A. I could not tell you. I have never seen a copy of the book.

Q. Look at this hand book of railroad securities of Latham, Alexander & Co. of January 1896, and see if you have ever seen anything like that before.

A. I have never seen this book. I think such books as these are gotten out by quite a number of firms in New York. I think the substance of the book is gotten out by one person, and the person who issues it just stamps his name on the back of it. I think that is the way it is done.

Q. Is not this book gotten out by the stock exchange of New York?

A. No; I think not.

Q. Who gets the book out? They have an annual book showing the stock that is on the market, don't they?

A. My impression is that it is gotten out by the Financial Chronicle, a newspaper here.

Q. Is not that book authority in the operation of the stock exchange on Wall street, New York?

A. I think the book is simply a statement of the prices of
503 stocks and bonds for that year; possibly compiled by the Financial Chronicle.

Q. Don't it show all the stocks and bonds that are on the market in Wall street?

A. I don't know; I could not tell you. There are a great many bonds and stock- that are not listed on the market. I don't know whether it shows the listed or unlisted securities.

Q. What securities are listed in this book? Are they securities that are on the market?

A. I could not tell you what is in it. I have never looked it through at all.

Objected to.

Q. Look at page 33 of the hand book, under the head of Yazoo & Miss. Valley, this entry, "Ill. C. call trust bond, gold, 1953, $24,699,000; rate per year, four per cent.; periods M. & N.; fiscal year, 1893 to 1894, 1894 to 1895; miles operated, 807."

The defense here objects to any further reading of the book.

By the COURT: Do you know whether that book is gotten up by the person- or brokers who have their names on it or not?

A. No, sir; I don't know. There is nothing considered an absolute authority except the mortgages themselves. If a person wants the bonds, they have to go to the original trustees to see what they are. I know the Financial Improvement Co. in two instances within the last year have had titles misrepresented to bonds of street railroads that our firm was interested in, and it had to be changed; I know that personally.

Q. You don't know whether the statement contained in here is correct or not?

A. I don't know anything about that statement.

Q. You don't know whether these L., N. O. & T. consolidated bonds are on the market, or whether the I. C. are?

A. I don't know anything in the world about it, sir.

Objection sustained.

Q. You have spoken of some part of the construction work of the L., N. O. & T. R. R. Co. having been done by the Miss. Valley Construction Co. I see no contract here with the Miss. Valley Construction Co. Under what contract did they work on this railroad?

A. The Memphis & Vicksburg, a portion of the line from Memphis to Leland, was first contracted with William M. Johnson, and he assigned that to the Miss. Valley Construction Co., and the Miss. Valley Construction Company assigned all their rights, etc., to the Financial Improvement Co.

Q. The bonds and stocks for the payment for the work was really issued to the Financial Improvement Co.?

A. Yes, sir; the Financial Improvement Co.

By the COURT: Until after the assignment of the contract?

A. The bonds were not issued until the latter part of 1884, after the assignment of the contract to the Financial Improvement Co.

By COUNSEL:

Q. Then the Financial Improvement Co., either as contractors or as the assignees of the contractors with Johnson, as assigned by him to the Mississippi Valley Construction Co., really did the whole work?

A. Really the whole work.

Q. And received the pay for the whole work?

A. Yes, sir; received pay for the whole thing, the bonds and stock-.

Q. Did William M. Johnson do anything himself?

A. I think he assigned his contract to the Mississippi Valley Construction Co. before he did anything or very little of anything.

Q. Who composed the Mississippi Valley Construction Co.?

A. I don't know its officers or its stockholders. I have no information.

Q. You have spoken of four miles of the railroad that were washed in by the encroachments of the Mississippi river there near Vicksburg. Was that south of Vicksburg, or north?

A. It was south. The whole four miles did not wash in. There was only about a half mile that caved in, but we had to build four miles back of the hills there in order to get rid of the river.

Q. That is south of Vicksburg?

A. Yes, sir.

504 Q. That necessitated the building of the tunnel?

A. Yes, sir; that necessitated the building of the tunnel. The tunnel is in that four miles of line.

Q. Well, now, when you built the tunnel, how much new lines did you have to build to get the road to pass through the tunnel instead of going around where it originally was?

A. The mileage was about the -ame as before. We had about four miles of the old line and built abo-t four miles of the new.

Q. Did not some contracting company contract for the four miles of new line and the tunnel?

A. The Financial Improvement Co. had the whole thing.

Q. Who did the work under the Financial Improvement Co.?

A. At what part of the line?

Q. I mean that tunnel and that four miles.

A. I have forgotten. McDonald did the tunnel work himself, but I have forgeotten who did the grading on each side of the tunnel. J. P. McDonald was a general contractor. He might have done the whole four miles, and I think probably he did, but I have forgotten.

Q. You have spoken of the big divide as north or south of Vicksburg.

A. It is south.

Q. How far south?

A. Approximately, 23 or 24 miles. It is beyond Big Black river.

Q. About three miles north of Port Gibson?

A. Yes, sir.

Q. Along the line of the L., N. O. & T. R. R.?

A. Yes, sir.

Q. The Big Black bridge is also south of Vicksburg, is it not?

A. It is south of Vicksburg.

Q. This tunnel and this big divide were then that part of the railroad that was under the control of R. H. Elliott, engineer?

A. Elliott was the assistant engineer; the principal assistant engineer, I think. I have forgotten his title, but he was the engineer in charge of it.

Q. You have spoken of the trouble that you had there with slides in the cuts of the road. Were they north or south of Vicksburg?

A. They were principally south of Vicksburg; south of Harriston principally.

Q. Is that south of Port Gibson?

A. Yes, sir.

Q. How far south of Port Gibson?

A. I think it is about 20 miles south.

Q. What part of the road in Mississippi was the most costly outside of the iron bridges and tunnel?

A. Well, the hill division between Harriston and Wilson were expensive, and then the line in the neighborhood of Vicksburg, with the tunnel, and just north of Vicksburg, and then all through from Vicksburg up to Rolling Fork was exceedingly costly, and then from Leland past Clarksdale was exceedingly costly.

Q. The road crosses the Tennessee line about five miles from Memphis?

A. It is about 12½ or 13 miles from Memphis.

Q. Is that a hill country in Tennessee where the road runs through?

A. Yes, sir; a part of it.

Q. How far below the Mississippi line did you construct the bottom line?

A. The delta line begins at Nonconnor. We run along below the hills until we reached about 15 miles of Memphis, and there we struck the delta proper.

Q. When was this tunnel and the four miles of road constructed there just below Vicksburg?

A. I think it was in 1885 or 1886.

Q. You have stated in your direct examination, in speaking of the difficulty of constructing this road through the swamp, that you could not get the material there. What sort of material was it that you could not get there?

A. It was very difficult to get the earthwork for th- embankments.

Q. Was not there plenty of earth there in the swamp?

A. There was plenty there, but it was very hard to put it in the embankments. It was very difficult to get the cross-ties.

505 Q. Was not there plenty of timber there?

A. There was plenty of timber there, but we could not get the timber for the ties at anything like reasonable prices. We had to buy some ten million feet of cypress logs that were up in the delta

and float them down to the Yazoo bridge and put up saw-mills and saw out the ties.

Q. Was not there any cypress in the wilderness there?

A. There was lots of cypress, but you could not wait until you got to a cypress brake to get the ties out.

Q. You had all the piles for the trestling hewn out?

A. Yes; they were hewn.

Q. Didn't you have plenty of timber to make the piles along there?

A. Plenty of timber, but lots that is not fir for piles.

Q. Didn't you find timber enough there to build the road?

A. Yes, sir; we did find it.

Q. You could get the material there?

A. We could get the material and did get a great deal of it.

Q. As a general thing, where you have to build trestling, don't you prefer being in the woods to being in the open air?

A. It depends upon the kind of woods that we are in.

Q. Did not you have post oak and white oak?

A. I never found a post oak in the bottom. There is what is called a cow oak there. I think that is a *p*secies possibly of white oak.

Q. You spoke about the overflow of 1882. You say that you went in there just after the overflow?

A. We made the first trip from Greenville to Vicksburg, I think, in May, 1882—just after the overflow.

Q. You went through the swamp, did not you?

A. We did not go through the swamp. The water had gone a part of the way down, and we came to Greenville on a steamboat. I was with Mr. Wilson. We took the narrow-*gua*ge road to Arcola and rode down in a buggy part of the way to Deer creek.

Q. What time was it that you determined the only way to protect the road was to close the levees?

A. I think it was in 1884, or about that time.

Q. Who was it that determined that?

A. The projectors of the road—the men who were financiering it.

Q. Who were they?

A. Mr. Wilson and Mr. Huntington.

Q. R. T. Wilson and C. P. Huntington?

A. Yes, sir.

Q. They concluded they would go in there and close the levees?

A. They concluded they would never operate the road there without the levees being put up.

Q. Did the R. R. Co. go in there and close the levees?

A. No.

Q. Who did?

A. The Financial Improvement Co.

Q. What interest did they have in the levees?

A. They were the owners of the securities of the road, and it was to their interest to protect the property.

Q. It was the Financial Improvement Co. trying to protect the road and not the road itself?

A. The Financial Improvement Co. built the road.

Q. In speaking of the Financial Improvement Co., you said "we." What did you have to do with it?

A. I was the agent of the Financial Improvement Co.

Q. Were you the vice-president of the Financial Improvement Co.?

A. No, sir; I was not an officer at all.

Q. You represented it on the ground?

A. Yes, sir.

Q. When it came to a settlement between the Financial Improvement Co. and the railroad, how did you manage about it? You were representing both sides?

A. I saw that the work was done as the representative of the Financial Improvement Co.

506 Q. The agent of the Financial Improvement Co. and the manager of the railroad had no disagreement, I suppose, as to this settlement about the work that was done?

A. I don't think there was any settlement about the work until the bonds were given, in 1884.

Q. You had no settlement at all until 1884?

A. No settlement at all.

Q. You said a great deal about the money that was expended in the construction of the road; who furnished that money?

A. It was furnished by the Financial Improvement Co.

Q. Was not that money furnished by C. P. Huntington and R. T. Wilson?

A. It was furnished by the Financial Improvement Co., as far as I know.

Q. The Financial Improvement Co. went in there to furnish the money and not to do the work?

A. The Financial Improvement Co. furnished the money, and we did the work.

Q. You spoke about certain work on the levees; who did that work?

A. It was done by the Financial Improvement Co. and paid for by the bonds of the levee district.

Q. Then the Financial Improvement Co. did not contribute anything to the levee- except what they were paid for?

A. In cases they did.

Q. What cases?

A. They were frequently called upon to make contributions to the levees.

Q. Mention one of them.

A. When the levees broke the Financial Improvement Co. with their men had to help to hold them.

Q. Could you mention one time and place when they put their men out there?

A. When the levee broke up there below Memphis some 40 miles, at about Moon lake, we had to send men there and keep them there. We frequently sent men out at Greenville.

Q. What year was this?

A. Probably 1884 or 1885.

Q. That was after all the levees had been put up, wasn't it?

A. No, sir.

Q. Were not the levees in the northern district there under Capt. Dabney put up in 1883 and 1884?

A. No, sir; I think they were possibly put up in 1885.

Q. When the Financial Improvement Co. did this work and put up the levee there in that district they took the levee bonds. At what prive per cubic yard did they put up the levee work?

A. I have forgotten. It was agreed upon by the board.

Q. They got well paid for all the work they did?

A. They took bonds of the company in payment.

Q. Well, the Financial Improvement Co. was a company that was seeking for securities of this kind, was it not?

A. No, sir; not of that kind.

Q. Are they not worth more than dollar for dollar now?

A. They are now. They were not worth but very little at that time. I think they are worth par now, but the Financial Improvement Co. had to take the bonds themselves.

Q. Did they try to market them?

A. Yes, sir; they tried to get money on them. They could not use them at all. They were not bonds that could be used.

Q. Now, while this work was going on on the levees by the Financial Improvement Co. what did you have to do with it?

A. I let the contract for the levee work.

Q. Whom did you let it to?

A. Various different contractors and paid for it in cash, and the Financial Improvement Co. took the bonds of the levee board in payment for them.

Q. Took these bonds at that?

A. Took them dollar for dollar, I think.

Q. That is what you paid?

A. I have forgotten just what price the bonds were taken at.

507 Q. You paid for the work at one price and took the bonds at another?

A. We paid for the work in cash.

Redirect examination:

Q. Major, I will get you to look at that paper, please. Is that the assignment?

A. Yes, sir; that is the assignment of W. M. Johnson to the Memphis & Vicksburg R. R. Co. This is marked Exhibit K.

Q. You were asked in your examination-in-chief for a detailed statement, which you gave, in respect to the bonds and stock issues which appear in Exhibit I. If you did not give them from a memorandum—and you answered, I believe, that you did—I will get you to state whether or not your knowledge in regard to the general amounts and total of these stocks and bonds issued depends upon memorandum.

A. I knew the amounts on that document to be correct.
Q. Of your own personal knowledge?
A. Yes, sir; that document was compiled under me.
Q. Who made that document?
A. I did not do the physical writing, but I had the data affixed to it.
Q. Are you prepared, if desired to do so, to support those statements on that document?
A. Yes, sir.
Q. You have the documents here to support it?
A. Yes, sir.
Q. You brought them here upon the notice which was served upon us by the plaintiff?

Objected to as leading and incompetent. The objection is overruled, and the plaintiff excepts.

A. Yes, sir; I brought them here at the notice of the plaintiff.
Q. These documents are here in this court-room, are they?
A. Yes, sir.
Q. Major Edwards, I will get you to state whether the same thing is true in regard to the other sheet referred to by you in stating the amount of the net earnings.
A. Yes, sir; there are the documents for that.
Q. They are here also in the court-room?
A. Yes, sir.

The statement of the net earnings, marked Exhibit L and dated May 31st, 1892, is here offered in evidence.
Ex. 1 & 2 & Johnson assignment all omitted.

Major WILLIAM STARLING, a witness for the defense, being duly sworn, testified as follows:

Q. Where do you reside?
A. Greenville, Miss.
Q. How long have you lived there?
A. About 14 years.
Q. In what business have you been engaged since 1882, and where?
A. Civil engineer; engaged in the levee service. For twelve years I have been the general engineer of the Miss. levee district.
Q. What counties or territory composed the Mississippi levee district?
A. Bolivar, Washington, Issaquena, Sharkey, and a small part of Warren.
Q. State whether or not the line of the Mississippi Valley railroad, which was formerly the L., N. O. & T. R. R., passes through the Mississippi levee district and in what way.
A. Iy enters the Mississippi levee district between Coahoma & Bolivar counties, and leaves it at a line between Sharkey and Warren, I believe, or Issaquena or both of them.
Q. In locating that line do you speak of the main line only?

A. Some places the Riverside division and the branch line—that is to say, it enters in the same subdivision.

Q. How is the line of the Riverside located as to the main lines—east or west of the main line?

A. West.

508 Q. What is the condition of the levees in the Mississippi levee district now as compared with their condition in 1882, 1883, 1884, 1885, '86, '87, '88, '89, and 1890?

A. With reference to the condition as compared with 1882 I can give you a pretty accurate statement, for I have just submitted one to the levee board which I am con-ected with. The levees are now about five feet higher than they were in 1882, and they contain about three and one-half times as much earth. They have also been gradually straightened and strengthened by an addition to the base of them and also by a re-enforcement on the back side. As compared with other years I can give no precise figures. I can say the work of improvement has gone forward since 1882, at which time a great impetus was given by the United States Government, and since that time they have been in much better condition.

Q. What is the condition of the bottom of which you have just spoken in the matter of protection from overflow by the waters of the Mississippi river at this time as compared with 1882, 1883, and 1884?

A. In my own district or generally along the Yazoo bottom?

Q. Or any other bottoms?

A. The condition of the Yazoo bottom above our district is known to me only from general reputation. I am not personally acquainted with it, but I know from official record and general reputation, and if that is a competent source of knowledge I am ready to give it. I know about what it was. The upper part of the levee line in Coahoma county and along there previous to 1884 was in a bad condition and had been abandoned and no work done on it for several years.

By Judge CRITZ:

Q. Are you starting to tell about the upper district?

Objected to as hearsay.

A. I don't know of my own personal knowledge. I have not seen many parts of that.

By Col. YERGER:

Q. Don't you know of your own knowledge that the levee system was frequently not connected and not completed in the upper levee district for this year, of your own knowledge?

A. I know it must have been, because we received the overflow from it, though I say I did not see it with my own eyes, but I am well satisfied that it was the case.

Objected to and objection sustained as to the condition of the levees on the upper part.

A. The water came down over there in very large amounts previous to the construction of the levee system there in 1884 and 1885. The reason I know is that we were subjected to damage suits by people in the upper part of our own district, because they wanted protection there at the upper part of our own line. I know that the water was there.

By Judge CRITZ:

Q. You did not see the water there?
A. Indeed I did; I waded in it.
Q. You know water when you see it?
A. Yes, sir.

By Col. YERGER:

Q. Major, state, if you know, how many times between 1882 and 1890 there was either a general or partial overflow in the Yazoo delta from the Mississippi river, between 1882 and 1890.

A. There was a general overflow in 1882, another in 1883, and another in 1884. There was a partial overflow in 1886 and one in 1890, and one or two small breaks in 1891.

Q. Do you know what effect these overflows of which you have spoken had on the line of the railroad constructed in the delta—of the L., N. O. & T. R. R.?

A. I know, in a general way, that they did some damage to the lines and interrupted connection, but I have no specific knowledge.

Q. Were you a resident of the Yazoo delta at the time the line of road was projected and constructed by the L., N. O. & T. R'y Co.?

A. Yes, sir.

Q. Speaking as a civil engineer and as a citizen of the county there, from your knowledge as both, what sort of a venture did you regard that at the time?

A. I thought it a very bold one; I may say a hazardous venture.

509 Q. How would you regard securities as that depended for their payment purely upon the successes of that enterprise in 1882, 1883, 1884, and 1885?

Objected to. The objection is overruled, and the plaintiff excepts.

A. I would not regard them as good as cash; but I don't know what difference I would make. I could not transport myself back at that time and say what they were worth. Of course they were not worth as much as the money.

Cross-examination:

Q. Your experience as an engineer has been mainly as a levee engineer?

A. Yes, sir; on the river.

Q. You have had no experience as a railroad-construction engineer?

A. None whatever.

Q. You don't claim to be an expert as to that?

A. Not at all.

Q. How long have you been there in charge of the levees?

A. I have been in charge as chief 12 years, and I have been connected with the levees 14 years.

Q. Who is the chief of the levees just above you?

A. T. G. Dabney.

Q. You and Mr. Dabney have control of all the Mississippi levees, don't you?

A. Yes, sir.

Q. Were you there in charge of these levees at the time they first started to build this L., N. O. & T. R. R.?

A. No, sir; I was the ass't engineer at that time.

Q. You were there at that time?

A. Yes, sir.

Q. I will get you to say to the jury what amount the L., N. O. & T. R. R. Co. or the Y. & M. V. R. R. Co. ever contributed in the way of money to the repair or building of the levees within your district.

A. Well, they contributed directly in money very little. They have indirectly contributed. They have assisted us in lending us money on one or two occasions, which has been retailed, and they took some bonds of ours, which they still hold. The only amount that I ever recollect of their contributing in money was an extra engine occasionally, and also on one occasion, I think, a gang of men. A bill was sent in amounting to some $500.00, but I think it was withdrawn afterwards.

Q. The balance of the work they did they got bonds for?

A. And it was repaid in money.

Q. With interest?

A. Yes, sir; the railroad did not take our bonds; they were taken by R. T. Wilson & Co., and the line was also made by him.

Q. By R. T. Wilson & Co.?

A. Yes, sir; the railroad company as such had nothing to do with that.

Q. These bonds are still in the hands of R. T. Wilson & Co., are they?

A. I believe so.

Q. They are good securities, are they not?

A. Undoubtedly.

Q. Worth more than dollar for dollar?

A. Quoted in the Memphis market at the last issue 104 and 105, and the old issues are presumably better.

Q. Now, the L., N. O. & T. R'y Co. and the Y. & M. V. R. R. Co. altogether never contributed anything more than $500 00 worth of work that you know of?

A. That is all that I remember.

Q. Was there any overflow anywhere on the Mississippi river in Mississippi in 1892?

A. No; not in Mississippi.

Q. Was the Mississippi delta affected by the overflow in 1892?

A. No.

Q. Was there any part of the L., N. O. & T. R. R. in Mississippi within the reach of overflow in 1892?

A. I have to consider a little about that. The Mississippi delta and the Yazoo delta is not absolutely closed. It is open at the mouth of the Yazoo river and the water backs up there. What damage that might have done in 1892 and 1893 I don't know,
510 but there were no breaks in the levees.

Q. There were no breaks in the levees and no overflows?

A. Not in 1892 or 1893.

Q. If there had been a serious overflow from the Yazoo river would you not know about it?

A. Undoubtedly; I knew of it at the time if there was one.

Q. You don't remember any such overflow from the Yazoo river?

A. No, sir.

Q. Now, was there any overflow in 1893 or 1894?

A. There has been no overflow since 1891 on the Mississippi side.

Q. From what?

A. From breaks in the levees. Indeed, the last three years have been years of low water.

By the COURT: I thought you said that there was an overflow in 1892, 1893, and 1894?

A. I said there has been none since 1891.

Q. How many breaks were there in 1891, and where were these breaks?

A. There was one in the upper part of the district, or said to be. I know there was, for I saw the water from it. It was, I think, at Robinsonville. There was one in my own district, at Stella, but the one in our district did very small damage. I don't know that it did any serious damage. I don't recollect whether it stopped the running of trains or not; I think it did for a few days. One in the upper district, I think, did little or no damage.

Q. Was there any overflow between 1884 and 1890?

A. There was none in our district.

Q. I said between 1885 and 1890?

A. There was only one that I remember; that was in 1886.

Q. Where was this?

A. It was at the point on the river called Johnson point, just above our district. I presume that it did very little damage. There was one at Stone Station and Port Royal, or thereabouts, but I am not personally familiar with those.

By agreement of counsel the following documents offered by the defense are not copied in this record, as the originals are to be used on the trial of this cause, to wit:

The ad valorem tax receipts of Washington Co. for the Riverside division, special charter, Dec. 13th, 1892.

The ad valorem tax receipts of the Riverside division, special charter, Dec., 1892, of Bolivar county.

For the same year, two receipts, one for Bolivar county and one for Washington, for the privilege taxes.

For the Riverside division, special charter, the ad valorem tax receipt signed by the sheriff of Bolivar county for the year 1893, and the privilege tax receipt also.

The ad valorem tax receipts and privilege tax receipt for the Riverside division, Washington county, for the year 1893.

The ad valorem tax receipt and privilege tax license signed by the sheriff of Bolivar county for the Riverside division, special charter, for 1894.

The same receipts for the same year, ad valorem tax receipt and privilege tax receipts for Riverside division, special charter, Washington county, 1894.

The ad valorem tax receipt signed by the sheriff of Bolivar county for the special charter, Riverside division, for the year 1895, and the privilege tax receipt signed by the sheriff and tax collector of Washington county, and the privilege tax receipts signed by the sheriff of Washington county for 1895.

511 The ad valorem tax receipts signed by the sheriff and tax collector of Wilkinson county of the Bayou Sara branch, and also the privilege tax for the Bayou Sara branch for the year 1892.

The ad valorem tax receipt of the Bayou Sara branch by the sheriff of Wilkinson county for the year 1893, and the privilege tax receipt for the year 1893.

The tax receipts for the Bayou Sara branch and the ad valorem tax receipts signed by the sheriff of Wilkinson county for 1894, and the privilege tax receipt for 1895, and the ad valorem tax receipt for 1895 on the Bayou Sara branch by the same sheriff and tax collector, and also the privilege tax for that year on the same branch.

The privilege tax receipt of the Helena branch and the ad valorem tax receipt of Coahoma county of 1893.

The privilege tax receipts for the Helena branch of the sheriff of Coahoma county for 1893, and the ad valorem tax receipt paid in December, 1893, by the sheriff of Coahoma county on the Helena branch.

The ad valorem tax receipt by the sheriff of Coahoma county for that branch for 1894, and the privilege tax receipt for 1894, and the ad valorem tax receipt for 1895, and the privilege tax receipt for 1895 on the Helena branch, Coahoma county.

The affidavits under section 21 of the Mobile & North Western charter, being sec. 5 of the charter of the L., N. O. & T. R. R., tendered to the sheriffs of all these various counties, in which they claim the road paid by affidavit for the years 1892, 1893, 1894, and 1895, and also the sheriffs' receipts for taxes of those years as paid by affidavit, excepting that in some instances the sheriff refused to issue the receipts and acknowledge on the affidavit the tender of the same, all of which will appear from the papers, excepting that in Warren county for the year 1893 and 1894 and Sharkey county for the year 1895. It is agreed by the counsel pro and con in open court that the affidavits were tendered in these counties for these

years and the issuance of the receipt refused by the sheriff, such tender being made by the Hon. Murray Smith, of Vicksburg.

The charter of the Memphis & Vicksburg R. R. Co. and of the New Orleans, Baton Rouge & Memphis R. R. Co. and the charter of the L., N. O. & T. R. R. Co., being that of 1882, referred to in the plaintiff's declaration. It is considered that all the charters and all other pertinent private statutes involved are offered in evidence.

J. A. RIDGELEY, a witness for the defendants, being duly sworn, testifies as follows:

Q. State what position, if any, you held with the I. C. R. R. Co. and the Y. & M. V. R. R. Co. in the year 1892.

A. In 1892 I was in Chicago, I suppose, as clerk. I went to Chicago—I think it was November the 30th, 1891. Up to that time I had been acting auditor for about a year.

Q. For how long?

A. For about a year prior to that time.

Q. For what company?

A. For the L., N. O. & T.

Q. Are you connected with the I. C. R. R. Co. or the Y. & M. V. R. R. Co. at this time?

A. No, sir.

Q. Have you any interest in this suit?

A. None whatever.

512 Q. I wish you would examine these books, Mr. Ridgely, and particularly the one covering the year 1892, and state whether the entries therein were made by you or under your direction and whether these books were properly kept and whether they are correct or not.

A. Yes, sir; the ledger and the journal there are the books kept by me as general book-keeper for the company and afterwards as acting auditor; they were under my supervision there.

Q. Do you or not recognize the books that you have just examined there as the books of the L., N. O. & T. R. R. Co. and the Y. & M. V. R. R. Co. kept by you and under your supervision during the year 1892?

A. Yes, sir.

Q. And these books were accurately and correctly kept?

A. Yes, sir; they were.

Cross-examination by Judge CRITZ:

Q. You don't know anything about the issues except as they were furnished you, Mr. Ridgely?

A. No, sir.

Q. Do you have any connection with the books except during the year 1892?

A. I think that it was in April, 1891, that I took charge of the books as general book-keeper for the company. I think that it was in April, 1891.

Q. And you kept the books up to that time?

A. Until, I think, January, 1892 or 1893. I believe that I went in the accounting department in 1890. I can refer to my writing in the books there and tell you just exactly what time I did take charge of them.

Q. These books that you have made out here are the books that you referred to?

A. Yes, sir; the journal and the ledger.

Q. Refresh your recollection and tell exactly what time you took charge of the books.

A. I see here that I commenced in March, 1891.

Q. Up to what time?

A. Through November, 1891.

Q. You were the book-keeper from March to November?

A. Yes, sir; to November the 30th.

Redirect examination:

Q. What year did you say it was?

A. I took charge of the books in March, 1891.

Q. How long did you remain in charge of them?

A. Until November, 1891. From November 30th to November 30th, 1892, I was the acting auditor.

Q. You were asked if your only information in regard to these books was not contained in those books themselves.

Objected —.

Q. You were asked if you knew anything as to the accuracy of these items contained in these books beyond the mere entries therein. Don't you know that the entries contained in these books are the reports of the various departments of the two railroad companies whose accounts are kept therein with you, as the book-keeper or auditor, and entered therein either by yourself or under your supervision accurately?

Objected to as leading and not properly in rebuttal.

Q. How did you get your information as to the items that were entered in those books; by yourself as book-keeper or under your supervision as auditor?

A. I got them from the head of the various departments, transportation, motive power, etc., and they are charged in the general books in accordance with the schedule of the accounts that we had filed.

Q. State whether or not it is a fact that these items were obtained from the various departments as they were made to the auditing department in the usual course of business.

A. Yes, sir.

513 It is admitted that the books about which this witness has testified are the same books referred to by Mr. Pfoutz in his testimony.

The defense rests.

The plaintiff here read in evidence the deposition of O. A. Gibson. The defense objected to the deposition, beginning at question No. 24 and continuing to the end of the deposition; which objection was overruled, and the defense excepted. The objection of the defense is sustained as to 52, 59, 60, and 69.

In the cross-examination the defense objects to the question and answer No. 230, and the objection was sustained, commencing at the answer at that part which follows the word "commission."

Obj. omit-.

Pending the reading of the deposition of O. A. Gibson by the plaintiff the defense objected to the several questions and answers in said deposition as set forth in their objection in writing filed in the papers in this case, and their objection, so made, was overruled except as above stated, and the defense excepts.

O. A. GIBSON, being duly sworn, testifies as follows:

Q. 1. State what is your occupation or profession.

A. Railway and levee contractor, I believe, Judge.

Q. 2. How long have you been engaged in the work of railway construction and levee construction?

A. I will have to approximate that. I think in both about fifteen years.

Q. 3. What levees have you been engaged in the construction of?

A. Levees that have been built by the United States Government.

Q. 4. On what rivers?

A. Mississippi and Arkansas.

Q. 5. State what railways you have had contracts on and done work for.

A. I have had subcontracts on this Aberdeen branch of the I. C., on what was formerly known as the L., N. O. & T., below Harriston—the Greenville loop, as we termed it then—Y. & M. V. line, above Greenwood; Tennessee Coal & Iron Co., and Ga. Pacific. I believe that is all. There was a little road I did some work on, but it didn't amount to anything. Oh, yes; the Kansas City R'y Co.; I overlooked that.

Q. —. What connection, if any, did you ever have with a road at Riverton, Ala.?

A. That is the one I referred to just now. I built a few miles of road there.

Q. 7. What was that called?

A. Tennessee River railway, I believe.

Q. 8. What connection did you ever have with any dummy lines, and where?

A. One of those dummy lines belonged to the—I built part of the dummy line for the Tennessee Coal & Iron Co. and Bessemer dummy line, and did some work for the Memphis & Birmingham or Kansas City.

Q. 9. You stated above that you did some work on the L., N. O. & T. R'y. State what the L., N. O. & T. stands for there.

A. That is the Yazoo & Mississippi Valley.

Q. 10. What was the name of it at that time?

A. L., N. O. & T.

Q. 11. What are those abbreviations for?

A. Louisville, New Orleans & Texas.

Q. 12. How much work did you do on the Louisville, New Orleans & Texas railway? Mention the amount and place.

A. Rice, C., and Gibson did ten miles below Harriston; I did seven miles above Greenwood, on the Y. & M. V. I think that is always eliminated that way from the main line.

Q. 13. Is that what you call the loop line?

A. No, sir. Then Ware & Gibson did ten miles from Wilczinski's jct. south on the Greenville loop of the L., N. O. & T.

Q. 14. What is that now called?

A. Belongs now, I believe, to the Riverside division of the Y. & M. V. road.

Q. 15. How much work did you do on the Georgia Pacific R'y in all?

A. Approximately—I have to approximate, you understand, to a very great extent—approximately, sixty miles. The firm in doing this Ga. Pac. work was Gibson & Corpening.

514 Q. 16. Enumerate where you did various work on the Ga. Pac.

A. I did part of a mineral line from the tunnel down to a coal mine in Alabama, and a short mineral line near the tunnel. This first line mentioned there runs west, above that a short distance, a mineral line running north to a coal mine. I did ten miles of work, commencing a short distance west of Waverly and running about three-quarters of a mile west of West Point. I then did, I believe, eleven miles, commencing just beyond Pheba, on the Ga. Pac., and running west to a point near Sapa station, Miss. I then commenced at Itta Bena, on the Ga. Pac. main line, and built a line up the Tallahatchie river to Webb's, approximately forty miles long. That is all the work I did for the Ga. Pac.

Q. 17. State what large creeks and creek bottoms, if any, were included in the Brooks work that was finished up by you.

A. Crossed Big Black. I don't remember; there was a little creek—Village creek—Spring creek it was; and I crossed McNutt lake on the Itta Bena branch. I can't remember the name of the big bayou I crossed.

Q. 18. In this work done upon the various roads you mentioned, what part of the work did you do?

A. On the work I did for the Ga. Pac., I did all the grading, bridging, put in the cattle gaps, box drains, furnished the ties from a short distance west of Waverly to Winona, excepting some 25,000 or 30,000 ties put in by Dunn Bros. I did all the bridging on the Itta Bena branch; put in the cattle gaps, box drains, and furnished the ties for that line.

Q. 19. State what experience, if any, you have had as bridge and trestle builder in railway-work, outside of what work you did for the Ga. Pac. railway.

A. Up to the time I commenced work for the Ga. Pac. I had my

first bridge I did was on the Greenville loop, I should say. Would you term that the Y. & M. V. road?

Q. 20. Yes. What kind of work did you do on the Bessemer dummy line?

A. Commencing two miles from Birmingham, we did the grading and bridging. That was done under the firm of Gibson & Corpening. I believe that I forgot to mention that we did more railway work now. I forgot to say we built about fourteen miles of the Mobile & Birmingham road, between Marion jct., running south.

Q. 21. You spoke of building a branch of the Ga. Pac. R'y, beginning at Itta Bena and running up north. State how long that was and how that branch compared in length and quality with what is known as the Tallahatchie branch of the L., N. O. & T. R'y, said L., N. O. & T. R'y being now the Y. & M. V. road.

A. It was approximately forty miles long. I think there is very little difference in the length of the two lines. About the quality, etc., I think that is very similar. Part of the way the lines are built parallel—about the same grades and crossings and the same streams in some instances.

Q. 22. What is the character of the country from Itta Bena up to the end of the Itta Bena branch on the Ga. Pac., and what is the character of the country along which the Tallahatchie branch of the L., N. O. & T. runs?

A. Quite a similarity in the soil and lay of the lands. It's level; no hilly land in that country. I think, perhaps, in Statem stretch of the Y. & M. V. there may be a little more bridging than on the Itta Bena extension. I will say, aside from that, the embankment will be very similar in height and style of soil.

Q. 23. Who, you say, built the Tallahatchie branch of the L., N. O. & T. road?

A. I think Flynn & Degarris.

Q. 24. From your judgment as a railway contractor and bridge-builder, what do you estimate was the comparative cost of building these two branches of road?

Counsel for defendant objects to the foregoing question because it is incompetent and based purely upon the opinion of the witness.

A. I would suppose, from my knowledge of the locality, that the approximate cost per mile would be in the neighborhood of the same. As I said before, there might be some little difference because of a small excess of bridging on the Y. & M. V.

515 Q. 25. When did you build this Itta Bena branch of the Ga. Pac.?

A. I believe you will have to refresh my memory if you have it in the testimony.

Q. 26. You built that the same year you finished the Brooks works. That was in 1889.

A. Yes; all right. Fall of '89 or '90; might have been in '90. I think maybe it was in '90; about that time. We were at work on the two lines at the same time.

Q. 27. You mean to say that while you were building this Itta

Bena branch, the Tallahatchie branch of the L., N. O. & T. was being built also?

A. Yes, sir.

Q. 28. How far apart are those two branches of railway?

A. It is twenty miles from Itta Bena to Minter City. At this point the Y. & M. V. ends—that is, on the southeast end. In other words, where the Y. & M. V. commences they then parallel each other for some eighteen or twenty miles. At some points they are very close together, and then diverge at others, maybe a half mile apart. I cannot tell just for what distance now. The road-beds are probably 100 ft. apart in some places.

Q. 29. You spoke above of having fifteen years' experience in railway construction and in the construction of levees. How much of this time were you engaged in railway construction and how much in levee work?

A. Approximately eight or nine years in railway construction; balance in levee construction.

Q. 30. State if you have ever been over the L., N. O. & T. R'y lines and over the Ga. Pac. line since they were constructed.

A. Yes, sir; over both.

Q. 31. How often have you gone over the L., N. O. & T. from Memphis to New Orleans, if ever?

A. Very many times. I did approximate in my former testimony, but it was merely an approximation.

Q. 32. While you were passing up and down this L., N. O. & T. road so many times, in what business were you engaged?

A. In the construction of railways and levees.

Q. 33. In passing over the L., N. O. & T. road, did you go clear through from Memphis to New Orleans or stop over, and if you stopped over, at what various points did you stop along the line?

A. My business as levee contractor necessitated my stopping at a great many places along the line.

Q. 34. How often have you passed over the Ga. Pac.—that part in Mississippi?

A. Very many times. I could not hardly approximate.

Q. 35. How much of the Ga. Pac. railway that was constructed by you, or you and your firm, was in the State of Mississippi?

A. I believe 61 miles.

Q. 36. How many miles of that was in what is known as the bottom or delta country of Mississippi?

A. Forty miles in the delta. That was the Itta Bena branch. Rest was in the uplands of Mississippi.

Q. 37. In the construction of the L., N. O. & T. road through Mississippi, how much of it is in the delta or bottom country?

A. The principal part of it is in the delta country.

Q. 38. What is the character of the country through which this railway runs from Port Gibson down to the Louisiana line?

A. To the best of my recollection, it is similar to the uplands of Mississippi—hills and valleys.

Q. 39. What is the character of the country for a short distance

south of the Tennessee line as it comes out from Memphis, before it reaches the delta—I mean in Mississippi—in Tennessee?

A. I think a little short part of the road this side of Lake View is something like the uplands of Mississippi—cuts and fills.

Q. 40. State, if you can, how far along the line of the L., N. O. & T. road it is from Port Gibson down to the Louisiana line. (Have you that railway map?)

A. No, sir. It would be an approximate. I think, maybe it is, approximately, 100 or 200 miles. No; that's wrong.

516 Q. 41. The map says 135 miles from New Orleans to Centreville, and from Port Gibson to New Orleans 209 miles; then the distance from Port Gibson to Centreville would be the difference between the two, wouldn't it?

A. Yes; then the difference is the distance from Port Gibson to the Louisiana line.

Q. 42. What is the character of the country about Port Gibson and Vicksburg?

A. Hill country; more especially around Vicksburg.

Q. 43. About how many miles do these larger cuts and fills about Vicksburg extend?

A. Approximately, seven or eight miles.

Q. 44. State about the average height of the embankment of the L., N. O. & T. road through the Mississippi delta, and state whether the road was built so as to be above high-water mark, or was it built on a level of the ground as near as possible? How was that and how protected from water?

A. I think there is an error in my former testimony there. It seems to me I made the statement there was 2½ feet or something. The grading runs from nothing, you might say, to, in some instances, 15 or 20 ft. near the approaches to bridges, and uniformly, I think, it runs from a foot to three feet where it does not cross streams. It is not above high-water mark; not intended to be. They run it with the view of getting a uniform grade, hugging the ground as much as possible, and getting a good road-bed. They expect to be protected by the levees when the Mississippi river overflows.

Q. 45. You have stated that this road-bed through the delta, leading out where it crosses streams and lakes, ranged from nothing to about three feet; do you mean three feet in height or three feet in cut?

A. In height. There are no cuts in that country. You can only approximate it; might be some places it would run exceeding three feet—some low places in the lands where — no bridges, but that is uniform way it runs; that country is very level.

Q. 46. What was the average slope of the side embankment of the road-bed?

A. It's the natural slope of the embankment which takes 1½ to one. It is supposed an embankment would regulate itself to that *that* condition when you empty the scrapers. That is the slope adopted by railway embankments.

Q. 47. What was the average height of the trestles along through

this *this* valley on the L., N. O. & T.; high, low, or medium as compared with other trestles?

A. I should say medium compared with other trestles in upland railway construction.

Q. 48. Usually, what is the character of the trestles along that line as to height?

A. In a great many instances low, and where they cross bayous or sloughs or streams they are high. I might say that the piles are usually long at those places to reach the foundation.

Q. 49. State, please, whether the trestling along the line of this L., N. O. & T. R'y were unusually expensive or inexpensive. State the facts from your experience as a trestle-builder.

A. I would not consider them so expensive as the trestles in an upland country, or, at least, they would not be quite so numerous.

Q. 50. Do you know what the cross-ties cost along this line and how many were used to the mile? State of your own knowledge.

A. I got out a few cross-ties above Greenwood, Miss., for which, as a subcontractor, they agreed to pay me 32 cents per tie. I did not get it, however.

Q. 51. How many used to a mile?

A. I believe the standard number is 2,640. Generally call
517 it about 2,700, and if the side tracks are long they would increase to about 3,000 per mile. Of course, that has something to do with the length of a side track.

Q. 52. What was the usual cost of cross-ties used in the construction of the L., N. O. & T. road to the railway Co.?

Counsel for defendants objects because witness cannot answer from his own knowledge.

A. My impression from conversations with tie contractors is they paid from 32 to 35 cents.

Q. 53. State, please, what is the usual cost of cross-ties for such work.

Counsel for defendants objects to that as being a question to an answer that is irrelevant.

A. From 27 to 35 cents, as to convenience of timber and cost of same.

Q. 54. What size rail was used on that line—on the construction thereof? Approximate it if you cannot give exact size.

A. My idea was at the time about 60-pound rail; approximately 60 pounds.

Q. 55. State, please, what was the cost of the earthwork and bridge-work on the Itta Bena branch of the Ga. Pac. R'y built by you—the forty miles from Itta Bena north.

A. I do not believe I can remember, unless you can refresh my memory upon that bridge and earth work.

Objection by counsel for defendant- because question is irrelevant.

The grading, cattle gaps, box drains, cross-ties, clearing, bridging, my recollection is about $122,000.00 approximately; might

make that $115,000.00 to $122,000.00 that they paid me for grading and bridging, cross-ties, cattle-guards, box drains, clearing, etc. I did some figuring to get at it before, but this time——

Q. 56. Was this for the whole work done by you, you and your partner, on this forty miles?

A. Yes, sir.

Q. 57. From your inspection of the work and construction of the Ga. Pac. and experience in work upon it, and your inspection of the work on the L., N. O. & T. and experience in the work upon that, how did the cost of the construction of the two roads compare?

Counsel for defendants objects because the question is irrelevant.

A. I would think, aside from the expensive bridging over the largest streams on the Y. & M. V. road, the cost of construction would compare about the same.

Q. 58. Which road had the most earthwork upon it per mile—the Ga. Pac. or the L., N. O. & T.? I mean the most in quantity.

A. In the uplands on the Ga. Pac. road the yardage would be in excess of the yardage on the Mississippi Valley Railway lines.

Q. 59. About what did the Ga. Pac. cost per mile in Mississippi complete, including the earthwork, wood-work, and laying down the iron, without the rolling stock?

Counsel for defendants objects because witness cannot answer of his own knowledge.

A. The division engineer, Maj. Joliffe, who had charge of the work I did here, was figuring up to see approximately what the cost would be. He said it would be from between $7,500.00 and $8,000.00 per mile.

Q. 60. What part did you take in this figuring done by Maj. Joliffe?

A. I did nothing except to look on. We were talking about it; we were together a great deal, and he talked very freely with me, and he made an estimate and said that to me in his office here.

Q. 61. If you ever made any estimate upon that part of the Ga. Pac. built by yourself, please state about what that estimate showed that the Ga. Pac. cost per mile.

518 A. My estimate would be only on a basis of—well, I do not make calculations; we frequently do figure on our steel rail and iron.

Q. 62. Please state what calculation you arrived at.

A. I think, if I recollect aright, I figured on some of my work running from $7,000.00 to $8,000.00 per mile. I did not know the exact cost of the Ga. Pac. rail, and I only got my information through quotations of rail sent to contractors.

Q. 63. Quotations at the time?

A. Yes. I suppose corporations would purchase for less than the quoted prices.

Q. 64. In making this estimate, how many cross-ties did you estimate to the mile?

A. I estimated 3,000.

Q. 65. At what price?

A. I estimated my cross-ties up here at 27 cents, and cross-ties in the valley at 35 cents.

Q. 66. At what did you estimate the cost of laying the track per mile?

A. $350.00, to the best of my recollection. That, however, is considered low for track-laying.

Q. 67. At what size did you estimate the rail?

A. 60 pounds to the yard.

Q. 68. At what price did you estimate the rail per ton?

A. I think about $32.00 in this estimate over here.

Q. 69. How long were you and Maj. Joliffe together when the calculation was made as to the cost of the construction of the entire line in Mississippi of the Ga. Pac. R'y? How long together in in making the calculation?

Counsel for defendant- objects.

A. I do not remember about the length of it. I always enjoyed being with him; he was a very fascinating man to me, and I was glad to be with him.

Q. 70. If you ever made any estimate of the cost of construction of the L., N. O. & T. R'y complete per mile in Mississippi, not including the rolling stock, state according to that estimate what said railway cost per mile to build same complete, including everything excepting the rolling stock.

Counsel for defendant- objects because the question is incompetent and irrelevant.

A. I made an approximate estimate in which I think I took the cost of bridging for my basis—that is, the expensive bridging on the L., N. O. & T. I took their estimate for it, and I think I made it approximately $10,000.00 to the mile. I believe in making that estimate I neglected to note items of fish-bars and bolts. In making the estimate that was overlooked, but I would say that it would not cost less nor over 15% to construct it.

Q. 71. In this estimate did you include or exclude the depots and side tracks?

A. My recollection is I took the side tracks as they were when it was constructed, and took their prices for station-houses, etc., on the line at the time.

Q. 72. Look at the paper now handed you and state if that is a copy of the estimate made by you.

A. Yes, sir. (Same has been filed as Exhibit 1 to Gibson's deposition.) I want to explain this is an error here—this $50.00 per mile in the exhibit; it is an error. It ought to be $450.00 instead of $50.00 for bolts and fish-bars. That is the approximate cost.

Q. 73. Any other corrections you desire to make to that Exhibit 1?

A. In this exhibit I have the Yazoo bridge at $100,000.00. I was going to say my impression is the bridge they built there cost $100,000.00, but the first bridge they built, I think, cost that. I

may be in error about that first bridge, but the approximate of 15% would cover any error, I think.

519 Q. 74. I see in Exhibit 1 that your summation is $9,081.12 per mile as the average cost. Why, then, did you put it at $10,000.00?

A. We approximated it so in case anything was overlooked—small items, for instance, like fish-bars, bolts, or anything—it would not exceed 15 %.

Q. 75. State what is included in the railway complete in the estimate made by yourself included in Exhibit 1.

A. Includes the grading, trestling, cattle-guards, box drains, clearing right of way, ties, steel rails, bolts, fish-bars, whatever side tracks necessary for commencement, and station-houses.

Q. 76. After the railway work is completed how does the railway company arrive at the determination of the actual cost of construction? What record is made of the same and who makes the record?

Counsel for defendant- objects because question is irrelevant and incompetent.

A. As far as my experience goes, the engineers all have profiles of the work to start out on and maps, etc. They figure the expense of everything, bridging, etc., and contractors receive final estimates from the chief engineers, and I suppose records are kept in the offices by which they could arrive at the actual cost at any time.

Q. 77. Are these estimates in writing, printed, or verbal?

A. I cannot say as to their being printed. My experience is they are given to us in writing.

Q. 78. How is the earth estimated—by the foot, yard, or ton?

A. By the cubic yard.

Q. —. How is the lumber and timber used in the trestles and other wood-work estimated—by the cubic foot, lineal foot, board measure, or what?

A. By board measure in superstructure.

Q. 80. How are the piles estimated?

A. By the lineal foot.

Q. 81. Are these estimates for piles made for the piles delivered, driven, or how?

A. Both. Some railways estimate them piles under the cap so much per lineal foot, some piles delivered so much per lineal foot and so much for piles driven under the cap. Contractors usually furnish drift-bolts without a separate price.

Q. 82. Whom do the construction engineers represent—the contractors or the railway company?

A. Represent the railway construction company.

Q. 83. If the railway is constructed by the railway Co. whom do the engineers represent?

A. The railway company. They are employed by the company and placed there at the expense of the railway company.

Q. 84. How were the estimates of the earthwork and wood-work

and other work done on the L., N. O. & T. work and the construction thereof kept and by whom?

A. In the case of the L., N. O. & T.—well, I was subcontractor under Dunnavon & Kelly in the work on the L., N. O. & T., and received estimates through them. The representative engineer, Mr. Gordon, of the L., N. O. & T. road, gave me a copy of my estimates for bridge-work as a matter of protection against the first contractor. I could always get a copy of these estimates from the engineer of the L., N. O. & T. R'y when necessary as a protection.

Q. 85. By whom were these estimates made out that were furnished you by Dunnavon & Kelly?

A. Made out by the local engineers on construction and sent to the chief engineers of the road, and from that source estimates were issued to contractors.

Q. 86. State whether or not you saw the original estimates that were furnished to the principal contractors under which you worked for the work done by you.

A. I did in the bridge-work.

Q. 87. State how these railway estimates are kept by the engineers. Are the estimates for bridging and trestling and
520 earthwork all lumped together or are they kept separate?

A. They must be kept seperate, as a matter of record, to show what each cost.

Q. 88. Do these final estimates, made by the railway company's construction engineers, give the exact cost of the road or only approximate the cost?

A. Necessarily the exact cost, or they would not be able to know the expense. The different items in construction must necessarily be made a record of in order to make settlements for construction, and they, each item, must be kept seperate and distinct.

Q. 89. When are the first estimates of the cost of construction of the railway made by the construction engineers, before or after the work begins?

A. Before, largely.

Q. 90. How do they arrive at the actual amount of construction work to be done before the work has been done—the amount of excavation, embankment, and bridging, etc.?

A. They send engineers over the line and they make maps, profiles, and cross-sections, showing where bridges are to be built, the height and length of bridges, and calculations about the cost of material, cost of handling earth, bridge timbers, etc., and upon that they make their calculation as to the cost of construction per mile before they commence construction on the line.

Q. 91. How do you know, when you go to build the earthwork of a piece of road, how high and wide to make the embankment, or how deep and how wide *wide* to make the cuts of the road-bed?

A. Engineers furnish us notes and profiles, giving the numbers of these centre stakes. We drive them 100 ft. apart, and those stakes are marked 1, 2, 3, 4, etc., and the notes represent those stakes, 1, 2, 3, 4, etc., and on those notes they give you the distance out from center stake to fills, showing the width of road-bed and cuts,

showing the distance put; the cuts should be taken down. In bridging they give you the bills for the length of piles, number of feet, board measure, superstructure; cattle guards the same; box drains the same. Clearing, they are required to make 100 ft., 50 ft. from centre of each stake. The quantities have been figured previous to this, and you know the exact yardage you have to give unless there is some change in the work; arrive at the cost of piling after they have been driven.

Q. 92. How did they determine the distance that each pile goes into the ground?

A. They are supposed to understand the soil to that extent that they calculate the piles should be driven from 15 to 18 feet in the ground in the valley country, and in giving bills for piling that is the basis for estimate.

Q. 93. But when they go to estimate how deep the pile is actually driven, how do they arrive at that?

A. They send a pile-recorder, and he stands right over the pile being driven with his book and level, and says how far to drive it and keeps a memorandum of the exact number of piles driven in te ground. They arrive at everything minutely.

Q. 94. What is the officer called who keeps the memorandum?

A. Pile-recorder.

Q. 95. Who does he report to?

A. To the division engineer—chief engineer.

Q. 96. In making settlements with contractors, on what basis are the settlements made?

A. On the figures of the engineers in charge of the work, and any change in the work is explained by the local engineers should it not correspond exactly with the first estimate.

Q. 97. You have mentioned the profiles; what are they?

A. Map showing the exact fills, cuts, and bridging on the whole line. A man in that line of business can take a profile, look at it, and tell just exactly the length of a bridge, number of feet
521 in it, and can take that profile and set down and figure out the exact quantity of everything in that work—that is, an engineer can do it. Some contractors do it without any trouble.

Q. 98. By whom are these profiles made out?

A. By the chief engineers—subordinates in the headquarter office.

Q. 99. You have spoken of the cross-sections; state what these are.

A. That is where the engineer takes levels of the land to get the proper grades for construction, for embankments and excavations.

Q. 100. How are the measurements made?

A. They have in the railway construction stakes every 100 ft. and take intermediate cross-sections in proportion to the lay of the land, by which they arrive at actual quantities in fills or excavations.

Q. 101. By whom are these cross-sections made?

A. By resident or local engineers in charge of the construction work.

Q. 102. What record is made of these cross-sections?

A. They have to turn them in into the office in order to have

profiles made of the work and for the reference of the chief engineers.

Q. 103. How do these cross-sections correspond with the stakes that are put upon the ground for the guidance of the workmen?

A. Correspond exactly with the numbers on the stakes.

Q. 104. How do these cross-section notes correspond with the stakes?

A. Just the same.

Q. 105. Do the estimates that are made by the engineers, upon which settlements are made, show the detail of the measurements of all the road?

A. Necessarily so.

Q. 106. Do you remember how many feet the crown of the fills of the L., N. O. & T. road were, as originally constructed?

A. I think I got mixed up before on that. I think I first said eight, then ten feet. I believe the standard is twelve feet for crowns for embankment.

Q. 107. Do you remember what was the standard adopted by the Ga. Pac. as to the crown of fills and the base of cuts?

A. I think the base of cuts was 14 feet.

Q. 108. In railway construction are these estimates of the engineers simply in paper manuscript, or are they transcribed into books and made matters of permanent record?

A. The usual custom is to transcribe them and keep them for records.

Q. 109. Are these cross-sections and profiles made in what we would call permanent form or simply temporary memorandums?

A. Usually transcribed into books for that purpose; at least, that is the way the Ga. Pac. have them. I have seen them in book form.

Q. 110. In laying off the work for railway construction, how are the distances divided up in length, into what divisions?

A. In sections, and they drive a stake every 100 feet; sometimes oftener.

Q. 111. How much is a section?

A. 5,280 feet. They have short or long sections sometimes.

Q. 112. Are nit these stations and sections all numbered?

A. Yes, sir.

Q. 113. Cannot you take the profile of the road and tell exactly where each fill and cut and bridge and trestle and waterway begins and ends?

A. You can tell the most minute thing about the construction.

Q. 114. How much did you get per cubic yard for the work done by you on the L., N. O. & T. road and on the Greenville loop?

A. I got 20 cts. per cubic yard on the main line, with the haul of 500 ft. free from cuts. I got 13 cts. straight on the Greenville loop.

Q. —. What did you get per foot, board measure, for the bridging, trestles, and culverts built by you on the L., N. O. & T. R'y?

A. My recollection is, $35.00 per thousand feet for superstructure, board measure, and 35 cents per lineal foot under the cap, two ft. off for broomage for the piles.

Q. 116. Then, under your contract there, you were only paid for the amount of piles under the cap—nothing for delivery?

A. Nothing for delivery; no, sir.

Q. —. In your work upon the Ga. Pac. how were you paid
522 per pile for piles driven and delivered?

A. For piles delivered per lineal foot and driven per lineal foot.

Q. 118. If you ever made an estimate of the actual cost of earthwork on that part of the L., N. O. & T. constructed by you, please state how much it amounted to per mile, including all the earthwork, all the trestling, box drains, culverts, and waterways.

A. I have made some estimate there. I believe you will have to give me the benefit of it.

(Witness has not memorandum and does not remember.)

Q. 119. In Exhibit I to your deposition you put down the length of the railway in question in Mississippi at 421 miles. Is that 421 miles intended to represent simply the main line, or do you add the length of the side tracks to the main line? In other words, if the railway was 421 miles long and the side tracks amounted to 20 miles in all, would you put the length of the line 440 or simply call it 421 miles?

A. 421, of course.

Q. 120. You simply take into account the main line, the side tracks thrown in?

A. Yes; side-track yardage would always be light on account of having a bank to build to.

Q. 121. Do the side tracks cost as much in proportion as the track of the main line?

A. No, sir.

Q. 122. Why not?

A. They have a bank to build to.

Q. 123. In Exhibit I you put the cost of trestling per mile $1,000.00. Is that by actual measurement or simply an estimate?

A. That is estimated on the basis, I suppose, of bridging I did myself. The usual estimate is $2.50 or $3.00 per foot for bridging.

Q. 124. What is it worth upon an average to do earthwork per cubic yard on that line—the L., N. O. & T.—at the time the road was constructed?

A. I suppose from 15 to 18 cents. You come in contact with the overhaul there; get 20 cents for that, having to haul 500 ft.

Q. 125. At what price did you put the cost of earthwork in your estimate of the Exhibit I to your deposition?

A. I cannot answer unless you refresh my memory.

Q. 126. 20 cts. per cubic yard; in Ex. I you estimated that there were 20 miles at 40,000 yds. per mile, 10 miles at 10,000 yds. per mile, and 391 at 10,000 per mile. Please explain what 20 miles you estimated at 40,000 yds. per mile and the 401 you estimated at 10,000 a mile.

A. That work would represent the work just above the work we did on the main line below Harriston, and 40,000 per mile applies

to the territory below Harriston. The rest is the same price and might include all the rest—balance of the road in Mississippi.

Q. 127. Was there any part of the L., N. O. & T. road which was built by you or you and your partner that amounted to as much as 10,000 yds. per mile?

A. Our work below Harriston ran from 8,000 to 10,000 yds. per mile. Our work on the Greenville loop ran from 4,000 to 7,000 cubic yds. per mile.

Q. 128. How did the work which you did below Harriston compare in quantity with the other earthwork upon the line of the L., N. O. & T. in the delta?

A. I suppose it would be very little difference, only as I have it here I made an average of 10,000 yds., which I think was liberal, in the delta. There might be some miles run over that considerably and some run considerably under it. That is a fair estimate of the yardage.

Q. 129. If the work which you actually did really amounted to less than 10,000 yds. per mile, why did you make your estimate at 10,000 yds. per mile?

A. In a number of places on the main line the fills are greater than on the line I built.

Q. 130. How did the amount of bridging on your work compare with the amount of work on the balance of the line? By bridging I mean trestling.

A. Ran along about the same, except where you crossed streams and bayous.

Q. 131. Any bayous on the work done by you below Harriston and on the Greenville loop?

Q. I did not do any bridging below Harriston, only on the
523 Greenville loop. The bridges were short.

Q. 132. Is that estimate of 40,000 yds. per mile liberal or moderate for the 20 miles you spoke of?

A. Exceedingly liberal.

Q. 133. Have you ever known any railway work where there was an average of as much or more than 40,000 yds. a mile for the length of 20 miles?

A. No, sir. I think, in this instance, in making that average, there might be possibly a few miles over 20. I was approximating it. We took off the slope way down in some of those big cuts; had a camp down there, and after the construction of the road we did some little work in there widening the slopes a little; also, in making an allowance here for big divide, I made an allowance of $25,000.00, which was very liberal. The engineers who had charge of the work lived in our camp most of the time.

Q. 134. This extra allowance of $25,000.00 for grading big divide, was that much allowed in your estimate extra?

A. Yes; extra allowance for any excess that might occur in addition to 40,000 yds. per mile.

Q. 135. Was the $32,000.00 for the Vickburg tunnel in addition to the 40,000 yds. per mile?

A. No, sir.

Q. 136. Was not the mileage of the tunnel included in your estimate up there?

A. No, sir; these cuts were all below Harriston.

Q. 137. You allowed the yardage of 10,000 per mile through that tunnel in addition to the $32,000.00?

A. Yes, sir. In all this works the bridging cuts quite a figure; reduce the yardage considerably on earthwork.

Q. 138. You have stated in a former answer that you were paid the total sum of about $122,000.00 for the work you did on the Itta Bena branch of the Ga. Pac. Please state how much the total grading of that 40 miles of railway amounted to and what you were paid per yard therefor.

A. My recollection is, on the final estimate I got about 312,000 yards of embankment, for which they paid me 15 cts. per yard. I believe we made about $46,800.00; 8,000,000 ft. of lumber, board measure, amounted to about $24,000.00; I think it was $30.00 a 1,000 feet; 75,000 lineal feet of piles at 35 cents makes $23,250.00; cost of the ties for the 40 miles, $900.00 per mile, make a total of $36,000.00. Total cost of the work I did on the 40 miles amounted to about $123,500.00. I have made no estimate for the clearing there; $2,160.00 for clearing.

Q. 139. What was the cost of clearing the right of way for the L., N. O. & T.?

A. That does not show just like that does, and makes my testimony look a little strange?

Q. 140. Doesn't make any material difference. What was it worth to clear the right of way on the L., N. O. & T.?

A. We got $30.00 an acre for that that I did.

Q. 141. State, please, what it was worth.

A. I suppose usually about—about 30% usually on the upper part of the line would be clearing, and about 20% on the lower part would be clearing.

Q. 142. The question I now ask is, what was it worth to clear this right of way per acre?

A. I cannot answer what it cost. I can answer what it would be worth; about $40.00 per acre.

Q. 143. How wide was the right of way?

A. 100 ft. wide.

Q. 144. What per cent. of the main line of the L., N. O. & T. in Mississippi do you estimate had to be cleared?

A. That would be an approximate estimate entirely. I would think, from my experience, that there would be at least 30% to clear; that would be liberal.

Q. 145. In your Exhibit No. 1 to your deposition you made no allowance for the clearing?

A. No, sir; there is an error there in fish-bars and the clearing.

Q. 146. What is included in the clearing? Does that include the necessary grading?

A. Everything; clearing and grubbing come under one head.

524 Q. 147. How did the cost of the work upon the Itta Bena

branch done by you compare with the average cost of construction of the L., N. O. & T. main line in Mississippi?

Counsel for defense objects.

A. Maybe I can recollect my answer previous that, with the exception of more bridging, the approximate cost of construction would, I think, be about the same.

Q. 148. More bridging on which road?

A. Y. & M. V.

Q. 149. How much would this more bridging on the Y. & M. V. exceed the bridging on the Itta Bena branch of the Ga. Pac., in your judgment?

A. You do not mean Ga. Pac. up here?

Q. —. No; the Itta Bena branch.

A. I would think, taking out the large, expensive bridges, exceed it 10%.

Q. 151. Large, expensive bridges on the main line of the Yazoo & M. V.?

A. Yes, sir.

Q. 152. You mean to say that the Y. & M. V., which was the L., N. O. & T. road, in your judgment, cost 10% more per mile than the Tallahatchie branch of the Ga. Pac., and the larger bridges in addition to this?

A. Outside, proportionately speaking. Excess cost in those pile bridges would be approximately 10% greater than on the Itta Bena branch. That would, of course, leave out the steel bridges—iron bridges, I should say.

Q. 153. Do you mean to say that the trustling on the L., N. O. & T. road cost 10% more than the trustling on the Itta Bena branch of the Ga. Pac. road per mile?

A. 10% more, as a gross estimate; yes. That does not include the iron bridges.

Q. 154. Tell us what it was actually worth per cubic yard to do the work in the construction of the L., N. O. & T. road, taken as a whole, from the Tennessee to the Louisiana line.

A. I think we made an estimate there of, maybe, 15, 18, and 20 cents on their work.

Q. 155. What was that work really worth?

Counsel for defense objects to question and answer because the proper basis, showing the capacity of witness to answer it, has not been laid, and because the answer would be a mere opinion of the witness, and because it is incompetent and irrelevant.

A. Road-bed measurement, it would be worth 16 cents a cubic yard.

Q. 156. What do you mean by road-bed measurement?

A. Every yard you handle you are paid for. In cuts you get 20 cents.

Q. 157. Under the contracts you had with the L., N. O. & T. road, did you get the road-bed measurement, or how was the estimate made?

A. For all excavated material we were required to haul into embankments 500 ft. off free—for one price, at least. Where there were no fills in 500 ft. of cuts, you were paid straight so much per cubic yard.

Q. 158. Then, making the estimates according to the method adopted by the L., N. O. & T. Co. in the construction of that road, what was it worth per cubic yard?

A. I take the price from 20 to 22 cents with 500-ft. haul free and 15 to 16 cents for embankment would be about right.

Q. 159. Taking the whole trestle-work from the Tennessee line to the Louisiana line, please give an answer stating what it was worth to build these trestles, giving the value of the lumber per 1,000 and the value of the piles per lineal foot—piles under the trestles.

A. You mean board measure for the lumber?

Q. 160. Yes, sir.

A. The only basis I have is the prices they paid me, $35.00 a thousand foot, board measure, for superstructure and 35 cents per lineal foot for piles driven.

Q. 161. Was the cost of the earthwork upon the L., N. O. & T. road per cubic yard greater or less than the cost of the earthwork upon the Ga. Pac.?

A. You mean per cubic yard?

Q. 162. Yes, sir.

A. On the Itta Bena extension?

Q. 163. Yes, sir.

A. I got 15 cents there. I would suppose the prices were
525 5 to 10 per cent. in excess of prices paid by the Ga. Pac. on earthwork, taking it as a whole.

Q. 164. Since the Riverside division was constructed do the trains run continuously on the Riverside division from Coahoma station to Riverside junction, or are there two or mors sets of trains running that distance?

A. They have a through service from Coahoma to Rolling Fork on the Riverside division.

Q. 165. Where is Rolling Fork?

A. At the junction on the south end of the Riverside division.

Q. 166. Is not from Rolling Fork to Coahoma the full length of what is known as the Riverside division of the Y. & M. V.?

A. Yes, sir.

Q. 167. You say that they run through trains from Coahoma, one end of this Riverside division, to Rolling Fork, the other end of the Riverside division; does that statement apply to passenger or freight trains, or both?

A. Both.

Q. 168. State whether or not there is a seperate train from Leland to Huntington.

A. My recollection is that they run a train from Greenville to Leland and from Leland to Greenville, and that they run a train from Greenville to Huntington, I am not so sure.

Q. 169. How long have these trains been running, as you have

stated in your last two answers—that is, from Coahoma to Rolling Fork on the Riverside division, and from Greenville to Leland, and from Leland back to Greenville? How long have the trains been running that way?

A. Ever since the construction of the road, I think.

Q. 170. Do the trains run from Helena, on the Helena branch, to Eagle's Nest, or is there a seperate train each way from Lula?

A. In my testimony before I posted myself from their folders; that is where I got my information. I do not remember just what my answer to those questions was.

Q. 171. State from your experience as a railway contractor what was the most expensive railway grading, per mile, that you ever saw—that is, per cubic yard for the material moved.

A. On the rock-work in the vicinity of Birmingham, on the Kansas City road, they paid 80 cents per cubic yard for solid rock; 40 cents for loose rock; 20 cents per cubic yard for earthwork, and approximately the same price on the Ga. Pac.

Q. 172. How did that solid rock have to be taken out?

A. Blasted out and hauled out on carts.

Q. 173. State whether or not there was any rock-work in the construction of the L., N. O. & T. from Memphis to New Orleans.

A. There was no rock-work; cemented gravel in some places.

Q. 174. This rock-work which you have spoken of above which cost 80 cents per cubic yard, was the quantity taken from the large cuts there more or less than from the largest cuts on the L., N. O. & T. road?

A. With one exception they were in excess of the large cuts.

Q. 175. Where was the largest cut on the L., N. O. & T. road?

A. They call it Big divide—about 14 miles below Vicksburg. Sage and Hamilton did that work.

Q. 176. Do you think the $25,000.00 extra for this estimate is large or small?

A. Liberal.

Q. 177. Is not the $32,000.00 for the Vicksburg tunnel the amount actually given by the L., N. O. & T. Co. in its reports of what that cost?

A. My recollection is that I took that amount from their statements. (Which statements are filed with the deposition of Mr. Wilson.)

Q. 178. State your place of residence when you are at home.

A. West Point, Mississippi.

Q. 179. How long have you resided there?

A. Between 28 and 30 years.

Cross-examination:

Q. 180. In your examination-in-chief you stated that the
526 line of railway constructed by the L., N. O. & T. R'y Co. was not constructed so as to be above high-water mark; state now, please, how much of the line of that road was dependent on the levees at the time of its construction and how much is dependent now for protection from overflows.

A. I would suppose that all the line from one mile below Lakeview, with the exception, maybe, of 4 or 5 miles in there just below Lakeview to Yazoo river, would be dependent upon the levees.

Q. 181. What would have been the effect upon the line of said railway at the time it was constructed had one or more crevasses occurred in the levee at points between Lakeview and the Yazoo river?

A. I would suppose from a single crevasse, where the road would be near it, it would probably wash away the embankment for half a mile.

Q. 182. Do you know whether a number of crevasses occurred in the line of levee between Lakeview and the Yazoo river during the construction of said railway in the year 1882?

A. I do not.

Q. 183. Do you know whether there were a number of crevasses in the line of levee above mentioned in the year 1890?

A. I do not.

Q. 184. What would be the effect upon the present line of that railway if from one to twenty crevasses were to occur in the spring, when the Mississippi river was flood tide?

A. I suppose each crevasse would proportionately damage the line as to locality to the river, etc.

Q. 185. Is it not a fact that the line of railway constructed by the L., N. O. & T. R'y Co. is below high-water mark and dependent for protection on levees solely, and a large part of its embankment would be washed away in the event of crevasses occurring in the line of levee protecting it?

A. I think it would.

Q. 186. With what company was your contract for constructing that work which you say you did on the Greenville loop?

A. Dunnavon & Kelly.

Q. 187. With what railway company, if any, was their contract for the construction of said work, if you know?

A. With the construction company that was constructing the main line—Huntington & Wilson.

Q. 188. How did the work constructed by you on the Itta Bena branch of the Ga. Pac. railway compare with the work on the main line of the L., N. O. & T. from Shaw to Leland, from a point just north of the Yazoo river, and from a point just north of Coahoma station and between Wilczinski and Greenville?

A. To approximate the work between Wilczinski and Greenville—we did that work, in fact—I do not know if the high yardage on the Ga. Pac. was not greater on the road from Wilczinski to Greenville.

Q. 189. How as to Shaw and Leland?

A. The yardage would be greater between Shaw and Leland on the Valley line by possibly 10 to 15 %. North of the Yazoo river the embankment is high. I suppose that it is about the heaviest embankment they have got. I think it would be in excess of maybe 5 to 10 % of the Itta Bena branch. I mean the L., N. O. & T. above Coahoma.

Q. 190. When the line of the L., N. O. & T. was constructed, was

that portion immediately north of the Yazoo river, immediately north of Elizabeth, and immediately north of Coahoma constructed with earth trestling?

A. In some places they were constructed—well, they have filled up some of those trestles.

Q. 191. State what part was constructed of earth and what part constructed of bridges or trestles.

A. I do not believe I could answer you definitely. Changes are taking place there, bridging and putting in embankment and making different changes which railways very frequently do.

Q. 192. How were the approaches to the bridges over the Big Black, Big and Little Bayou Pierre originally constructed; on bridging, trestling, or earth?

A. To the best of my recollection constructed on bridging.

527 Q. 193. How is it constructed now at the points last named?

A. My recollection is that it is largely filled in with earth as the bridges begin to decay, and instead of putting in more bridges they have put in earth.

Q. 194. In speaking of the construction of trestling, as you have done in your examination-in-chief, were you speaking of it as it now exists or when it was first put in?

A. My estimates were made upon the basis of the construction line when first constructed.

Q. 195. In your examination-in-chief you were asked as to cost of cross-ties. Is there any uniform or regular price for cross-ties?

A. There was in those days a very uniform price for ties, and there is yet to some extent.

Q. 196. Does not the cost of cross-ties vary as to quality and character of timber used for making same, location of timber, and length of haul?

A. In those days the prices for cross-ties were very uniform, and there was not so much regard paid to the quality of timber. More recently they make the difference in favor of cypress ties.

Q. 197. What is the difference in the cost of standard cypress tie delivered on dump and standard oak tie delivered at same point?

A. I think the Valley road in the last year—that is, the Y. & M. V. road in the last year—have made a demand on their contractors for cypress ties entirely. They find them more preferable. In the uplands they prefer the oak tie, from the fact that the spikes adhere more to the oak, and in curves *tay* are much safer tie to use.

Q. 198. What was the relative value of the two ties just mentioned at the time of the construction of the L., N. O. & T. road?

A. No special value placed upon ties than, I think, above the oak tie; no special demand made for them.

Q. 199. Do you mean, then, to say at the time of the construction of this line that oak and cypress ties brought the same?

A. If the distance was the *me* that they had to be hauled, everything being equal, because there was an excess of cypress timber in many places and it was easier to get out.

Q. 200. In your examination-in-chief what, in your judgment,

the L., N. O. & T. railway cost per mile for construction, is your estimate based on actual cost of construction or what you now believe said line of road should have cost? Please speak from your own knowledge.

A. I bases my calculation on my experience of years in that business—on the basis of prices given me for the different features of the work and upon basis of prices I got for similar work.

Q. 201. You have given in your examination-in-chief what you term a completed railroad; from that statement water tanks, coal chutes, and ballast are omitted. Would you regard a line of railway as complete in construction that had neither water tanks, coal chutes, or its track ballasted?

A. They cannot get along without water tanks. In those days they used wood instead of coal—in the first days of the L., N. O. & T. As to a completed road-bed, there seems to be no limit of demands on a road-bed to make it just what you want it. Some roads go to the expense of bringing in ballast from a distance of various kinds—rock and gravel.

Q. 202. In your examination-in-chief you defined a completed road, and omitted from it the items of water tanks, coal chutes, and ballast; what I want to know is if you, as a railway contractor, regard any line of railway complete which had neither water tanks, coal chutes, or its line of track ballasted.

A. I would consider it complete without regard to ballast. It is not complete without coal chutes and water tanks.

Q. 203. In your direct examination some question was asked about the distance from Port Gibson to the Louisiana line; as a fact, while that distance is given by you, was it not furnished to you by Judge Critz?

A. No, sir; I got it from the folder.

Q. 204. On the occasion of the taking of this deposition here today?

A. I do not remember whether he did or not.

Q. 205. Do you know of your own knowledge the mileage distance from Port Gibson to the Louisiana line?

528 A. I did not in the absence of the folder.

Q. 206. You did not have that folder before you on this occasion, did you?

A. No, sir. I think I referred to a guide I have at home this morning, which gave me some information about it.

Q. 207. Did I understand you to say that you saw none of the engineers' estimates upon the work you did upon the L., N. O. & T. road, or rather on the Greenville loop, excepting the bridge-work?

A. No; I was furnished a copy of all my embankment work by the engineer in charge of the work. It is the custom to give contractors a duplicate of the estimate sent in to headquarters, and on final estimate it is the custom of the engineer in charge to give you the total.

Q. 208. What engineer was it who gave you that copy?

A. Man by the name of Meador, who had charge of the work at the time.

Q. 209. Are you a professional civil engineer?

A. No, sir.

Q. 209. What you know about these estimates is from facts obtained by you as a practical builder of levee and railroad embankments?

A. Yes, sir.

Q. 210. You do not claim to know, as a matter of fact, what the company's actual estimates were on all this work done?

A. No, sir.

Q. —. And you do not claim to know what was actually paid by the builders for work done in building the railway?

A. My estimates are just based on my own practical experience in railway construction.

Q. 212. Outside of your knowledge of what you received for work you did on the line yourself, as described in your testimony-in-chief, all the remainder of your testimony in that part is an estimate?

A. Yes; approximate estimate from the comparison of work done similar.

Q. 213. Your spoke in your testimony-in-chief of having done a good deal of work for the Ga. Pac. Was not that work done on the Ga. Pac. done for the branch of the road that runs from the main line up the bottom?

A. Yes, sir.

Q. 214. That branch was constructed and your work done on it after the main line of the Ga. Pac. was built?

A. Yes, sir.

Q. 215. Was not the main line of the Ga. Pac. built and put into operation after the main line of the L., N. O. & T. road was built and put into operation?

A. Yes, sir.

Q. 216. In your examination-in-chief you have given certain estimates in respect to the probable cost of the line of the L., N. O. & T. railway. Please state how much time you have devoted to making actual examination of the line of the L., N. O. & T. in order to furnish these estimates.

A. I have not spent a day with that in view. I just got it from having travelled over it repeatedly and from being in that business and from having constructed part of it also.

Q. 217. State when you first made these estimates that you have given in your examination.

A. Before I left camp I was at work on it to some extent in a casual way. I did not make any memorandums, I believe, regarding what had occurred. I commenced to make my memorandum up here, and began to try to get up data of my estimates I had received for work down there.

Q. 218. Have you made any written calculations or estimates other than that set forth in Exhibit No. One to your deposition in this case?

A. Only in a general way; only just for the purpose of arriving at the calculations I made. I took some of the information as to

bridges from your yearly pamphlets, I believe, and I took your prices for the tunnel.

Q. 219. You made no detailed mathematical calculations about it, did you?

A. I could not arrive at any conclusion at all without making some calculations. I suppose you understand a man could not calculate the cost of ties, bridging, and things of that sort without making some figures. He would be in a poor condition to
529 answer those questions if he hadn't made some calculations.

Q. 220. How many hours' work in making those calculations did you devote for this purpose?

A. I have not made any memorandum of the hours I have devoted to it. I suppose I have in the last 12 or 14 years devoted a good many hours to making these calculations.

Q. 221. How many hours' work did you devote to making the calculations which appear as your testimony—as Exhibit No. 1 to your depositions?

A. I could not answer.

Q. 222. A month?

A. No, sir.

Q. 223. Did you devote a week?

A. I do not reckon I did.

Q. 224. Is it not a fact, Mr. Gibson, that you devoted much less than that?

A. I do not know but what I have spent a couple of days over it.

Q. 225. The whole of two days?

A. No; I guess not. Not like you go into a business transaction and set right down to it for 10 or 12 hours.

Q. 226. Is it not a fact, Mr. Gibson, that Exhibit No. 1 pretty nearly shows about the sum of figuring you did do on it?

A. No, sir; I have dine a great deal of construction and that makes a man very familiar with these things. It is part of railway contractors' business; ought to be right in his mind continually.

Q. 227. I understand your testimony is that you probably devoted a couple of days to making these estimates?

A. I suppose, maybe, about that in this special case.

Q. 228. Where was that done?

A. A good deal of my figuring was done at my camp.

Q. 229. But about those two days?

A. Part in Jackson and part in camp and part at West Point.

Q. 230. In camp where and when?

A. Before I went to Jackson, at Myersville. I had second summons sent for me, and, in fact, some time before that Judge Beckett notified me and said he was going to have me summoned before the commission, and I tried to get away from them, I must admit. The first time they summoned me to Jackson I dodged them and got away, but I felt I could not afford afterwards to. I believe they sent for me down there. I did not want to go at all. The officer came after me, though, and I had to go, but I believe if I could hace escaped it I would have got loose again; had to go, though.

Q. 231. I understand, then, that this figuring of which you speak was done about the time when you were summoned before the railway commission at Jackson, on the first Monday of February of this year, to give your deposition in a proceeding before them? Was not that the time?

A. I was busy trying to get what information I could, I suppose, for two months before I was summoned to Jackson, gathering what information I could from the basis of my own work and from estimates I had here filed away of work I did for them and work I did for the Ga. Pac. I came home and spent some little time to run over the matter and familiarize myself with it. There was not much figuring done at Jackson; was no necessity for it at all, except the information I got from your pamphlets. I found that necessary because I was not familiar with what the road claimed the paid for the tunnel. I knew there was a judgment for $24,000.00, but I believe I got from the pamphlets $32,000.00, and my recollection is I took my information from your pamphlet in regard to the other bridging you made reference to there.

Q. 232. What I want to get at, this Exhibit No. 1 is not the result of any elaborate calculation such as engineers make, is it?

A. I guess it is. The steel rail cost about the same, and the variation in the price of ties is not great, and the variation in the price of bridging runs about the same in those days, and the prices of yardage, why even the commonest laborer on the road is familiar with it.

Q. 233. How about the quantity?

A. You can take the commonest fellow with a shovel and he can tell you to a fractional part of a yard what is in every 100 ft. of embankment you have got.

530 Q. 234. Without having the road before them?

A. No; not without having the cross-section notes before him.

Q. 235. Did you have the cross-section notes before you?

A. I did not, except for the work I did myself. They always furnish us those to work by.

Redirect examination:

Q. 236. In your cross-examination you have stated that the road would not be complete without water tanks and coal chutes, and that you had not made any allowance for water tanks and coal chutes in Exhibit 1 to your deposition. Please state about what it would cost per mile to furnish the necessary coal chutes and water tanks.

A. I could not approximate the cost of water tanks and coal chutes. I am not at all familiar with the construction of coal chutes and water tanks. I did suppose when I found those things were omitted, as I suggested this morning, I believe 10 to 15% added to my approximate price would fully cover every incidental that had been overlooked, and also the $400.00 error in fish-bars.

Q. 237. You still think that?

A. I do. I do because it seems to be such a liberal estimate.

Q. 238. In your cross-examination you stated that the work you did on the Ga. Pac. was on the Itta Bena branch after the main line was completed. Did not you do a considerable portion in the construction of the main line also before any part of it was completed in Mississippi? You stated to Mr. Hays the work you did on the Ga. Pac. was on the branch after the main line was completed. Didn't you do considerable portion of the construction of the main line on the Ga. Pac. also?

A. Yes, sir.

Q. —. Who was the division engineer or engineers in charge of the construction of the L., N. O. & T.?

A. Major J. M. Edwards was considered the chief.

Q. 240. Who were the division engineers in charge under Maj. Edwards?

A. R. H. Elliott was one of them; Capt. Jno. Grant and Maj. Gloster; I am not sure. I do not know who the others were. They had, of course, subordinates under them.

Q. 241. Is it not a fact that R. H. Elliott was the division engineer from Memphis down to Port Gibson?

A. Yes, sir; I think he seemed to be assistant chief. I will not say positively. I went to him in regard to some estimates I had, and he told me if the parties did not treat me properly he would see that I got copies.

Q. 242. Was not all the balance of the railway in Mississippi from Port Gibson down to the Louisiana line under said Jno. Grant?

A. Yes, sir.

Q. 243. Where does R. H. Elliott now live?

A. In Birmingham.

Q. 244. Where does Jno. Grant now live?

A. I think in Atlanta, Ga.

X ex. omitted.

531 EXHIBIT 1 TO GIBSON'S DEPOSITION.

20	miles, at	40,000	yds. per mile,	800,000,	at	20 cts..	$160,000
10	" "	10,000	" " "	100,000,	"	" ..	20,000
391	" "	10,000	" " "	3,910,000,	"	" ..	664,700
421	Total cost, earthwork						$778,230

Cross-ties.

421 miles, at 3,000 per mile, 1,263,000, at 35 cts.....	$442,050
" " tres-ling, average per mile, $1,000	421,000
" " of steel rail, 58 to the yard, 102.08 tons per mile, 42,975.68 tons, at $35.00 per ton	1,504,148.80
Bolts & fish-bars for 421 miles, at $50.00 per mile....	21,050.00
Laying track, 421 " " 350 " "	147,350.00
90 depots in 421 " " 700 " "	63,000.00
Big Black bridge.....	55,000.00

Yazoo bridge	100,000.00
Vicksburg tunnel	32,000.00
Extra for grading Big Divide	25,000.00
40.688 miles side track, at $4,000.00	162,752.00
	$—,818,050.80

9,081.12 for 421 miles.

I hereby certify that the annexed instrument of writing is a true and correct copy of the original filed in this office and designated as "Exhibit No. 6" in the case of Wirt Adams, State revenue ag't, *vs.* Y. & M. V. R. R. Co.

Witness my hand and seal of office this 23rd day of April, 1896.

THOS. C. KIMBROUGH,
Sec. R. R. Coms.

532 *Deposition of R. H. Elliott.*

R. H. ELLIOTT, a witness for the plaintiff, being duly sworn, testified as follows:

Q. What is your occupation or profession, and how long have you been engaged in that profession?

A. Civil engineer is my profession; been at it since 1867—about 29 years.

Q. What connection, if any, did you have with the construction of the Louisville, New Orleans & Texas railway from Memphis, through the Mississippi valley, to New Orleans?

A. I was the principal assistant engineer to Captain John Grant, who was chief engineer. I directed all the engineering work on the main line between Memphis and Port Gibson. I also built the branch line from Leland, on Deer creek, through Greenville, to Lake Washington; also the branch to Huntington, opposite Arkansas City; was employed from July, 1882, or the end of June, 1882, to April, 1886.

533 —. State by whom the branch from Helena to the main line and thence on to Eagles Nest was built. Was that built by the Louisville, New Orleans & Texas Railway Co. or purchased by them?

A. Purchased. It was built by Tom Lyon.

Q. When was the Riverside division built from Coahoma down to Wilczinski?

A. I do not know.

Q. You say you built from Leland to Lake Washington?

A. That is right; via Greenville.

Q. How near Hampton is Lake Washington?

A. Hampton is about the same place as Lake Washington.

Q. When was the main road built from Hampton out to the main line at Riverside junction?

A. I do not know, sir. It was done after I left.

Q. When was the road built from Memphis, Tenn., down to Port Gibson?

A. About October, 1884, as well as I recollect. The last rail was laid then, understand.

Q. When was the road built from Port Gibson down south to the Louisiana line?

A. I cannot give any date for that; same date as the other. All the work was finished about the same time.

Q. Was not the main line of the whole road from Memphis down to New Orleans in process of construction at the same time and completed about the same time?

A. Yes, sir; that was the connecting day I gave you. I think the southern end of the line was completed first, but we joined the main line on the day I gave.

Q. State, please, when you did the work mentioned by you above on the several branches designated.

A. On March 4, 1886, was completed the Lake Washington branch, to the best of my memory.

Q. Please explain what you mean by the Lake Washington branch.

A. From Leland to Lake Washington or Hampton, on Lake Washington.

Q. Now, the other branch where you did the work?

A. I am doubtful as to the date of the completion of the Huntington branch, which doubt also involves the date of completion of the Lake Washington branch; but my memory is that they were completed about the same time in 1886; it may have been 1885.

Q. I believe you said the line from Coahoma down to Wilczinski was completed after you left there?

A. After I left.

Q. State, please, how the cost of the construction of these branches compared with the cost of construction of the main line.

A. It was less than the main line.

Q. About how much less? What per cent. less?

A. I think it was about $3,000 less per mile.

Q. Who made the estimates of the work—construction work—done in the construction of railroads?

A. Profiles are sent to the general office—my office—of each division from the office of the division engineer, a division engineer controlling about fifty miles of main line. They are made up for him by the assistant engineer in charge of the party in the field, who is at that time employed in location. The estimates are also returned by the locating party, based upon the levels run upon the line. The quantities are checked over in the division engineer's office, and they are returned to my office or the office of the principal engineer and are again checked at that office. This work of estimating was done previous to the execution of any work by the contractors, as a general rule, and the work is then staked out by the engineers in accordance with these notes. The estimates are made as the work progresses for each hundred ft. of the road-bed. This estimate is returned to the division engineer, is checked at his office, returned to the office of the principal engineer and again checked. After the quantities are checked, they are approved by

the principal engineer. The estimate for the monthly work done by the contractor is approved by him, and the amount due the contractor is put on this estimate, 10 or 15 per cent. being reserved from the monthly payments until the completion and acceptance of the whole work, when the balance is paid.

534 Q. By whom were the engineers employed? Whom did they represent?

A. They were appointed by the principal engineer in charge of the work, he being authorized by the general manager of the railroad company and the chief engineer of the railroad company.

Q. Then the engineers in the construction represented the L., N. O. & T. R'y Co.?

A. Yes, sir.

Q. Who had actual charge of all work from Port Gibson up to Memphis, including the branches built? I mean what engineer.

A. Myself.

Q. What duty did your position impose upon you as to the estimates of the land work and the quantity of work done on the part of the road and the cost?

A. I decided all questions of location, grade, and in some instances prices, and was responsible for the accuracy of the work and the carrying out of the specifications by the contractors.

Q. Who passed upon and decided the quantity of the work done and the cost on that part of the road?

A. The cost was decided and the acceptance of the bid of each contractor by the general manager of the road, James M. Edwards, in most instances, and Capt. Jno. Grant; in some instances by myself. The quantities were determined in my office.

Q. Then did you have a knowledge of the quantities of woodwork and earthwork of all that part of the road and the branches of the road that were built under your supervision?

A. I did have a knowledge of it and some memory of it now. The work also included cost of track and iron bridging.

Q. What engineer had the supervision of the laying of the track on that part of the road that was under your supervision? Was that also under your care?

A. The laying of the track was superintended by many engineers. I do not recall the names except in the Huntington branch and the Lake Washington branch. In these cases the division engineer was B. B. Gordon.

Q. Who had the general supervision of the laying of the track from Memphis down to Port Gibson and the branches that were superintended by you?

A. I had the general supervision of the whole work, and was constantly on it; passed upon the acceptance of all the track between the points named.

Q. Please state as nearly as you can what was the cost of the construction of said railway from the Mississippi and Tennessee line near Memphis down to Port Gibson. I mean the main line, including the grubbing, clearing, all the earthwork, trestles, bridges, cross ties, spikes, fish-bars, rails, water tanks, depots, and everything

ready for the cars or rolling stock, but not including the cars, engines, or rolling stock.

A. I have no knowledge of the cost of depots and water tanks. The cost of the line completed was about $13,000.00 a mile, to the best of my memory. It is, however, many years since I have seen my notes connected with the work.

Q. Does this estimate of $13,000.00 per mile for the main line from the Tennessee and Mississippi line down to Port Gibson include or exclude the side tracks?

A. Includes the side tracks, but not all of them nor to their full extent, as many were added afterwards and extended and some extended. This work continued after the road was turned over into the hands of the running department.

Q. By "depots" you simply mean the depot houses, do you not?

A. Yes, sir; and the lands on which they are located.

Q. Is the cost of the right of way included in the $13,000.00 per mile?

A. Yes, sir.

Q. State how many miles there are or were from Port Gibson south to the Louisiana line.

A. I do not recollect.

Q. State what is the distance along the L., N. O. & T. road, main line, from Memphis, Tenn., to Vicksburg.

535 A. 219 miles.

Q. Now give, as near as you can, how far it is from Vicksburg, along the main line, to Port Gibson.

A. My impression is that it is about 29 miles—in that neighborhood.

Q. Give as near as you can the distance from where the L., N. O. & T. R'y main line crosses the Tennessee and Mississippi line to the city of Memphis.

A. Do not recollect. That was about four miles; possibly, five.

Q. Was the cost of building that part of the railway in Tennessee greater or less than the average cost from the Tennessee and Mississippi line to Port Gibson?

A. Greater.

Q. Do you mean the construction work in Tennessee was greater in proportion than in Mississippi?

A. Yes, sir.

Q. State, if you know, about what was the cost of the terminals of the road in Memphis.

A. Have no knowledge of the cost of the terminals in Memphis.

Q. State, if you please, how many feet or how many miles of trestling were included in the main line of the road from Port Gibson to the Tennessee line.

A. Do not remember; can give you an estimate of the cost of trestling from Vicksburg to Memphis—$402,500, about. That does not include iron bridging or foundation for iron bridging. There was a small amount of trestling done by the contractors other than those who received this specified amount, but the amount paid them was small. I do not recollect it.

Q. State as near as you can or estimate the additional cost that was paid to those other trestle-builders.

A. I think it was about $20,000.00, but I did not control this payment, and it is not impressed upon my memory.

Q. Were not the payments for all this other work made through you or through your recommendations? I do not mean the $20,000. I mean the other.

A. Yes; all the $402,500 was paid by my approval.

Q. Under whose approval were all the payments made for the earthwork and laying of the track and other construction work that was done under your supervision?

A. All paid under my order with the exception of some track that was laid by company forces. The company forces were under the control of the general manager of the road, and was time payment for day work, and required no estimate.

Q. State whether the proportion of trestling per mile from Vicksburg to Tennessee line was greater or less than that portion of the track in Tennessee.

A. Yes; it was greater in Mississippi than it was in Tennessee. The difference was slight, however.

Q. Was there more or less trestling between Vicksburg and Port Gibson in proportion than there was from Vicksburg to Memphis?

A. No; I would say it was about the same.

Q. State approximately, as near as you can, what it cost to construct said railway from Port Gibson south to the Louisiana line as an average per mile.

A. Do not know.

Q. State, if you can, whether the cost of the construction of the railway from Port Gibson down south to the Louisiana line was greater or less than that part which was under your control.

A. Much greater south of Port Gibson than north the average per mile.

Q. State, if you can, about what the difference was.

A. Cannot recall it; have no estimates on it; made no estimates on it.

Q. State about what the average cost of trestling was per lineal foot.

A. To the best of my memory, about $3.50 to the running foot—average.

Q. What was about the average amount of trestling per mile?

A. My memory is that the average trestling per mile was about 450 feet. This average per mile, at $3.50 per lineal foot, will not make $400,000 from Memphis to Vicksburg, but in
536 the four hundred and odd thousand dollars is included extra bills and many other pieces of work other than the direct main-line trestling—just what I do not recall. A great deal of the timber was gotten out during the overflow, but not sufficient to build the trestles in dry season. My impression is that extra amounts were allowed for hauling on the timber in the dry season at several points along the line where it was necessary to push the work.

Q. State, please, what it cost per lineal foot for the piling that was used.

A. Do not recall it.

Q. Do you remember what was paid for the lumber?

A. No, sir.

Q. State, please, what it cost per cubic yard to do the earthwork upon an average.

A. My impression is that it varied from 12½ to 20 cents; small amoun-s being at the lower price.

Q. State whether you were paid for each yard of dirt in the cuts and also each yard in the fills, or did you require the material from the cuts to be carried into the fills and pay for it but once.

A. Well, the whole work was embankment; therefore paid by yardage in the bank. There were no cuts for 200 miles between Memphis and Vicksburg. On the balance of the work where there were cuts we paid sometimes what is called "road-bed measurement"—that is, both cuts and fills being paid for in some instances with a haulage limit with cart-work; in other instances we put the train on and paid for haulage by train.

Q. As a general rule, did you not require the contractor to haul the dirt taken from the cuts as much as 500 feet, if necessary, to go into a fill?

A. To the best of my memory, we had 500 feet free haul on regular cut-work, and earthwork done in this way comes in cost to about the price usually paid for road-bed measurement.

Q. State if there were any washouts along the line of said railway or the branches under your charge during the time of construction. If so, where were the washouts?

A. A great many washouts occurred in 1883 and 1884. The Mississippi river overflowed the bottom lands and, to a great extent, this railroad. In 1883 the road was incomplete; fresh earth removed; many trestles were but half completed; therefore the earthwork was badly washed and many trestles were moved from position. The cost of this repair work fell upon the railroad company. In 1884 the overflow was extensive; lifted a great deal of track from the road-bed; washed it in a great many places. The trestles were better prepared and were not greatly damaged. This repair work also fell upon the railroad company.

Q. Was there any damage done after that by water—before you quit the service of the road?

A. Local freshets in the hills caused many washouts along the line south of Vicksburg. I do not recall the year, but during my connection with the road Bayou Pierre bridge was swept.

Q. State about how much it cost to repair these washouts.

A. Do not recall; generally repaired by company forces on time work, in most cases pay-rolls, and therefore no estimates. Sometimes contractors did it. We paid them extra for it.

Q. Is the extra cost of repairing these washouts included in your estimate of $13,000 per mile for construction from Memphis down to Port Gibson?

A. No, sir.

Q. Were there any crevasses on the Mississippi levees during the construction of said railway, while you were there in charge of that work?

A. My recollection is that the crevasses that caused the overflow of the line in 1883 and 1884 were caused by the very heavy overflow of the river in 1882, and that the levees were never entirely completed until about 1885. I recall one break which I did not see, but for which I had to prepare the Sunflower bridge before its completion, but I do not recall the year in which it occurred, as
537 the iron bridges were not completed at the time of the joining up of the road in October, 1884, but were completed after the road was in fairly running order.

Q. Was there any crevasse on the Mississippi levee during the time that you were engaged there in the construction of that road, which crevasse cut the road-bed?

A. I recollect the road-bed being cut in many places by the water coming from the Mississippi overflow, and my impression is that some of it was caused by breaks in the levees that occurred at the time the water came in; others were caused by water from old crevasses.

Q. What I mean is, were there any crevasses during the time you were there engaged in the construction of that railroad along beside the railroad track, the water from which crevasses come across and cut the railroad bed in two?

A. To the best of my memory there were.

Q. Is it not a fact that the main line of the road was built far enough back from the river for the water from these crevasses to spread out over the bottom before it reached the railroad track?

A. Yes, sir; in most places. In some portions of the line just below Memphis a break in the levee will immediately cut the railroad line. I remember its being cut right above Clarksdale. Except a few miles just below Memphis, where the railroad in the Yazoo delta is located behind the levee, the water will have to spread over the country for several miles before it reaches the railroad.

Q. How many *yerad*- per mile, earthwork, was there upon the road from Memphis down to Port Gibson in the construction of the main line of this road? Approximate it as near as you can.

A. I think it averaged about 15,000 yards to the mile, but the variation was so great that I cannot state definitely. It ran as low as 10,000 for many miles together. On the hill work I think it possible some miles contained 40,000 yards.

Q. State what proportion of the right of way had to be cleared and what did it cost per acre to clear the right of way.

A. I do not recall the percentage of cleared land to timber land. The best of my memory is that the cost of right of way, clear, was $25 per acre, as a rule. In some special instances they have been higher.

Q. Was not all the trestle-work constructed from timber obtained from the woods and mills along the line of the railway?

A. No, sir; very little of it.

Q. Where did you get the piling?

A. We tried to enforce the use of cypress piling, which necessitated going quite a distance to get the timber and floating it in the river and carrying it along the line. We did not succeed in having cypress used in all the trestles, having, in many instances, to use white oak cut in the neighborhood of the work; but the trestles built with white oak were not a large percentage of the total.

Q. Was any lumber hauled from a distance and put into the construction of the trestles?

A. Great part of the lumber was brought from long distances. Some of it, not a large portion, was cut by mills in the neighborhood of the line.

Q. What did it cost per mile to lay the track?

A. $450 a mile, I believe, was the contract price, but this does not represent the cost of track-laying to the railroad company, and an additional $100 or $200 is allowed for the cost of repairing the track after it comes out of the contractor's hands. If the road-bed is ballasted, the additional cost will vary from $1,200 to $1,800 a mile, or even $2,500, depending upon the source of supply of ballast and the amount that goes under the track. On this ballast question I have no estimate; had nothing to do with the work, it being done after the road was turned over to the running department, as it was necessary to complete the track to allow the stuff to be hauled in from the gravel pits and the high ground. It is also necessary to remember that ballast cannot go immediately on buck-shot soil. It is necessary to cover the buck-shot partly with fine sand, silt, or mold of some kind. The ballast sinks into the buck-shot soil and its usefulness is destroyed. I know that in
538 portions of the road this gravel ballast was put under the track without the necessary support of silt underneath, and a large portion of it was lost. This method of work was corrected afterwards and the work properly done.

Q. How many cross-ties did it take per mile?

A. 2,640; do not think it runs any more than that.

Q. What kind of rail was used upon the track—what weight?

A. 56 pounds, I believe; 50 and 56. I believe the first we used was 50.

Q. What did that cost per ton?

A. Do not know; did not have anything to do with the purchase of the rails. I only knew the general market price at the time. I do not recollect now exactly what it was.

Q. State what rivers were bridged from the Tennessee line on this railway down to the Louisiana line.

A. Do you mean iron bridges?

Q. Yes, sir.

A. Yazoo pass; of this I am certain; Sunflower river, Hushpuckana river; Georgia Pacific narrow guage was spanned by building an iron girder; Rolling Fork river was spanned by building an iron girder; Yazoo river was spanned by a very long and costly bridge; Big Black was spanned, Bayou Pierre was spanned, Homochitto was spanned. There are two or three streams that I

believe were also spanned, neither of them constructed by myself. One of them was Bogue Phalia, completed after I left the road, and I think a stream south of Port Gibson, the name of which I do not recall.

Q. Please give the cost of each of these iron bridges.

A. In regard to cost, I can only recollect definitely the cost of the Yazoo River bridge, which was $226,000. The balance of the bridge-work, including Homochitto and the bridge over a stream the name of which I do not recall, amount to about 1,250 to 1,300 lineal feet. The cost with foundations was about $100 per foot, making a total of $125,000 to $130,000.

Q. State what tunnels were made along the line of this railway in Mississippi and the cost thereof.

A. One tunnel was constructed on the loop line, just below the town of Vicksburg. The cost of the tunnel was $122,500, as I recollect. This loop line was built to avoid the scour on the then existing main line. I believe it has since been utilized as a portion of the main line.

Q. What time did the L., N. O. & T. R'y Co. commence to run its trains from New Orleans to Memphis and from Memphis to New Orleans?

A. I do not recollect the exact date. My impression is that it was about November or December, 1884.

Q. Was not all the ballast that was put on the road at all put on after the trains began to run thereon and was not the ballast hauled in upon the trains?

A. My memory is that most of the ballast went upon the road after it was opened, but that there was some of this work done before that date on the upper division.

Q. Were the rails used on this railway iron or steel?

A. Steel.

Q. State, if you can, about what was the cost of spikes and fish-bars per mile.

A. Do not recollect.

Q. Have you ever been over that portion of the road from Port Gibson south to New Orleans?

A. Yes, sir.

Q. When the lawsuit about the tunnel you have mentioned was ended was there not an allowance of about $32,000 in addition to what had already been paid?

A. No, sir; the $122,000, with a little interest, covered the entire cost of contract work. There was some work done by the railroad company afterward, of which I have no knowledge, as it was done by the running department.

Q. From your estimate of the cost of the road in Mississippi and the cost in Louisiana, just from inspection, which do you think cost the more per mile, the work in Louisiana or the work in Mississippi, taken altogether?

539 A. I will answer to that my memory is that the average cost was about the same.

Q. In the construction of said railway from Vicksburg to Port Gibson did you not use a portion of the track of the Ship Island R. R. and of the Grand Gulf & Port Gibson R. R.?

A. No, sir; the Ship Island railroad was a narrow-*guage* railroad. The *iron* iron on it was somewhere about 30 pounds per yard, and we could not use it for purpose of track on the main line; neither could you use but a small percentage of the grading of the narrow-*guage* road, as it was very much curved and broken in profile. To the best of my memory, the benefit we received from the Ship Island road amounted to but 16 per cent. of the cost of the Ship Island road, which, to the best of my memory, amounted to about $750,000. With regard to the Port Gibson & Grand Gulf road, we utilized about a mile and a half of its track and the bridge over Bayou Pierre for a short time. The iron and bridge, however, were replaced before the completion of the main line, the bridge having been washed away during a local flood. I will, however, state that if the bridge had not been washed away, its structure was too light for permanent use on the main line, and the intention was to replace it by a stronger structure.

Q. State what records of the construction of this L., N. O. & T. R'y were made by the engineers, if any, including everything that was written or drawn with reference to the same.

A. Estimates from these plans for bridges, etc., were on file in the engineer's office, so far as the completed work was concerned. Many of them were in use at that time and were not filed, but were either at that office or branch offices.

Q. Were not all the estimates of the line kept in field books and filed with the chief engineer of the company?

A. That I could not answer. I was seldom in the chief engineer's office and saw very little work there. In my office work was under construction when I left on a branch line, and the final winding up of the whole matter took place after I left the company. The final records, therefore, were not made during my time. Current records of construction were kept in my office. I do not know whether they were gathered together and put in record form later.

Q. Is it not customary to put in permanent record form the estimates showing the entire work done in the construction of railroads?

A. Yes; and they, the estimates, are generally to be found in the auditor's office, with vouchers attached, but not in record form.

Q. Did not the final estimates of this work which passed through your hands show the amount of earthwork and all other work that was done upon the line or that part of the line which was under your control?

A. Yes, sir; except the extra work, which was very frequently just paid upon vouchers—day work, etc. That would pass out of my office without record, except possibly a note being kept of it, but no extended record.

Q. Were not these final estimates filed with the chief engineer of the company or with the L., N. O. & T. R'y Co.?

A. That I cannot say.

Q. What became of those final estimates when they left your office?

A. Went into the auditor's office. I cannot say that the records of the engineer's office were ever condensed; put in permanent record form.

Q. Did not the estimates passing through your office and from there turned over to the chief engineer's office show all the work in detail, showing what amount of work was done upon each end of the whole line?

A. No, sir; there was a great deal of work done by the operating department that did not pass through my office.

Q. What I mean is this: Did not the final estimates of the construction of the work which passed through your office and from your office were sent to the chief engineer's office show in detail all the construction work that was done?

A. No, sir; there was a quantity of work done by the operating department of the company outside of the engineering department. On them I would have no records, nor would it be shown in my office in any way. My impression is that the running de-
540 partment took one section of the road, and laid by time work 60 miles of track, doing it as a sort of test work upon the contractors, and also to relieve the engineering department as much as possible, as, because of sickness in the bottoms, we could not keep the ranks of the engineer's corps full at all times.

Q. Do not the records in the auditor's office show the vouchers for all the money that was paid out?

A. Yes, sir.

Q. Was any record kept of the work done by the railroad in laying of track?

A. I presume there was; must have been for the pay-rolls to be made out and passed; but they were not passed through my office.

Q. Is it not customary to have final estimates and vouchers in writing to show the exact cost of all these things?

A. Such is the general custom, but in the construction of the L., N. O. & T. R'y, because of continued sickness among the engineers in the field, it was very difficult matter to keep the record in shape.

Q. Did not the engineers in charge of the construction of said railway make out what they called "detailed estimates," showing all the earthwork and trestle-work done upon the line and showing exactly where such work was done?

A. As a rule, yes; but there were many exceptions to this rule.

Q. What were the exceptions?

A. We had at times a great deal of time work thrown on our hands, made necessary by the overflows and rapidity of the work, and in these cases the time was kept by the contractors, with such supervision as was found necessary, and returned in lump with the approval of the engineer in charge, the percentage allowed for extra work added, and passed directly into the auditor's office, and without record, as far as I know.

Q. Were not these detailed estimate sheets turned over to the general engineer's office and passed into the auditor's office?

A. They passed from my hands and I do not recall that there was a chief engineer appointed after I left, neither was I ever chief engineer of that line, but I remained for a year or two the only engineer on construction after the chief engineer had left the railroad. I left my office in running order, left the railroad and took other work, and therefore I did not prepare any record, but the estimates, as they came into the office, and all note books, as they came into the office, were filed there and were there when I left. I cannot say that the records of the chief engineer's office, of the work south of Port Gibson, ever came into my office at all; also my office was moved from Vicksburg to Memphis. The notes were put in boxes, so far as I remember, and that is the last I saw of them.

Q. You did not report to Grant at all?

A. No, sir; except verbally, and had discussions as to work and receiving directions such as he saw fit to give; but as a rule he was so busy with his work that we only met occasionally—every month or two months—for an hour, for discussion.

Q. What time did Grant leave the employ of said company?

A. I do not recollect, but I think it was in the winter of 1884 or 1885.

Q. Did you not have charge of the entire construction of said railway in Mississippi after he left up to the time you left?

A. No, sir; the work was completed and turned over to the running department. I had charge of the construction of the branches that were in progress.

Q. How many miles of hill country was included in the line of railroad that was under your charge from Memphis to Port Gibson?

A. Of the line from Vicksburg to Port Gibson, which I have stated, I believe to be about 29 miles—twenty odd miles—and ten miles above the town was hill country. Part of that ten miles was hill country and part was bottom land. About thirty-nine miles.

Q. Was not what is usually termed the big divide included in your division?

A. Yes, sir.

Q. The track from Port Gibson to the Mississippi and Louisiana line was also in broken-hill country, was it not?

541 A. Yes, sir.

Q. About like that above Vicksburg?

A. A little tougher soil.

Q. Was there more or less trestling, upon an average, below Port Gibson to the Louisiana line than there was above Port Gibson to Memphis?

A. There was less trestling below. I would like to add that you cannot judge of it now. There was more when I left the road than there is now, because it has been filled in.

Q. Was there not two or three times less trestling, upon an average, below Port Gibson as there was above?

A. Cannot say anything about the proportion; do not know.

Q. Did not the trestling cost much more per mile than the earthwork?

A. Yes, sir.

Q. Then you take into consideration the earthwork and the trestling above Port Gibson; was it not about the same, on the average, in cost that the earthwork and trestling was below Port Gibson?

A. No, *isr*: would not cost as much.

Q. Would not cost as much as above?

A. No, sir.

Cross-examination by Mr. MAYES:

Q. Major, in the opening of your testimony you spoke of having done work from the year 1882 to 1886 for the L., N. O. & T. R'y Co. in the construction of a part of its main line and some of its branches. I will ask you if that work was done by you for the L., N. O. & T. R'y Co. proper or for a construction company.

A. That I could not say.

Q. You do not remember about that?

A. Do not recall that, sir. My impression is that the name L., N. O. & T. was not selected for some time, but we worked under charters of several companies. Who were the financial backers I do not recall—that is to say, what company paid out the money.

Q. You have estimated that the road from Port Gibson northward cost about $13,000 per mile. That estimate, I understand you to say, does not include the cost of ballasting?

A. No, sir; it does not.

Q. Looking at the matter as a civil engineer and an expert, I will ask whether, in your opinion, the ballasting was necessary, or, to put it differently, whether the road could be said to be properly constructed without ballasting.

A. I would say, sir, from absolute knowledge on the subject, that you could not operate that road through the bottom lands without ballast of some form—in other words, we failed to operate it, and the ballasting was found to be necessary before we could run the passenger trains successfully in wet weather. It was not the intention at first to ballast the road. We were driven to it from the fact that we ran great danger in the buckshot section when the road became wet under the influence of rainy weather and winter.

Q. Is it not true that there are quite a number of items of expense and cost about the construction of a railroad and about the construction of this railroad which would not appear in and would not constitute a part of the engineer's preliminary estimates?

A. Yes, sir.

Q. Extras and things of that sort?

A. Yes, sir.

Q. For instance, do these estimates show the salaries and compensation paid the engineers?

A. The estimate put into the company?

Q. Yes.

A. No, sir; would not show that.

Q. Did your estimate of $13,000 per mile include that item?

A. Yes, sir.

Q. Is it not a fact that a great deal of the work that was done in your district below Vicksburg and above Port Gibson was done over the embankment of the Gulf & Ship Island railroad?

A. Yes, sir.

542 Q. And is it not true that the engineer's estimates of which you have spoken in your examination-in-chief would not show the true cost of such work as that? Is it not true that the engineer's estimate might either exceed or fall below the actual cost?

A. Yes, sir; on that section of the line.

Q. The profiles would not fully show that work?

A. No, sir.

Q. You spoke in your testimony-in-chief of the probable cost in Louisiana of building the road down there by comparison with the cost of that part of the road which was built under your superintendence in Mississippi. The comparison which you made is based upon an estimate merely, is it not?

A. Yes, sir.

Q. You have no official data before you?

A. None at all.

Q. Have not had any?

A. No, sir.

Q. As a civil engineer and an expert in these matters, what, in your opinion, would be the possibility of a man's riding over that railroad and seeing it finished and giving any reliable close approximation of the cost of its building?

A. He could make possibly a good chance estimate on the hill work. He would underestimate the bottom work or the work in the Mississippi bottom. They would deceive him. He would not be able to make a reliable estimate that way.

Q. Major, in response to a question propounded by Judge Critz about the crevasse water of the Mississippi river flowing over several miles of country and being somewhat dispersed before it struck the line of the L., N. O. & T. as finally built, you gave an explanation, which the stenographer was excused from putting down, of the conditions under which the main line of the railroad was located back from the river, and I would like for you to repeat that as an answer to this cross-interrogatory, so that he can get it down.

A. In locating the line from Memphis to Vicksburg the question that presented itself as the most serious one was the question of avoiding the overflows of the Mississippi river through the crevasses in the levee. If the railroad had been located on what is called the river front—that is, immediately in the rear of the levee—any single crevasse in the levee could have destroyed the railroad, and would have kept the line cut until the Mississippi had returned to within its banks. A line located in the interior of the delta—that is, several miles from the levee, and therefore from the river—the water would be dispersed through the country between the

broken levee and the railroad line and would be passed under the railroad line through the various trestles, and possibly a break in the railroad line would be avoided. It was decided not to attempt the river-front location, but to seek middle ground in the Yazoo delta, following such ridges as might be found on the route, and so placing low ground between the railroad and the river in which the overflow waters would collect from any crevasses that might occur, and could hence be passed freely through the trestles and bridges over the various rivers and bayous that passed under the railroad.

Q. Do you know whether the railroad track, as constructed up to the time you left there and to the extent you were acquainted with it, was above or below the overflow line of the Mississippi river?

A. The question will need further explanation as to the conformation of the country adjacent to the river. There is a gradual slope away from the river of the surface of the country of about one foot per mile. An average overflow of the Mississippi river will top its bank about two feet, and without the presence of the levee this water would flow into the interior country along the natural slope of the country, which has been stated to be a foot per mile, of course filling the lower ground first and following the streams. It follows from this explanation that if the railroad line was six miles from the river front the railroad embankment would necessarily be eight feet high above the ground to equal the height of the water in the river—that is to say, there
543 would be six feet height of bank to compensate for the six feet of fall of the country, and there would be two additional feet to make it equal to the rise of the river above its banks. A railroad built upon this principle was evidently an impossibility at any reasonable cost, but inasmuch as the fall of the water away from the river took the slope of the land when the water is two feet above the banks of the river, it would be only two feet above the average height of the land of the interior; therefore a railroad to be two feet high six miles from the river would be equivalent to the height of the water at that point, and if openings were left in this road across the various bayous, deep swamps, and rivers this water would naturally pass through those openings and not cut the railroad bed. It was on this theory that the location was made. The question was unsettled for some time as to its success, but from several overflows and the experience therein gained it was found to answer its purpose, but not at all points. At some points the water would not be led away by the openings, would mass against the road-bed, finally overflowing it and cutting it away, and in nearly all instances where this occurred the track was floated from its position.

Q. Do you remember any occasions when you saw the railroad track overflowed?

A. Yes, sir; I saw it overflowed twice that I recall. To the best of my memory, on one occasion the overflowed track, including where it was up to the track, was 60 miles of the railroad bed, and in the other instance the overflow was over one hundred miles.

Q. Do you remember any occasion when there was a crevasse at Yazoo pass that cut away the railroad at Clarksdale?

A. Yes; I remember that. That is one of those two; that occurred on one of those occasions.

Q. Major, holding in view your knowledge of that country and the then existing conditions when that railroad was built, is it not true that the construction and maintenance of a railroad there was a very hazardous and risky piece of business?

A. In the sense of an investment of money it was regarded as an exceedingly bold location of a railroad, the future of which was entirely uncertain, and at that time failure was freely predicted.

Q. As one instance, I will get you to state about the Bonne Carre crevasse and the effect of that on the road.

A. The Bonne Carre crevasse was so located that the railroad must necessarily pass in its immediate vicinity. As it admitted the waters of the Mississippi at every annual rise, it was necessary that this crevasse should be stopped before the railroad was constructed. Several attempts had been previously made to close this crevasse, but they had failed, and it was thought at that time to be very doubtful of success.

Q. Please state where the Bonne Carre crevasse is, geographically.

A. Bonne Carre crevasse is about, as I recollect, twenty miles above New Orleans.

Q. In the State of Louisiana?

A. Yes, sir.

Q. I will ask you to state what the cost of that work on the Bonne Carre crevasse was on the occasion you speak of.

A. There was expended on the Bonne Carre crevasse at that time a little over $80,000.

Q. Do you know anything about the company or the construction company, either, having to spend money in order to preserve the road-bed while in course of construction by the reparation and strengthening of the Mississippi levees?

A. I cannot say of my own knowledge that the money was paid. I knew of a subscription being raised by the company I represented, whatever that was.

Q. You do not know the amount?

A. I do not.

Q. You know such subscriptions were made?

A. Yes, sir.

Redirect examination by Mr. CRITZ:

Q. What was Grant's name?

A. John A. Grant.

544 Q. Where is Mr. Jno. A. Grant, who you say was the chief engineer in charge of the construction of this railroad from Port Gibson to New Orleans?

A. He is a resident of Atlanta, Ga.

Q. You have stated in your cross-examination that there was

extra work done in the construction of this railway which was not included in the engineer's estimates that passed through your office. Was not an account of all this extra work kept as the work progressed, and were not the payments for the same made upon these accounts, and were not vouchers given for the money paid out?

A. Of that I cannot say from positive knowledge. I only know in general. All the accounts were paid on vouchers. All that passed through my hands was paid on vouchers.

Q. Did not some part of this extra work pass through your hands?

A. Occasionally.

Q. Was it not impossible to make any intelligent settlement for this work or work done on force account without keeping some account of it as the work was done?

A. Absolutely necessary to keep account; what we call time or force account usually.

Recross-examination by Mr. MAYES:

Q. These subscriptions of which you spoke in aid of the Mississippi levees were not included in any of the estimates of the cost of construction that you have given, were they?

A. No, sir.

Pending the reading of the deposition of R. H. Elliott the defendants interposed their objections to the questions and answers therein in the examination-in-chief and in the redirect examination; which said objections are in writing and are filed among the papers in the case. The court overruled the same and the defendants excepted.

Obj. omitted.

Plaintiff here introduced assessment-rolls returned by the railroad company for the years 1886, 1887, 1888, 1889, 1890, and 1891, showing the number of miles of road in Mississippi and the miles for each county and the valuation put on it by the railroad company in each year, and the number of cars and engines owned by them and the valuation put on each of those, and the number of depots, coal chutes, and water tanks and the valuation put on t-em for each year by the railroad company.

Objected to as irrelevant and immaterial, as the question in this case as ruled by the court is what the road cost and not what it is worth for the purpose of taxation or for anything else; also because the documents were not made until 1896; also because not best evidence. Objection overruled. Defendants excepts. Documents considered read.

The originals of these documents are to be used by consent and are not copied into this record.

Pending the reading of the deposition of R. T. Wilson by the defendants the plaintiff made objections in writing filed in the cause to certain questions and answers in said R. T. Wilson's deposition; which objections were sustained and said questions and answers excluded. Said objections are as follows:

Now comes the plaintiff and objects and moves the court to exclude the following questions and answers in the deposition of R. T. Wilson:

Question. Now, I will ask you to state, if you please, whether or not it was the case that in any of the years from 1884 to 1892, inclusive, during the period that you were connected with the railway company, that Louisville, New Orleans & Texas Railway Company did declare and pay to its stockholders out of the profits an annual dividend of eight per cent. upon its capital stock over and above the payment of its debts and liabilities.

Answer. It never did.

Question. Did it declare and pay a dividend of any other per cent.?

Ans. It never declared or paid a dividend of one cent during the whole period.

545 Question. I will get you to state whether or not during the period from 1884 until your connection with it terminated the profits of that railroad company enabled it to declare and pay to its stockholders an annual dividend of eight per cent. on its capital stock over and above its liabilities.

Ans. The profits never did in any one year enable us to pay eight per cent. or any other per cent.

The plaintiff then rested.

Thereupon the defendants reintroduced J. M. EDWARDS, who, being first duly sworn, testified as follows:

Q. You stated on yesterday, in your examination, that you were the superintendent of construction of that railroad constructed by the L., N. O. & T. R. R. Co., together with its branches. If you can, state to the jury what it cost to construct those roads, and make a statement of the amount expended for construction in each year seperately.

Objected to. Objection overruled. Plaintiff excepts.

A. Do you mean the cost in securities or the cost in cash to the construction Co.?

Q. What it cost in cash to the construction Co.

Witness here produced a pamphlet from which he proceede- to answer.

A. I will state to the jury that this cost gives the actual amount of cash expended after allowing credit for the net earnings of the operating department of the road, showing what the deficit was for construction, crediting all the net earnings of the property for each year from 1883 and 1884 up to the year 1892.

This statement summarizes the amount to Dec. 31st, 1884. If you want the detail by the month for each month from May, 1882, when the first voucher was given, up to December 31st, 1884, I have that also.

Q. By years will answer. Just give it by years.

The plaintiff here objected to the witness testifying concerning matters of which there is better evidence in his possession, the witness having stated that he now had the vouchers for each disbursement in the court-room.

The court ruled that he could state the general result and tender the vouchers to counsel for plaintiff.

The plaintiff excepts to this ruling of the court.

A. The total amount to December 31st, 1884, was $10,978,725.96. Credit that amount with the earnings for the year of $61,942.02 makes $10,916,783.94.

The construction amount for 1885 was $2,450,245.38. Credit that with the net earnings and interest at 6 % and charging interest on the cost at 6 % leaves the net amount that year after crediting earnings with 6 %, $2,123,807.60.

And the total amount through 1885 of $13,040,591.54.

The amount of the construction account for 1886 was $1,378,106.37. Credit that with the net earnings and interest of $518,482.28 leaves the net amount of cost of construction above earnings $859,623.49.

Making a total up to that date, after taking off the net earnings, of $13,900,215.03.

For 1887 the construction account was $1,607,555.68. Credit that with earnings and interest on the earnings of $689,732.76 and it leaves the net amount of construction above the earnings and interest $917,822.92.

Making a total up to the year 1887, $14,818,037.95.

For the year 1888 the construction work was $2,171,803.71. Credit that with net earnings and interest on the earnings of $675,456.03 and it makes the net construction account above earnings received $1,496,347.6-.

And a total up to that date of $16,314,385.63.

For the rear 1889 the construction work was $3,252,769.07. The net earnings, with interest, amounted to $1,105,832.35, leaving the net cost of construction above earnings of $2,146,936.72, and making a total to that date of $18,461,322.35.

In 1890 the cost of construction was $3,646,871.67. That is credited with earnings and interest on the net earnings of $944,926.52, leaving the net amount of construction above net earnings $2,701,945.15.

Total cost to that date $21,163,267.50.

546 The cost of construction in 1891 was $2,090,154.75. Credit that with net earnings above operating expenses, $1,251,763.25, leaving the net amount $838,391.50.

Total amount to that date $22,001,659.

And for the five months ending May 31st, 1892—that is, the time the people I represented sold their interest in the property—the construction account of that year was $844,882.94, credited with $276,599, leaving the construction cost $568,283.94.

Making the total amount to that date $22,569,942.94.

That is the cash cost, allowing interest on the construction and crediting the earnings with interest at the rate of six per cent. That is the cash cost to the Financial Improvement Company.

Q. Can you state what was the actual money paid out on the construction account without any interest on the earnings and without any interest on the outlay?

A. Not crediting the items?

Q. Just straight out cost of construction.

A. This statement that I am reading (picking up another document)——

Plaintiff makes same objection as to reading from these documents. Overruled. Plaintiff excepts.

A. This statement, I will state, was compiled by me from the books and papers of the company which were kept at the time by the Financial Improvement Company without any anticipation or reference to any matter having to be brought into court.

Q. Have you got these books and documents here to substantiate it?

A. Yes, sir.

Same objection, ruling, and exception.

A. Yes, sir; they are here in the court-room now. I will state that this statement shows only the interest charged up to 1884, when the road began its operations, and after that there was nothing charged at all, and it brings down the total $20,711,696.29 up to May 1st, 1893.

Q. That is the actual cost?

A. Yes, sir.

Q. In money?

A. Yes, sir.

Q. Take out the interest item up to 1884.

A. The interest amount up to 1884, $929,957.93.

Q. Substract that from the total cost.

A. Leaves $19,761,738.36, without allowing a cent of interest on the investment at all.

Counsel for defendants here stated that they now produce these books and vouchers referred to by Mr. Edwards in the court-room and tendered them to counsel on the other side.

Cross-examination by Mr. CRITZ:

Q. Please file the two statements from which you read in giving your testimony in your original examination on this introduction as exhibits to your deposition.

A. I do so, sir.

Statements filed and marked Exhibits 1 and 2, respectively, to the testimony of J. M. Edwards in rejoinder.

This was all the evidence in the cause.

Statements omitted.

547 EXHIBIT "L."

Statement of the Net Earnings of the Louisville, New Orleans & Texas Railway Company, with Interest to May 31, 1892.

Grand Gulf & Port Gibson R. R	$15,083.54	
Miss. Valley & Ship Island R. R	23,632.23	
L., N. O. & T. and branches	23,226.25	
Net earnings, with interest to December 31st, 1884		$61,942.02
Interest, 6 %, one year	3,716.52	
L., N. O. & T. and branches for 1885	322,721.26	
		326,437.78
Net earnings, with interest to December 31st, 1885		388,379.80
Interest, 6 %, one year	23,302.79	
L., N. O. & T. and branches for 1886	495,180.09	
		518,482.88
Net earnings, with interest to December 31st, 1886		906,862.68
Interest, 6 %, one year	54,411.76	
L., N. O. & T. and branches for 1887	635,321.00	
		689,732.76
Net earnings, with interest to December 31st, 1887		1,596,595.44
Interest, 6 %, one year	95,795.73	
L., N. O. & T. and branches for 1888	579,660.30	
		675,456.03
Net earnings, with interest to December 31st, 1888		2,272,051.47
Interest, 6 %, one year	136,323.00	
L., N. O. & T. and branches for 1889	969,509.26	
		1,105,832.35
Net earnings, with interest to December 31st, 1889		3,377,883.82
Interest, 6 %, one year	202,673.03	
L., N. O. & T. and branches for 1890	742,253.49	
		944,926.52
Net earnings, with interest to December 31st, 1890		4,322,810.34
Interest, 6 %, one year	259,368.62	
L., N. O. & T. and branches for 1891	992,394.63	
		1,251,763.25
Net earnings, with interest to December 31st, 1891		5,574,573.59
Interest, 6%, 5 months	139,364.34	
L., N. O. & T. and branches to May 31st, 1892	137,234.66	
		276,599.00
Net earnings, with interest of the L., N. O. & T. & branches to May 31, 1892		5,851,172.59

Exhibit 1 to J. M. Edwards in Rejoinder.

Main line.	1884.	1885.	1886.	1887.	1888.	1889.	1890.	1891.	5 mos. ending May 31, 1892.	Totals.
General expenses	107,596.01	18,898.12	10,370.36	32,207.95	5,485 63	2,192.37	787.67	2,950.95	168.25	180,527.33
Legal expenses	57,102.51	17,235.26	17,623.94	17,490.84	2,679.00		4,250.00			117,181.55
Engineers and expenses	286,301.07	22,651.61	5,721.46	3,212.46	8,454.36	4,266.80	11,110.07	4,067.40	1,441.52	347,226.75
Right of way and damages	191,061 88	31,121.67	16,771.48	16,427.52	7,985.02	4,418.17	43,241.40	9,398.61	5,982.00	326,407.75
Roadway	2,036,514.26	104,691.86	9,431.97	21,735.32	98,048.22	79,881 43	53,965.04	69,106.87	14,422.78	2,487,797.75
Cross-ties	6 8,971.13	5,362.89	3,498.45	250.75		852 41				648,935.63
Track	2,430,034 87	266,955.70	103,370.72	135,236.79	35,437 91	101,258.66	99,650.52	31,302.82	6,618.07	3,063,784.62
Bridges and trestles	875,241.68	78,373.99	2,547.47	13,100.76	38,017.08	55,780.10	30,011.57	38,934.02	4,445.20	1,137,351.87
Lumber and timber	58,929.82									58,929.82
Yazoo bridge	268,040.68	9,218.29				13,529.15	1,601.75			277,258.95
Telegraph construction	53,568.90	658.61	149.21							69,498.62
Depots and platforms	84,113.29									84,113.29
Tanks, water stations	6 ,821.82	13,099.37	2,240.48	3,005.96	2,261.31	4,117.13	5,255.68	2,227.59	1,036.54	98,674.88
Locomotives	296,990.53	158,656.71	4,000.00	41,330.00	1,346.50	99,920.50	96,102.40			698,347 54
Equipment	539,314.86	129,908.63	109,974 38	88,6 9.36	43,998.14	218,919.49	119,158.77	138,472 42		1,427,757.05
Section, tool, and watch houses	41,278.40	22,000.18	610.83	3,887.43	857.22	1,507.96	1,188.82	712.24	100.93	72,144.31
Street railroad, Vicksburg	7,697.47						27,400.00			35,097.47
Terminals, New Orleans	304,833.11	60,114.91	50,823.88	53,827.17	54,969.99	26,315.63	10,140.07	4,332.70	25,000.00	561,024.76
Levees	103,697.85		3,458.33		500.00		26,763.97			163,692.85
Roadway maintenance	248,826.36									248,826.36
Car and motive dept	73,821.70									73,821.70
Rent, Ill. Cent. R. R. track	8,625.85									8,625.85
Ballast	228,639 01	125,234.24	75,389.28	82,104.70	45,939.91	60,160.45	60,792.19	97,981 60	51,014 93	827,256.31
Road crossings	22,193.68									22,193.68
Turn-tables	8,854.16	1,292.98	5,938.34	1,537.37	548.50	423.23	326.48	960.37		19,880.53
Machinery & tools for shops		1,806.86	21,959.70	5,172.24	3,086.93	71.33	4,933.71	5,088.67		42,119.44
Cattle-guards & fencing	18,306.95	7,658.69	7,708.36	27,558.74	7,245.95	9,861 09	3,373.35	2,900.33	556 29	85,168.85
Lever, hand, and push cars	9,359.67	8,130.68	286.31		5,527.26	1,690.65	216.00			25,210.57
Taxes	4,854.14									4,854 14
Car shops and sheds	1,257.42	1,235.99	3,002 56	3,483.61	742.24	2,120.27	44.10	122.44		12,008.63
New Orleans yard	33,418.59	31,005.18	43,965.62	4,254.77	11,009 70		7,096.15	5,051.87	1,546.57	136,450.45
Yazoo passenger bridge	4,200 00		1,800.00							6,000.00
Sunflower River bridge	11,200.00	4,800.00					21,776.12	1,476.88	1,404.36	16,000.00
Memphis yard	4,576 48	5,589.27	2.90	12,658.06	8,115.96					55,600.03
Baton Rouge yard	2,037.27									2,037.27
Tunnel	2,372.00	82,562.82	21,961 02	29,457.60	25,811 46					161,764.90
Hushpuckana bridge	9,996.00	4,200.00	700.00							13,496.00
Big Black River bridge	8,568.00	3,600.00	707.28							11,460.72
Homochitto bridge		6,000.00	246.14							5,753.86
Amounts forwarded	9,146,696.80	1,221,173.61	313,321.21	597,151.20	448,048.29	687,277.82	629,125.83	415,747.78	113,739.44	13,572,282.08

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Main line (cont.).	1884.	1885.	1886.	1887.	1888.	1889.	1890.	1891.	5 mos. ending May 31, 1892.	Totals.
Amounts bro't for'd	9,146,696.80	1,221,173.61	313,321.21	597,151.20	448,048.29	687,277.82	629,125.83	415,747.78	113,739.44	13,572,282.60
Bayou Pierre bridge		5,880.00	2,627.10							8,507.10
Insurance	5,399.15	6,616.30	101.33	23,394.46						35,511.24
Land account	62,376.81				90,704.03				3,101.00	156,181.84
Grand Gulf & Port Gibson R. R. stock	17,003.20									17,003.20
Levee tax accounts	13,431.70									13,431.70
Overflow damages	42,911.95									42,911.95
Engine-houses		534.33	1,008.14	14,417.35	10,475.41	3,756.44	2,544.82	87.34	3.50	32,827.63
Fuel stations		5,907.54	4,662.58	7,273.42	7,466.65	1,136.61	4,017.44	784.47	7.25	31,195.96
Interest	929,957.93									929,957.93
Incidentals		3,142.03	945.20		383.55					4,470.78
Machine shops		2,637.94	2,654.19	4,775.70	584.51	1,459.47			71.22	12,183.03
Stations & warehouses		95,806.50	35,779.19	19,377.27	8,315.46	11,931.51	31,263.99	11,836.08	4,567.34	218,877.14
Miscellaneous	7,677.98	9,271.80								16,949.78
Smith shops			22.50	1,197.25						1,219.75
Vicksburg yard			12,291.44	4,094.08	8,532.32		3,685.18	10,799.01	3,420.44	42,822.47
Grading city of Baton Rouge		8,106.06	2,246.25	1,271.42	1,572.30			119.55		13,316.38
Memphis Bluffs construction			10,000.00							10,000.00
Real estate, Council Bluffs			5,116.58	1,729.60						6,846.18
Wilson yard							626.14			626.14
Vicksburg shops, new							78,104.91	68,452.24	12,237.77	158,794.92
Transfer-boat					13,493.75					13,493.75
Vicksburg property					58,900.00					58,900.00
R. T. Wilson & Co.'s commission for financiering construction	436,000.00									436,000.00
Original cost of venture, franchises, etc., with interest to Dec. 31, 1884	515,344.67									515,344.67
Total cost, main line	11,176,800.19	1,359,076.71	390,775.71	674,681.85	648,416.27	705,562.15	749,368.31	507,826.47	137,147.96	16,349,655.62
" " Leland branch	58,690.25	289,997.97	156,449.30	6,121.23	25,037.40	525.00	7,580.34			544,401.49
" " Hampton "						104,641.57	6,551.56			111,193.13
" " Bolivar "					276,649.56	611,500.42	64,943.16			952,193.14
" " Bayou Sara "				898.78	12,906.42	379,368.03	15,098.83	6,402.62		414,674.68
" " Helena "					141,709.10	43,411.12	24,054.95	7,891.37		217,066.62
" " Clinton "			10,993.24	5,526.00		97,231.38	803.83	89.00		114,643.45
" " N., J. & C. "						101,748.36	994,584.16	18,333.22	39,747.25	1,154,412.99
" " Southport "				20,650.00	108,366.88	60,030.21	45,851.63	37,046.69	2,465.89	274,371.30
" " River lines								10,090.21		10,090.21
" " Tallahatchie						41,356.65	434,239.34	21,480.75		497,076.74
" " L., N. O. & T., of Arkansas						18,367.95	20,503.19	5,731.05	727.21	45,329.40
" " East Side div								4,137.23	579.25	4,716.48
" " West Side "								16,161.47	5,709.57	21,871.04
Total construction cost main line & branches, with interest to Dec. 31, 1884	11,235,490.44	1,649,074.68	558,218.25	707,877.86	1,213,065.71	2,163,742.84	2,362,679.30	635,150.08	186,377.13	20,711,696.29

550 Leland branch.

	1884.	1885.	1886.	1887.	1888.	1889.	1890.	Totals.
								46.48
General expenses	33.15	13.33						13,849.90
Engineers and expenses	4,022.34	9,751.81		75.75			334.50	18,874.47
Right of way and damages	930.35	16,373.32	311.30	150.00	775.00		231.50	67,523.09
Roadway	26,535.49	28,128.06	700.95	272.50	11,654.59			26,628.08
Cross and switch ties	11,305.45	15,322.63					6,175.31	241,570.98
Track	8,260.85	67,862.00	153,054.27	3,070.80	3,147.75			50,104.01
Bridges and trestles	6,492.32	42,441.14	998.70	103.30	68.55			516.60
Roadway maintenance	516.60							39,175.25
Ballast		39,175.25					111.51	154.51
Engine-house		43.00						28.80
Fuel stations		28.80					497.54	14,056.36
Stations and warehouses		10,894.98	13.25	460.80	2,189.79			169.53
Road crossings	169.53						179.28	5,875.30
Cattle-guards and fencing	59.76	5,183.30	45.65	158.34	248.97			5,344.86
Section, tool, and watch houses		3,556.52		1,372.68	415.66			4,062.54
Telegraph construction		2,577.66	1,325.18	159.20				1,053.27
Turn-tables		697.67		355.60				25,907.60
Arkansas City incline	364.41	25,543.19			31.95		50.70	1,994.94
Tanks, water stations		690.50		1,221.79				21,714.81
Steamer Marion		21,714.81						500.00
Steamer Harold				500.00				218.33
Huntington incline				218.33				175.40
New incline				175.40				99.90
Incidentals					99.90			4,756.98
Levee, Longwood				2,173.26	6,405.24	525.00		
Total cost, Leland branch	58,690.25	289,997.97	156,449.30	6,121.23	25,037.40	525.00	7,580.34	544,401.49

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Bolivar branch.	1888.	1889.	1890.	1891.	1892.	Totals.
Ballast	26,025.46	64,392.26	43,778.57	.....	.....	134,196.29
Cattle-guards and fencing	1,608.59	6,781.90	823.47	.....	.....	9,213.96
Cross-ties	26,950.00	47,744.65	.....	.....	.....	74,694.65
Engineers and expenses	9,975.97	18,008.16	1,473.04	.....	.....	29,457.17
Track	129,896.56	228,076.86	4,987.09	.....	.....	362,960.51
Roadway	33,786.34	96,787.75	2,112.95	.....	.....	132,687.04
General expenses	447.15	2,158.60	930.00	.....	.....	3,535.75
Use of engines	.....	5,634.00	700.00	.....	.....	6,334.00
Transportation and use of cars	4,000.00	15,974.48	.....	.....	.....	19,974.48
Right of way and damages	19,509.10	34,207.68	1,387.83	.....	.....	55,104.61
Stations and warehouses	2,362.30	23,756.66	5,948.04	.....	.....	32,067.00
Section, tool, and watch houses	622.75	7,128.79	1,040.30	.....	.....	8,791.84
Telegraph construction	1,904.26	5,248.78	777.70	.....	.....	7,930.74
Bridges and trestles	19,251.08	48,030.43	14.85	.....	.....	67,296.36
Turn-tables	174.75	131.92	.....	.....	.....	306.67
Tanks, water stations	135.25	7,437.50	69.32	.....	.....	7,642.07
Total cost, Bolivar branch	276,649.56	611,500.42	64,043.16	.....	.....	952,193.14
Hampton branch.						
Ballast	.....	7,316.42	2,278.95	.....	.....	9,595.37
Cattle-guards and fencing	.....	1,424.03	44.47	.....	.....	1,468.50
Cross-ties	.....	9,321.84	.....	.....	.....	9,321.84
Engineers and expenses	.....	1,744.08	.....	.....	.....	1,744.08
Roadway	.....	15,987.55	249.45	.....	.....	16,237.00
General expenses	.....	507.75	.....	.....	.....	507.75
Track	.....	46,478.18	1,522.89	.....	.....	48,001.07
Use of engines	.....	837.00	305.00	.....	.....	1,142.00
Transportation and use of cars	.....	3,379.78	.....	.....	.....	3,379.78
Right of way and damages	.....	5,542.40	.65	.....	.....	5,543.05
Stations and warehouses	.....	2,700.20	1,259.35	.....	.....	3,959.55
Section, tool, and watch houses	.....	573.15	86.03	.....	.....	659.18
Telegraph construction	.....	1,036.90	.....	.....	.....	1,036.90
Bridges and trestles	.....	7,458.19	804.77	.....	.....	8,262.96
Turn-tables	.....	334.10	.....	.....	.....	334.10
Total cost, Hampton branch	.....	104,641.57	6,551.56	.....	.....	111,193.13

	1887.	1888.	1889.	1890.	6 mos. ending June 30, 1891.	Totals.
Ballast	.....	.....	7,734.97	500.55	.....	8,235.52
Bridges and trestles	.....	997.12	48,252.96	11,226.32	5,435.73	65,912.13
Cattle-guards and fencing	.....	.....	2,204.04	308.98	230.02	2,743.04
Cross-ties	.....	.....	15,706.67	.....	.....	15,706.67
Engineers and expenses	798.78	6,017.06	5,757.54	187.50	3.75	12,764.63
Track	.....	.....	80,017.46	966.95	.....	80,984.41
Roadway	.....	2,255.24	64,499.84	403.60	5.40	67,164.08
General expenses	.....	113.50	1,744.10	259.00	.....	2,116.60
Use of engines	.....	.....	1,377.00	.....	.....	1,377.00
Transportation and use of cars	.....	.....	7,240.44	.....	.....	7,240.44
Right of way and damages	100.00	3,523.50	3,472.79	.....	.....	7,096.29
Stations and warehouses	.....	.....	7,961.00	571.98	727.72	9,260.70
Section, tool, and watch houses	.....	.....	4,044.85	5.65	.....	4,050.50
Telegraph construction	.....	.....	2,574.00	.....	.....	2,574.00
Turn-tables	.....	.....	680.81	41.75	.....	722.56
Tanks and water stations	.....	.....	1,911.41	626.55	.....	2,537.96
Original cost, West Feliciana R. R.	.....	.....	124,188.15	.....	.....	124,188.15
Total cost, Bayou Sara branch	898.78	12,906.42	379,368.03	15,098.83	6,402.62	414,674.68
Mobile & North Western—Helena branch.						
Cattle-guards and fencing	.....	.....	269.65	170.46	.....	440.11
Cross-ties	.....	.....	2,323.72	336.80	.....	2,660.52
Engineers and expenses	.....	143.05	497.47	1,043.95	188.55	1,873.02
Track	.....	.....	32,497.78	3,840.26	807.65	37,145.69
Roadway	.....	.....	3,861.91	1,925.74	1,018.60	6,806.25
General expenses	.....	.....	165.00	860.00	.....	1,025.00
Use of engines	.....	.....	189.00	65.00	.....	254.00
Transportation & use of cars	.....	.....	60.00	.....	.....	60.00
Right of way and damages	.....	200.00	1,040.10	1,720.50	1,526.35	4,486.95
Bridges and trestles	.....	.....	2,506.49	6,827.17	.....	9,333.66
Ballast	.....	.....	.....	5,277.75	2,453.61	7,731.36
Incidentals	.....	.....	.....	307.32	.....	307.32

Mobile & North Vestern—Helena branch.	1887.	1888.	1889.	1890.	6 mos. ending June 30, 1891.	Totals.
Stations and warehouses				155.20		155.20
Telegraph construction				401.80		401.80
Tanks—water stations				781.11		781.11
Helena incline				341.89	1,385.61	1,727.50
Section, tool, & watch houses					53.35	53.35
Turn-tables					457.65	457.65
Original cost, Mo. & No. West'n 1sts		141,366.13				141,366.13
Total cost, Helena branch		141,709.18	43,411.12	24,054.95	7,891.37	217,066.62

Clinton and Port Hudson—Clinton branch.	1886.	1887.	1889.	1890.	June 30, 1891.	May 31, 1892.	Totals.
553 Lease	10,993.24	5,500.00					16,493.24
Cattle-guards and fencing			58.15				58.15
Cross-ties			7,225.72		89.00		7,314.72
Engineers and expenses			831.10				831.10
Roadway			8,415.86	645.36			9,061.22
General expenses			12.50				12.50
Track			32,769.07				32,769.07
Right of way and damages		26.00					26.00
Bridges and trestles			7,918.98				7,918.98
Stations and warehouses				158.47			158.47
Original cost, Clinton & P. H. R. R.			40,000.00				40,000.00
Total cost, Clinton branch	10,993.24	5,526.00	97,231.38	803.83	89.00		114,643.45

Natchez, Jackson & Columbus.	1886.	1887.	1889.	1890.	June 30, 1891.	May 31, 1892.	Totals.
Bridges & trestles			780.22		13,915.23	37,919.52	52,614.97
Cattle-guards and fencing			46.48	52.70	307.05	3.95	410.18
General expenses			15.00				15.00
Track			88,500.36	327.33	669.66	125.42	89,622.77
Right of way and damages			10,860.85		1,280.87		12,141.72
Transportation & use of cars			659.87				659.87
Turn-tables			885.58				885.58
Engine-houses				54.62			54.62
Fuel stations				36.90			36.90
Roadway				28.50	157.25	1,101.57	1,287.32
Stations and warehouses				6,291.18	1,417.35	538.69	8,247.22
Natchez yard				699.37	158.39	40.50	898.66
Engineers and expenses					76.30	12.10	88.40
Section, tool, and watch houses					350.72	5.50	356.22
Original cost, N., J. & C. road				180,000.00			180,000.00
Subject to $1,250,000.00 1st-mtge. 6%, liquidated for $800,000 L., N. O. & T. 4% gold bonds and $7,093.56 cash				807,093.56			807,093.56
Total cost, N., J. & C. branch			101,748.36	994,584.16	18,333.22	39,747.25	1,154,412.99

554 Southport branch.	1887.	1888.	1889.	1890.	1891.	Month ending Jan. 31, 1892.	Totals.
Cross-ties			37.80				37.80
Engineers and expenses			148.05				148.05
Road crossings			34.24				34.24
Stations and warehouses			50.15				50.15
Track			10,662.10	9,691.85	2,207.37	1,505.05	24,066.37
Elevator			48,819.93	420.71	23,664.75	41.09	72,946.48
Vegetable platform			151.53				151.53
Wagon road			26.25				26.25
Tank-water stations			14.16	36.71			50.87
Wharves and docks			86.00	10,987.86	11,127.57	799.45	23,000.88
Right of way and damages				1,129.50	7.00		1,136.50
Telegraph construction				20.00			20.00
Roadway						120.30	120.30
Property & terminals	20,650.00	108,366.88		23,565.00			152,581.88
Total cost, Southport branch	20,650.00	108,366.88	60,030.21	45,851.63	37,006.69	2,465.89	274,371.30

Leland, Hampton, Bolivar—River lines.					6 mos. ending June 30, 1891.		
Ballast					6,004.38		6,004.38
Bridges and trestles					792.22		792.22
Cattle-guards and fencing					942.16		942.16
Engine-houses					31.25		31.25
Roadways					860.10		860.10
Right of way and damages					256.32		256.32
Stations and warehouses					240.51		240.51
Section, tool, & watch houses					269.18		269.18
Track					466.50		466.50
Telegraph construction					227.59		227.59
Total cost, river lines					10,090.21		10,090.21

	1889.	1890.	6 mos. ending June 30, 1891.	1892.	Totals.
Engineers and expenses	6,552.87	18,073.75	1,221.65	.....	25,848.27
Roadway	19,984.36	58,032.20	115.60	.....	78,132.16
General expenses	263.85	2,027.00	500.00	.....	2,790.85
Right of way and damages	14,515.82	2,419.55	46.25	.....	16,981.62
Bridges and trestles	39.75	37,082.03	.....	.....	37,121.78
Ballast	.....	34,990.38	14,834.53	.....	49,824.91
Car shops and sheds	.....	43.01	.....	.....	43.01
Cattle-guards and fencing	.....	6,099.51	562.76	.....	6,662.27
Cross-ties	.....	39,063.55	.....	.....	39,063.55
Track	.....	186,369.00	729.55	.....	187,098.55
Incidentals	.....	103.99	.....	.....	103.99
Stations and warehouses	.....	18,025.47	674.11	.....	18,699.58
Section, tool, and watch houses	.....	4,907.40	1,626.73	.....	6,534.13
Transportation	.....	3,149.40	.....	.....	3,149.40
Telegraph construction	.....	4,434.87	.....	.....	4,434.87
Turn-tables	.....	1,044.41	.....	.....	1,044.41
Tanks, water stations	.....	2,363.57	33.81	.....	2,397.38
Minter City incline	.....	11,975.25	550.76	.....	12,526.01
Use of locomotives	.....	2,800.00	585.00	.....	3,385.00
Use of cars	.....	1,235.00	.....	.....	1,235.00
Total cost, Tallahatchie branch	41,356.65	434,239.34	21,480.75	.....	497,076.74

L., N. O. & T. of Arkansas.			1891.	5 mos. ending May 31, 1892.	
Cattle-guards and fencing	111.50	91.05	4.35		206.90
Cross-ties	918.75				918.75
Engineers and expenses	1,543.65	837.70	402.50		2,783.85
Roadway	10,691.63		8.70		10,700.33
General expenses	308.85				308.85
Track	4,738.57		78.44		4,817.01
Right of way and damages	55.00	1,098.40	600.00	223.52	1,976.92
Stations and warehouses		9,361.38	1,490.56	10.99	10,862.93
Helena yard		8,339.66	3,129.25	490.97	11,959.88
Incline		775.00			775.00
Section, tool, and watch houses			17.25	1.73	18.98
Total cost, L., N. O. & T. of Ark	18,367.95	20,503.19	5,731.05	727.21	45,329.40

Tallahatchie, Clinton—East Side division.	6 mos. ending Dec. 31, 1891.	5 mos. ending May 31, 1892.	Totals.
Ballast	1,822.54	4.05	1,826.59
Bridges and trestles	53.80	16.38	37.42
Cattle-guards and fencing	62.94	136.60	199.54
Engine-houses	60.82	60.82	
Engineers and expenses	31.75	....	31.75
Roadway	76.35	264.92	341.27
Machine shops	25.54	25.54	
Right of way and damages	150.00	150.00	
Stations and warehouses	789.29	282.52	1,071.81
Section, tool, and watch houses	37.55	198.36	235.91
Track	987.14	124.75	862.39
Turn-tables	72.81	16.06	56.75
Tanks, water stations	33.30	86.35	53.05
Total cost, East Side division	4,137.23	579.25	4,716.48
Helena, Bayou Sara, River, Leland, Hampton, Bolivar—West Side division.			
Ballast	107.30	777.70	885.00
Bridges and trestles	3,414.60	163.34	3,577.94
Cattle-guards and fencing	306.49	83.49	389.98
Engine-houses	30.90	62.50	93.40
Engineers and expenses	114.35	....	114.35
Roadway	4,515.02	3,262.68	7,770.70
Right of way and damages	138.35	1,113.55	1,251.90
Stations and warehouses	1,699.81	534.51	1,165.30
Section, tool, and watch houses	1,055.04	107.74	947.30
Track	3,509.39	795.78	4,305.17
Telegraph construction	166.24	.....	166.24
Turn-tables	1,004.80	16.06	1,020.86
Tanks, water stations	99.18	51.18	150.36
Machine shops	.....	25.54	25.54
Total cost, West Side division	16,161.47	5,709.57	21,871.04

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557 EXHIBIT 2 TO J. M. EDWARDS IN REJOINDER.

	1884.	1885.	1886.	1887.	1888.	1889.	1890.	1891.	5 mos. ending May 31, 1892.	Totals.
Total cost main line	$10,920,035.71	2,160,247.41	1,210,663.83	1,574,359.67	1,607,134.27	1,794,588.38	2,035,560.68	1,962,831.14	795,653.77	24,059,074.86
" " Leland branch	58,690.25	289,997.97	156,449.30	6,121.23	25,037.40	525.00	7,580.34			544,401.49
" " Hampton						104,641.57	6,551.56			111,193.13
" " Bolivar					276,649.56	611,500.42	64,043.16			952,193.14
" " Bayou Sara				898.78	12,906.42	379,368.03	15,008.83	6,402.62		414,674.68
" " Helena					141,709.18	43,411.12	24,054.95	7,891.37		217,066.62
" " Clinton			10,993.24	5,526.09		97,231.38	803.83	89.00		114,643.45
" " N., J. & C						101,748.36	994,584.16	18,333.22	39,747.25	1,154,412.99
" " Southport				20,650.09	108,366.88	60,930.21	45,851.63	37,006.69	2,465.89	274,371.30
" " River lines								10,090.21		10,090.21
" " Tallahatchie						41,356.65	434,239.34	21,480.75		497,076.74
" " L., N. O. & T. of Arkansas						18,367.95	20,503.19	5,731.05	727.21	45,329.40
" " East Side division								4,137.23	579.25	4,716.48
" " West Side division								16,161.47	5,709.57	21,871.04
Yearly construction cost, L., N. O. & T. and branches	10,978,725.96	2,450,245.38	1,378,106.37	1,607,555.68	2,171,803.71	3,252,769.07	3,646,871.67	2,090,154.75	844,882.94	28,421,115.53
Less net earnings, with interest	61,942.02	326,437.78	518,482.88	680,732.76	675,456.03	1,105,832.35	944,926.52	1,251,763.25	276,599.00	5,851,172.59
Net yearly construction cost	10,916,783.94	2,123,807.60	859,623.49	917,822.92	1,496,347.68	2,146,936.72	2,701,945.15	838,391.50	568,283.94	22,569,942.94
Total construction cost, L., N. O. & T. and branches	10,978,725.96	13,428,971.34	14,807,077.71	16,414,633.39	18,586,437.10	21,839,206.17	25,486,077.84	27,576,232.59	28,421,115.53	
Less net earnings, with interest	61,942.02	388,379.80	906,862.68	1,596,595.44	2,272,051.47	3,377,883.82	4,322,810.34	5,574,573.59	5,851,172.59	
Net total construction cost	10,916,783.94	13,040,591.54	13,900,215.03	14,818,037.95	16,314,385.63	18,461,322.35	21,163,267.50	22,001,659.00	22,569,942.94	

558 Thereupon the court, on request of the plaintiff, gave the following charges to the jury.

Said charges, having been already copied in this record, are omitted here by agreement of counsel filed herein.

The plaintiff requested the court to give the jury the following charges, numbered from 1 to 16, inclusive; which the court then and there refused to do, and the plaintiff then and there, in open court, excepted, said charges being as follows:

Said charges, having been already copied in this record, are here omitted by agreement of counsel filed herein.

Thereupon the court, at the request of the defendants, gave the jury the following charges; to the giving of which the plaintiff then and there, in open court, objected, and, his objection being overruled, he then and there, in open court, excepted. Said charges are as follows:

Said charges, having been already copied in this record, are omitted here by agreement of counsel filed herein.

Thereupon the jury having found for the plaintiff for the year 1895, and for the defendants for the years 1892, 1893, and 1894, as will more fully appear from the judgment rendered in this case, the plaintiff moved for a new trial in words and figures as follows:

Said motion, having already been copied in this record, is omitted here by agreement of counsel filed herein.

Whereupon, on August 1st, 1896, the same being a day in the regular July term of said court, the court overruled the said motion of plaintiff for a new trial, and the plaintiff the- and there, in open court, excepted to said ruling of the court, and tenders this his bill of exceptions thereto, which is signed, sealed, and ordered to be made a part of the record in said cause, together with the stenographer's transcribed notes, as a part thereof.

This September 14, 1896.

ROB'T POWELL, [SEAL.]
Judge of the 7th Circuit Court, District of Miss.

Endorsed: Filed Sept. 16, 1896. F. B. Neal, clerk, by W. J. Brown, Jr., D. C.

559 *Defendants' Bill of Exceptions.*

STATE OF MISSISSIPPI,
County of Hinds.

In the Circuit Court, First District, at the July Term, 1896.

WIRT ADAMS, State Rev. Agent, Use, &c.,
vs.
YAZOO & MISS. VALLEY RAILROAD COMPANY *et als.*, Defendants. } 2788. Consol.

Bill of exceptions for the defendants, The Yazoo & Mississippi Valley Railroad Company and The Illinois Central Railroad Company.

Be it remembered that on the 21st day of July, A. D. 1896, the same being a day of the regular July term, 1896, of said circuit court, came on to be heard the above-entitled causes, consolidated, on the issues of fact joined therein; and, both sides having announced themselves ready for trial thereon, thereupon came a jury of twelve good and lawful men, who, being duly elected, empaneled, and sworn well and truly to try the issues joined between the parties, the pleadings and the exhibits were read to the jury, and thereupon the plaintiff introduced the following evidence:

W. M. Massie, a witness, who, being first duly sworn, testified as follows:

For testimony of W. M. Massie see defendants' bill of exceptions.

2. The originals assessment-rolls made by the railroad assessors of the years 1892, 1893, 1894, and 1895 of the L., N. O & T. railroad and property and branches, said rolls for the years 1893, 1894, and 1895 being made out against the Yazoo & Mississippi Valley Railroad Company as follows:

Original rolls to be used on the trial of this cause by agreement of counsle filed herein.

3. The original objections made in 1892 by the Louisville, New Orleans & Texas Railway Company to the assessment of that year, and in 1893 by the Yazoo & Mississippi Valley Railroad Company to the assessment of that year as follows:

Not copied. Originals to be used on the trial of this cause.

560 4. The articles of consolidation of October 24th, 1892, between the Louisville, New Orleans & Texas Railway Company and the Yazoo & Mississippi Valley Railroad Company, as follows:

Originals to be used on trial of this cause by agreement of counsel filed herein.

5. The articles of consolidation of August 12th, 1884, between the Tennessee Southern, the Memphis & Vicksburg, the New Orleans, Baton Rouge, Vicksburg and Memphis, and the New Orleans and Mississippi Valley Railroad companies, as follows:

6. Deed of trust, dated September 1st, 1892, between the Illinois Central Railroad Company and the United States Trust Company. This deed was offered in support of the plaintiff's declaration that the Illinois Central Railroad Company was the owner of the railroad and property of the Louisville, New Orleans & Texas Railway Co. and in support of the replication of novation.

Defendants objected on the ground that it was irrelevant, incompetent, and immaterial as to the first grounds, but do not object as to the issue on novation. Objection was overruled and the defendants excepted.

The deed introduced was as follows:

The original to be used on the trial of this cause by agreement of counsel filed herein.

7. The lease of the Yazoo & Mississippi Valley Railroad Company made to the Illinois Central Railroad Company on March 31st, 1888.

Defendants objected on the ground that the same was incompetent, irrelevant, and immaterial. Their objection was overruled and defendants excepted.

Said lease was as follows:

Original to be used on the trial of this cause by agreement of counsel filed herein.

8. List of stockholders of the Yazoo & Mississippi Valley Railroad Company on March 31st, 1888, marked Exhibit A to the stenographer's notes.

The defendants objected on the ground that the same was incompetent, irrelevant, and immaterial. Their objection was overruled and defendants excepted.

Said list, having already been copied in this record, is here omitted.

9. The minutes of a meeting of the stockholders of the Yazoo & Mississippi Valley Railroad Company held on the 4th of October, 1893, containing a list of the stockholders of said company on that day, marked Exhibit B to the stenographer's notes.

Defendants objected on the ground that the same was incompetent, irrelevant, and immaterial. Their objection was overruled and they excepted.

Said minutes are as follows:

Said Exhibit "B," having already been copied in plaintiff's bill of exceptions, is here omitted by agreement of counsel filed herein.

10. A list of the stockholders and officers of the Mississippi Valley Company on the 14th day of October, 1892, marked Exhibit "C" to the stenographer's notes.

Defendants objected on the ground that the same was incompetent, irrelevant, and immaterial. Their objection was overruled and they excepted.

Said list, having already been copied in plaintiff's bill of exceptions, is here omitted by agreement of counsel filed herein.

11. A list of the stockholders and officers and directors of the Yazoo and Mississippi Valley Railroad Company from June 1st to

October 25th, 1892, marked Exhibit "D" to the stenographer's notes.

The defendants objected on the ground that the same was incompetent, irrelevant, and immaterial. Their objection was overruled and they excepted.

Said Exhibit "D," having already been copied in plaintiff's bill of exceptions, is here omitted by agreement of counsel in writing filed herein.

561 12. List of stockholders, marked Exhibit "E" to the stenographer's notes.

The defendants objected on the ground that the same was incompetent, irrelevant, and immaterial. Their objection was overruled and they excepted.

Said Exhibit "E," having already been copied in plaintiff's bill of exceptions, is here omitted by agreement of counsel in writing filed herein.

13. Minutes of the meeting of the board of directors of the Yazoo & Mississippi Valley Railroad Company on the 18th of October, 1893, to show who the officers were, and that, on motion, those officers were elected to serve without salary, and that they were the same officers which the Illinois Central Railroad Company has.

Defendants objected on the ground that the same was incompetent, irrelevant, and immaterial. Their objection was overruled and they excepted.

Said minutes are marked Exhibit "F" to stenographer's notes and are as follows:

Said exhibit, having already been copied in plaintiff's bill of exceptions, is here omitted by agreement of counsel in writing filed in this cause.

14. The charter of the Mississippi Valley Company, to show that said company was required to have a certain number of directors, and that each director was required to have ten shares of stock, and that the Illinois Central Railroad Company owned that stock, and that the other holders held the exact number of shares needed to qualify them as directors.

Defendants objected on the grounds of incompetency, irrelevancy, and immateriality. Their objection was overruled and they excepted.

Said charter is marked Exhibit "G" to the stenographer's notes and is as follows:

Charter book to be used by agreement of counsel filed herein.

15. Minutes of the Yazoo & Mississippi Valley Railroad Company of August 1st, 1893, marked Exhibit "H" to the stenographer's notes.

Defendants objected on the grounds of incompetency, irrelevancy, and immateriality. Their objection was overruled and they excepted.

Said Exhibit "H," having already been copied in plaintiff's bill of exception, is omitted here by agreement of counsel filed in writing herein.

16. List of directors of the Illinois Central Railroad Company

from June 1st to Oct. 25th, 1892, marked Exhibit "I" to the stenographer's notes.

Defendants objected on the grounds of incompetency, irrelevancy, and immateriality. Their objection was overruled and they excepted.

Said Exhibit "I," having already been copied in plaintiff's bill of exceptions, is here omitted by agreement of counsel filed herein.

17. List of stockholders of the Illinois Central Railroad Company on October 24th, 1892, marked Exhibit "J" to the stenographer's notes.

Defendants objected on the grounds of incompetency, irrelevancy, and immateriality. Their objection was overruled and they excepted.

Said Exhibit "J," having already been copied in plaintiff's bill of exceptions, is here omitted by agreement of counsel in writing filed herein.

562 When and as the plaintiff offered in evidence the assessment-rolls above for the years 1892, 1893, 1894, and 1895, defendants objected to the same, in so far as they were offered for the purpose of showing the cost of the property, in that they did not reasonably tend to show said cost, and also that they were secondary evidence and not the best evidence; also so far as they undertake to fix the privilege taxes and the municipal taxes. Said objections were overruled and defendants excepted.

Plaintiff here rested.

Whereupon the defendants moved the court to exclude all of the evidence of the plaintiff; which motion the court overruled, and the defendants excepted. Said motion was in writing and was as follows:

Comes the defendants, The Yazoo & Mississippi Valley Railroad Company and The Illinois Central Railroad Company, and the plaintiff herein, having closed his case, moves the court to exclude all of the testimony.

W. G. YERGER &
MAYES & HARRIS,
For Motion.

CRITZ & BECKETT, *Contra.*

Endorsed: Filed and entered July 22, 1896. B. F. Neal, clerk, by W. J. Brown, Jr., D. C.

The defendants then introduced the following evidence:

1. The minutes of the meeting of the board of directors of the Mississippi Valley Company on Oct. 14th, 1892 (their minutes, page 189); also their minutes of May 17th, 1893 (minutes, page 199); which minutes are as follows:

See minute book.

2. John C. Willing, a witness, who, being duly sworn, testified as follows:

This testimony, having already been copied in plaintiff's bill of exceptions, is here omitted by agreement of counsel filed herein.

3. Mortgage of Sept. 18th, 1884, by the Louisville, New Orleans & Texas R'y Co. to Pardee & Crolius, as trustees. Charter Book, page 571.

Charter book to be used by agreement of counsel filed herein.

4. Mortgage of Sept. 18, 1884, by the Louisville, New Orleans & Texas Railway Company to the Metropolitan Trust Co. of New York, as trustee. Cha-ter Book, p. 586, as follows:

Charter book to be used by agreement of counsel filed herein.

5. Mortgage of Aug. 25th, 1885, by the Louisville, New Orleans & Texas Railway Company to Pardee & Crolius, as trustees. Charter Book, p. 621, as follows:

Charter book to be used by agreement of counsel filed herein.

6. Mortgage of Aug. 25th, 1886, by the Louisville, New Orleans & Texas Railway Co. to the Union Trust Co. of New York, as trustee. Charter Book, p. 635, as follows:

Charter book to be used by agreement of counsel filed herein.

7. Mortgage of August 25th, 1886, by the Louisville, New Orleans & Texas Railway Company to the Union Trust Company of New York, as trustees. Charter Book, p. 649.

Charter book to be used by agreement of counsel filed herein.

8. Mortgage of August 26th, 1886, by the Louisville, New Orleans & Texas Railway Company to the Union Trust Company of New York, as trustee. Charter Book, p. 670, as follows:

Charter book to be used on the trial of this cause by agreement of counsel filed herein.

9. Mortgage of 27th of August, 1886, by the Louisville, New Orleans & Texas Railway Company to Pardee & Crolius, as
563 trustees. Charter Book, p. 692.

Charter book to be used by agreement of counsel filed herein.

10. Mortgage of 27th of November, 1886, by the Louisville, New Orleans & Texas Railway Company to the Union Trust Company of New York, as trustee. Charter Book, p. 719.

Charter book to be used by agreement of counsel filed herein.

11. Mortgage of April 14th, 1895, by the Yazoo & Miss. Valley Railroad Company to the United States Trust Company of New York, as trustee. Charter Book, p. 761, as follows.

Charter book to be used by agreement of counsel filed herein.

12. Mortgage of April 15th, 1893, by the Yazoo & Mississippi Valley Railroad Company to the Union Trust Company of New York, as trustee. Charter Book, p. 788, as follows.

Charter book to be used by agreement of counsel filed herein.

14. B. C. Pfouts, a witness, who, being duly sworn, testified as follows.

This testimony, having already been copied in the plaintiff's bill of exceptions, is here omitted by agreement of counsel in writing filed herein.

15. The deposition of R. T. Wilson, which was in terms and figures following:

This deposition, having already been copied in plaintiff's bill of exceptions, is here omitted by agreement of counsel filed herein.

Error.

Pending the reading of the foregoing deposition the defendants interposed their objections in writing to certain questions propounded by the plaintiff and the answers thereto, said objections being in writing and filed amongst the papers in this cause and are as follows:

Defendants herein object to the following questions and answers in the cross examination in the deposition of R. T. Wilson. The questions:

1. "Well, give us the actual cash cost of the road that was paid out for work that was done and material furnished," and the answer thereto, and also all other questions and answers referring to the actual cost to the Financial Improvement Company.

2. "Do you know who composed the members of it?" (meaning thereby of the Financial Improvement Company), and the answers thereto, and all other questions and answers relating to the constitution of the membership of said Financial Improvement Company and the interest of R. T. Wilson or R. T. Wilson & Co. therein, for the reason that the said questions and answers are incompetent, irrelevant, and immaterial.

MAYES & HARRIS,
Att'ys for Def'ts.

Endorsed: Filed July 24th, 1896. F. B. Neal, clerk, by W. J. Brown, Jr., D. C.

Said objections were by the court overruled, and defendants excepted.

16. The defendants introduced as evidence the agreement between the Memphis & Vicksburg Railroad Company and William M. Johnston, marked Exhibit A to the deposition of R. T. Wilson, as set forth above.

17. Defendants introduced as evidence the agreement between the Tennessee Southern Railroad Company and the Financial Improvement Company, marked Exhibit "B" to the deposition of R. T. Wilson, as set forth above.

18. Defendants introduced as evidence the agreement between the New Orleans, Baton Rouge, Vicksburg & Memphis Railroad Company and the Financial Improvement Company, marked Exhibit C to the deposition of R. T. Wilson, as set forth above.

564 19. Defendants introduced as evidence the agreement between the New Orleans & Mississippi Valley Railroad Company and the Financial Improvement Company, marked Exhibit D to the deposition of R. T. Wilson, as set forth above.

20. J. M. Edwards, a witness, being first duly sworn, testified as follows:

The testimony of J. M. Edwards, having been already copied in the bill of exceptions of plaintiff, is here omitted by agreement of counsel herein filed.

21. William Starling, a witness, being first duly sworn, on oath says:

The testimony of William Starling, having been copied in the

bill of exceptions of plaintiff, is omitted here by agreement of counsel in writing filed herein.

22. Defendants offered the ad valorem and the privilege-tax receipts for taxes paid in cash in and for the years 1892, 1893, 1894, and 1895 to the sheriffs and tax collectors of the counties of Bolivar and Washington on the property assessed for those years as Riverside division, special charter. Said receipts are in words and figures following:

By agreement of counsel the original receipts are to be used in the trial of this cause.

23. Defendants offered the ad valorem and the privilege-tax receipts for taxes paid in cash in and for the years 1892, 1893, 1894, and 1895 to the tax collector of Coahoma county on the property assessed for those years as the Helena branch. Said receipts are in words and figures as follows:

By agreement of counsel the original receipts are to be used in the trial of this cause.

24. Defendants offered the ad valorem and the privilege-tax receipts for taxes paid in cash in and for the years 1892, 1893, 1894, and 1895 to the tax collector of Wilkinson county on the property assessed for those years as the Bayou Sara branch. Said receipts are in words and figures following:

By agreement of counsel the original receipts are to be used on the trial of this cause.

25. Defendants offered the affidavits and sheriff's receipts for the years 1892, 1893, 1894, and 1895 for all the taxes and property assessed for those years (except such as was and is covered by the receipts hereinbefore just set forth), made and taken under section V of the act of March 3, 1882 (being the adopted section of the charter of the Mobile & Northwestern Railroad Company), in some instances said papers showing that on tender of such affidavit made to the sheriff and tax collector he had refused to issue the receipt demanded, but had acknowledged over his own written signature the tender of the affidavit and demand of receipt.

No objection was made by plaintiff to any of such papers, and it was agreed by counsel for both sides in open court that in Warren county in and for the years 1893 and 1894, and in Sharkey county for and in the year 1895, similar affidavits had been tendered to the respective sheriffs and tax collectors in behalf of the Yazoo & Miss. Valley R. Company by the Honl. Murray F. Smith, and receipts demanded, but they were refused by said collectors.

Said affidavits, endorsements, and receipts are as follows:

By agreement of counsel the original affidavits and receipts are to be used on the trial of this cause.

26. Defendants offered the charter of the Memphis & Vicksburg Railroad Company, of the New Orleans, Baton Rouge, Vicksburg & Memphis Railroad Company, and of the Yazoo & Mississippi Valley Railroad Company; which said charters are as follows:

See charter book for these charters.

565 It was then agreed by counsel for both sides in open court that all private statutes pertinent to the case should be referred to and used as if introduced in evidence.

J. A. Ridgely, a witness, being first duly sworn, testified as follows:

The testimony of this witness, having been copied in the bill of exceptions of plaintiff, is here omitted by agreement of counsel in writing filed in this cause.

The defendants here rested.

The plaintiff thereupon offered in rebuttal the following additional evidence:

1. The deposition of O. A. Gibson, which was in words and figures following:

The deposition of said O. C. Gibson, having been already copied in the bill of exceptions of plaintiff, is omitted here by agreement of counsel filed herein.

Pending the reading of the said deposition of witness O. A. Gibson, the defendants interposed their objections to the same; which objections are in writing and filed amongst the papers in this cause and are as follows:

Comes the defendants, The Yazoo & Mississippi Valley Railroad Company and The Illinois Central Railroad Company, and object to the deposition of O. A. Gibson herein taken by the plaintiff, and for cause of objection assigns the following:

Beginning with question 24 and the answer thereto, they object to all of said deposition after said question and answer, and including the same, for the following reasons:

1. The same are incompetent and irrelevant under and to the issues presented in this case.
2. Because the same are hearsay.
3. Because the same are not the best evidence.
4. Because the same are secondary and not primary testimony.
5. Because the same are opinion evidence, as the witness is not shown by his own testimony or otherwise to be qualified as an expert.
6. Because the same are mere guesses and the estimates not based on knowledge or proper preliminary proofs by way of foundation laid.
7. Because the same are confessedly made of guesses and estimates not competent from any point of view.
8. To that part of answer #230 which follows the word "commission," because the same is not responsive to the question.
9. For various good reasons to be assigned at the hearing, and because in respect to the matters therein testified about plaintiff served defendants with formal notices to produce vouchers, estimates, and other documents on the trial, and this defendants have done, to cover the matter inquired about in said questions and answers, being the actual cost of the road.

MAYES & HARRIS,
Att'ys for Def'ts.

Endorsed: Filed July 24, 1826. F. B. Neal, clerk, by W. J. Brown, Jr., D. C.

The court sustained said objections as to questions and answers numbered 52, 59, 60, and 69, and to all that part of answer numbered 230 which follows the word "commission." All the remainder of said objections the court overruled and allowed the deposition to be read, except as stated, and to this the defendants excepted.

The papers and documents referred to by said Gibson in his deposition were in words and figures as follows:

Originals to be used by agreement on trial of this cause.

The deposition of R. H. Elliott, which was in words and figures as follows:

Said deposition, having been copied in the bill of exceptions of plaintiff, is omitted here by agreement of counsel in writing filed herein

Pending the reading of the said deposition of the said Elliott,
566 the defendants interposed their objections to the questions and answers therein; which objections were in writing filed amongst the papers of this cause and were as follows:

Comes the defendant- The Yazoo & Mississippi Valley Railroad Company and The Illinois Central Railroad Company and object to the depositions of R. H. Elliott herein taken by the plaintiff, and for cause of objection assigns as follows:

Beginning with question on page 5 which begins with the words, "Please state as nearly as you can what was the cost of construction of said railway," and the answers thereto, they object to all of said deposition after said question and answer and including the same for the following reasons:

1. The same are incompetent and irrelevant under and to the issues presented in this case.

–. Because the same are hearsay.

3. Because the same are not the best evidence.

4. Because the same are secondary and not primary evidence.

5. Because the same are mere guesses and the estimates not based on knowledge or proper preliminary proofs by way of foundation laid.

7. Because the same are confessedly made of guesses and estimates not competent from any point of view.

8. For various other good reasons, to be assigned at the hearing, and because in respect to the various matters therein testified about plaintiff served defendants with formal notices to produce vouchers, estimates, and other documents on the trial, and this defendants have done, to covery the matters inquired about in said questions and answers, being the actual cost of the road.

MAYES & HARRIS, *Att'ys.*

Endorsed: Filed July 25th, 1896. F. B. Neal, clerk, by W. J. Brown, Jr., D. C.

In presenting their objections to the depositions of Gibson and of Elliott the defendants supported the same by referring the court to the three several notices which had been served on them by the

plaintiff, and which are on file amongst the papers of this cause, requiring defendants to produce on the trial documents and papers, and it was shown to the court that there were and had been since the beginning of the trial five large dry-goods boxes and one large bundle in the court-room, which defendants, by their counsel, stated contained the papers called for, and which were then and there in court and at the disposal and use of the plaintiff for the purpose of showing the cost of constructing said railroad. The fact of the presence of said papers in court and their tender to the plaintiff was not in any way questioned by plaintiff.

The court overruled all of said objections and allowed said deposition to be read throughout; to which action the defendants excepted.

Plaintiff here introduced the assessment-rolls filed before the railroad commission, as railroad tax assessors, on the — day of ——, 189–, for taxation of the L., N. O. & T. R'y property for the years 1886, 1887, 1888, 1889, 1890, and 1891, which rolls are as follows:

By agreement of counsel the original rolls are to be used on the trial of this cause and are not copied into this record.

To the introduction of said rolls and each of them the defendants then and there objected because the same were irrelevant
567 and immaterial, as they do not show or tend to show the cost of the property, because they are not the best evidence, but are secondary, and because they were not made until the year 1896.

The court overruled defendants' objections, and defendants excepted.

Plaintiff then rested.

The defendants then introduced in rebuttal the following evidence:

1. J. M. Edwards, a witness, who, being duly sworn, on oath said:

This evidence, having been already copied in the bill of exceptions of plaintiff, is here omitted by agreement of counsel in writing filed herein.

At the conclusion of the examination-in-chief on this introduction counsel for the defendants stated that they had present in the court-room the books and vouchers referred to by Mr. Edwards, and that they tender them to counsel for plaintiff for such use as they might wish to make of them. Such books and vouchers were contained in one large package and three moderate-sized goods boxes. Counsel for the plaintiff then and before beginning the cross-examination of said witness requested and were allowed by the court time for consultation, and retired for that purpose with Exhibit- 1 and 2 to the witness' evidence. After an interval of time they returned, announced themselves to be ready to proceed, and then cross-examined the witness, as stated in the stenographer's notes.

The papers and documents referred to by the said witness and put in evidence were as follows:

Originals to be used on the trial of this cause.

Here the defendants rested.

This was all of the evidence in the case. The trial lasted five days, and during the whole — the boxes and bundles of papers hereinbefore described were in the court.

Thereupon the court, at the request of the plaintiff, gave the following charges to the jury:

And the court, at the request of the defendants, gave the following charges to the jury:

The defendants further requested the court to give to the jury the charges following, which the court refused to do:

All of the charges given and refused, having been copied before in the record, are omitted here by agreement of counsel in writing filed in this cause.

To the action of the court in giving each and every of the plaintiff's charges that were given and in refusing each and every of the defendants' charges which were refused the defendants then and there in each instance immediately excepted.

Thereupon the cause was submitted to the jury on the evidence, the instructions of the court, and the arguments of counsel; and the jury having returned a verdict in favor of the defendants for the years 1892, 1893, and 1894 and in favor of the plaintiff as to the taxes demanded for the year 1895, as will more fully appear from the judgment rendered in this cause, the defendants moved for a new trial in the words and figures following, to wit:

Said motion, having been already copied in this record, is here omitted by agreement of counsel in writing filed herein.

Whereupon, on August 6th, 1896, the same being a day in the regular July term, 1896, of said court, the court overruled
568 the said motion of the defendants for a new trial, and the defendants then and there in open court excepted to the said order and judgment of said court, and they tender this their bill of exceptions thereto, which is hereby signed, sealed, and ordered to be made a part of the record in this cause as consolidated, together with the said stenographer's transcribed notes as part thereof.

This the 14th day of September, 1896.

ROB'T POWELL, [SEAL.]
Judge of the 7th Circuit Court, District of Mississippi.

Endorsed: Filed Sept. 16, 1896. F. B. Neal, clerk, by W. J. Brown, Jr., D. C.

Agreement of Counsel.

STATE OF MISSISSIPPI, *Hinds County.*

In the Circuit Court, First District.

WIRT ADAMS, State Revenue Agent, *vs.* YAZOO & MISS. VALLEY R. R. CO. ET AL. — Nos. 2788, 2916, and 3018. Consolidated.

In this case it is agreed that in making up the transcript for the Supreme Court to be used both on the appeal of the plaintiff and

cross-appeal of the defendants the clerk of the circuit court shall omit from such transcript the following documents and instruments of evidence which appear in the record or which were used upon the trial, to wit:

1. All summons in the case.

2. All interrogatories and papers filed for the purpose of taking depositions of witnesses where such depositions were not in point of fact taken.

3. The assessment-rolls made by the railroad commissioners acting as railroad assessors for the year- 1886, 1887, 1888, 1889, 1890, 1891, 1892, 1893, 1894, and 1895.

4. Articles of consolidation of August 12th, 1884, and same of October 25, 1892.

5. Deeds of trust as follows: Illinois Central Railroad Company to United States Trust Company, Sept. 1st, 1892; mortgage of Sept. 18th, 1884, shown in Charter Book, page 571; mortgage of same, shown in Charter Book, page 586; mortgage of August 25, 1885, shown in Charter Book, page 621; mortgage of August 25, 1886, shown in Charter Book, page 65; mortgage of August 25, 1886, shown in Charter Book, page 670; Mortga-e of August 27, 1886, shown in Charter Book, page 592; mortgage of November 27, 1886, shown in Charter Book, page 719; mortgage of April 14, 1893, shown in Charter Book, page 761; mortgage of April 15, 1893, shown in Charter Book, page 788.

6. The original charter of the Mississippi Valley Company, shown in the Illinois Central charter book, but the supplemental charter amendatory must be copied.

7. The original annual reports of the Louisville, New Orleans & Texas railroad in the years 1887, 1888, 1889, 1891, set forth as exhibits to the deposition of R. T. Wilson.

8. The tax receipts which were offered in evidence by the defendants, showing the payment of taxes in cash on the Riverside division, special charter, and on the Helena branch and on the Bayou Sara branch.

9. The affidavits tendered to the various sheriffs and the tax receipts received from such sheriffs under section 5 of the act of March 3rd, 1882, being section 21 of the Mobile & North Western charter in and for the years 1892 to 1895, inclusive.

10. The charters of the Memphis & Vicksburg Railroad Company, of the New Orleans, Baton Rouge, Vicksburg & Mem-
569 phis Railroad Company, and the charter of the Louisville, New Orleans & Texas Railway Company, being the acts of 1882 and 1884, and of the Yazoo & Mississippi Valley Railroad Company.

11. Exhibits 1 & 2 to the testimony of J. M. Edwards on his last introduction.

It is further agreed that in order to save padding the record that none of the documents which the clerk must copy need be copied more than once, and therefore, where the -ame are copied by him as a part of the pleadings or other record of the cause in advance of the trial, such documents may be referred to by the bill of excep-

tions without being copied therein; and, further, that where such documents are copied in the first part of the bill of exceptions filed by the plaintiff they need not be copied into the bill of exceptions filed by the defendants, but may be referred to as a part thereof; and, further, that where such documents are set forth in the bill of exceptions filed by the defendants they need not be copied into the bill of exceptions filed by the plaintiff, but may be referred to as a part thereof.

It is further agreed that the documents indicated above as being those which the clerk shall not copy may be used on the argument and presentation of the case in the Supreme Court by either party by reference to the original documents, and shall be treated and considered as part of the record in the Supreme Court, or else by reference to the charter book of the Illinois Central Railroad Company, or else by reference to the charter book of the Yazoo & Mississippi Valley Railroad Company, or else by reference to the appropriate officially published session laws of the State of Mississippi.

It is further agreed that the aforesaid summons and interrogatories and other papers for the taking of the depositions of certain witnesses, which depositions were never, in fact, taken, and the aforesaid tax receipts, showing the cash taxes paid on certain branches, and the aforesaid affidavits and sheriff's receipts made and tendered and received under section 5 of the act of March 3rd, 1882, cut no figure in this appeal on either side and need not be sent up to the Supreme Court either by copy or in the originals.

CRITZ, BECKETT & JONES,
Att'ys for Plaintiff.
MAYES & HARRIS,
Att'ys for Defendants.

Endorsed: Filed October 19, 1896. F. B. Neal, clerk, by W. J. Brown, Jr., D. C.

570 *Plaintiff's Petition for Appeal.*

THE STATE OF MISSISSIPPI,
Hinds County.

Circuit Court.

WIRT ADAMS, State Revenue Agent, Use, &c., Plaintiff,
vs.
THE YAZOO & MISSISSIPPI VALLEY RAILROAD Co. *et al.*, Defendants.
No. 2788. Consol.

To the clerk of said circuit court:

Petitioner, Wirt Adams, State revenue agent, plaintiff in said above-styled consolidated causes, demands an appeal to the Supreme

Court from the judgment overruling his motion for a new trial rendered at the July term, 1896.

CRITZ, BECKETT & JONES AND
J. A. P. CAMPBELL,
Att'ys for Petitioner.

Endorsed: Filed this 17th day of November, 1896. F. B. Neal, clerk, by W. J. Brown, Jr., D. C.

Defendants' Petition for Appeal.

STATE OF MISSISSIPPI, }
County of Hinds. }

In the Circuit Court, in Vacation.

WIRT ADAMS, State Revenue Agent,
vs.
THE YAZOO & MISS. VALLEY RAILROAD CO. ET ALS. } 2788. Consol.

The petition of The Yazoo & Mississippi Valley Railroad Company and of The Illinois Central Railroad Company, defendants in the above-entitled cause, shows that on the — day of August, 1896, being a day of the July term, 1896, of said court, the said plaintiff, Wirt Adams, State revenue agent, did recover in this court a judgment against the said defendants in the sum of — dollars and the costs of court, whereby the said defendants feel themselves aggrieved, and the said plaintiff having prayed his appeal from said judgment of this court to the supreme court of this State, the said defendants herein pray a cross-appeal from the said judgment of the said circuit court to the said supreme court, at the October term, 1896, and tender herewith their bond in the sum of five hundred dollars, conditioned according to law, and not desiring a supersedeas.

THE YAZOO & MISSISSIPPI VALLEY
RAILROAD COMPANY,
By MAYES & HARRIS, *Attorneys.*
THE ILLINOIS CENTRAL RAILROAD
COMPANY,
By MAYES & HARRIS, *Attorneys.*

Endorsed: Filed November 21st, 1896. F. B. Neal, clerk, by W. J. Brown, Jr., D. C.

571 *Defendants' Appeal Bond.*

STATE OF MISSISSIPPI, }
County of Hinds. }

In the Circuit Court, in Vacation.

WIRT ADAMS, State Revenue Agent,
vs.
THE YAZOO & MISS. VALLEY RAILROAD CO. ET ALS. }

We, the Yazoo & Mississippi Valley Railroad and the Illinois Central Railroad Company, as principals, and R. W. Millsaps and Ed-

ward Mayes, as sureties, do acknowledge to owe Wirt Adams, State revenue agent, the sum of five hundred dollars; for the payment of which, well and truly to be made, we do hereby bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Witness our signatures this the 20th day of November, 1896.

The condition of the above obligation is such that whereas the above-named principals have prayed a cross-appeal from the judgment of this court heretofore rendered at the July term, 1896, against the said defendant in the above-entitled cause: Now, therefore, if the said defendants shall pay all the costs of said cross-appeal in case the judgment of the said court be affirmed as to said cross-appeal, then this bond shall be void; otherwise to remain in full force and effect.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY,
By MAYES & HARRIS, *Attorneys.*
THE ILLINOIS CENTRAL RAILROAD COMPANY,
By MAYES & HARRIS, *Attorneys.*
R. W. MILLSAPS.
EDWARD MAYES.

Endorsed: Approved November 21st, 1896. F. B. Neal, clerk, by W. J. Brown, Jr., D. C. Filed November 21st, 1896. F. B. Neal, clerk, by W. J. Brown, Jr., D. C.

572 *Certificate.*

STATE OF MISSISSIPPI, }
Hinds County. }

I, F. B. Neal, clerk of the circuit court in and for said county and State, hereby certify the foregoing 434 pages, the first volume containing 249 pages and the second volume containing 185 pages, to contain a full, true, and correct transcript of the record of the cause stated in the caption (excepting such papers and documents as have been omitted by agreement of counsel) as the same remains on file and of record in my office, together with a copy of the appeal bond filed in said cause.

Given under my hand and the seal of said court this 2nd day of December, 1896.

[SEAL.]

F. B. NEAL, *Clerk,*
By W. J. BROWN, JR., *D. C.*

The foregoing record endorsed: Filed December 5th, 1896. E. W. Brown, clerk, by C. C. Campbell, D. C.

573 The State of Mississippi to the sheriff of Hinds county, in said State:

You are hereby commanded to summon The Yazoo & Mississippi Valley Railroad Company and The Illinois Central Railroad Company, appellees, or Edward Mayes, their attorney of record, if th- be

found in your county, to appear before the supreme court of the State of Mississippi, at the capitol, in the city of Jackson, in the county of Hinds and State aforesaid, on the 28 day of November, A. D. 1896, then and there to answer the appeal of Wirt Adams, State revenue agent, use, &c., in cases No. 2788, 2916, and 3018, styled Wirt Adams, State revenue agent, use, &c., *vs.* said Yazoo & Mississippi Valley Railroad Co. *et al.*, from a judgment of the circuit court of the county of Hinds, in said State, rendered against said appellant on the — day of July, A. D. 1896, at the July term, A. D. 1896, of the said circuit court, in favor of said appellees, for the taxes — 1892, 1893, & 1894; and have then there this writ.

Given under my hand and the seal of said circuit court, at my office, in Jackson, Miss., and issued this the 17th day of November, A. D. 1896.

F. B. NEAL, *Circuit Clerk*,
By W. J. BROWN, JR., *D. C.*

Sheriff's Return.

Rec'd Nov. 17, '96.

W. T. RATLIFF, *Sh'ff*,
By L. F. CHILES, *D. S.*

Executed personally on Mayes & Harris, att'ys, by handing them a copy hereof, this Nov. 17, '96.

W. T. RATLIFF, *Sh'ff*,
By L. F. CHILES, *D. S.*

Filed Dec. 5, 1896.

E. W. BROWN, *Clerk*,
By C. C. CAMPBELL, *D. C.*

574 The State of Mississippi to the sheriff of Hinds county, in said State:

You are hereby commanded to summon Wirt Adams, State rev. agent, use, &c., appellee, or Mess. Critz & Beckett, his attorney-in fact or of record, if to be found in your county, to appear before the supreme court of the State of Mississippi, at the capitol, in the city of Jackson, in the county of Hinds and State aforesaid, on the 1st Monday of December, A. D. 1896, then and there to answer the appeal of the Yazoo & Mississippi Valley R. R. Co. & the Illinois Central R. R. Co. from a judgment of the circuit court of the county of 1st dist. Hinds, in said State, rendered against said appellant on the 25th day of July, A. D. 1896, at the July term, A. D. 1896, of said circuit court in favor of said appellee for $88,130.08, and have then there this writ.

Given under my hand and the seal of said circuit court, at my office, in Jackson, Miss., and issued this the 21 day of November, A. D. 1896.

F. B. NEAL, *Circuit Clerk*,
By W. J. BROWN, JR., *D. C.*

Endorsed: Rec'd Nov. 21, '96. W. T. Ratliff, sh'ff, by L. F. Chiles, D. S. Executed personally on R. C. Beckett, of Critz & Beckett, by handing him a copy hereof this Nov. 21, '96. W. T. Ratliff, sh'ff, by L. F. Chiles, D. S. Filed Dec. 5, '96. E. W. Brown, clerk, by C. C. Campbell, D. C.

575 THE STATE OF MISSISSIPPI,
From Hinds County.

Supreme Court.

WIRT ADAMS, State Revenue Agent, Use, &c., Appellant,
v.
Y. & M. V. R. R. Co., Appellees.

Assignment of Errors by Appellant.

Now comes the appellant and assigns for error in this cause as follows:

1. The court below erred in overruling the demurrer to the plea.
2. In sustaining the demurrer to the 4th, 5th, 6th, 7th, 8th, 12th, and 13th replications.
3. In overruling plaintiff's objections to the testimony of J. C. Welling and of B. C. Pfuts and of William Starling and of —— Ridgeley and of J. M. Edwards both on his first and second examination.
4. In refusing charges 1–16, inclusive, for plaintiff.
5. In giving the charges given for defendants.
6. In overruling plaintiff's motion for a new trial.
7. Other reasons to be assigned at the hearing.

CRITZ & BECKETT &
J. A. P. CAMPBELL,
Attorneys for Appellants.

Endorsed: 8629. Filed Dec. 5, 1896. E. W. Brown, clerk, by C. C. Campbell, D. C.

576 STATE OF MISSISSIPPI,
County of Hinds, First District.

In the Supreme Court, at the October Term, 1896.

WIRT ADAMS, State Revenue Agent, Appellant,
v.
YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY ET AL., Appellees,

and

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY ET AL., Cross-appellants,
v.
WIRT ADAMS, State Revenue Agent, Cross-appellee.

Assignment of Errors by Cross-appellants.

Come the cross-appellants herein, The Yazoo & Mississippi Valley Railroad Company and The Illinois Central Railroad Company, and for error herein suggest as follows:

The court erred in the following particulars:

1. In overruling the demurrers of the cross-appellants to the second, third, ninth, tenth, and eleventh replications of the plaintiff below severally.

2. In admitting in evidence the assessment-rolls of and for the years 1886, 1887, 1888, 1889, 1890, 1891, 1892, 1893, 1894, & 1895 severally.

3. In admitting in evidence the mortgage deed made by the Illinois Central Railroad Company in 1892.

4. In admitting in evidence the lease made in 1888 by the Yazoo & Mississippi Valley Railroad Company to the Illinois Central railroad.

5. In admitting in evidence documentary testimony and testimony of witnesses severally of the acquisition and holding of stocks as follows: Stocks of the Yazoo & Mississippi Valley Railroad Company and of the Mississippi Valley Company by the Illinois
577 Central Railroad Company and stocks of the L., N. O. & T. Railway Company by the Mississippi Valley Company severally.

6. In sustaining plaintiff's objections to the questions propounded by cross-appellants to the witnesses Welling, Wilson, and Edwards severally in respect to the ability of the L., N. O. & T. Railway Company and the Yazoo & Mississippi Valley Railroad Company severally to declare and pay an eight per cent. dividend in and for the years 1886 to 1892 respectively.

7. In overruling the objection of the cross-appellants to the question propounded by plaintiff to the witness Welling as to whether the L., N. O. & T. railroad from Memphis to New Orleans and the Illinois Central railroad from Memphis to New Orleans were competing lines.

8. In allowing plaintiff to make inquiry into and to introduce testimony as to the actual cost of the railroad to the construction company and the reasonable — of the same.

9. In allowing plaintiff to make inquiry into the connection of R. T. Wilson with the Financial Improvement Company and his interest in the same.

10. In allowing plaintiff to make inquiry into the operation of trains continuously over the main line of said road and its branches and over the "exempt" and the "non-exempt" portions of the road.

11. In overruling the objections of cross-appellants to the depositions of Gibson and of Elliott respectively.

12. In refusing the peremptory instruction asked by the cross-appellants.

13. In refusing the peremptory instruction asked by the Illinois Central Railroad Company.

14. In giving the instructions for the plaintiff numbered 17, 18, 19, 20, 20½, 21, 22, 23, 24, 25, 26, and 27 respectively and severally.

15. In overruling the motion of cross-appellants for a new trial.

578 16. In awarding interest on the taxes recovered for the year 1895.

17. In other particulars to be assigned at the argument.

Respectfully submitted.

MAYES & HARRIS,
Att'ys for Cross-appellants.

Endorsed: Filed Dec. 5, 1896. E. W. Brown, clerk, by C. C. Campbell, D. C.

And on December 8th, 1896, the following order was entered:

WIRT ADAMS, State Revenue Agent,
v.
YAZOO AND MISSISSIPPI VALLEY RAILROAD CO. ET AL. } 8629.

Argued orally by Messrs. J. A. P. Campbell and R. C. Beckett for the appellant and Mr. Edward Mayes for appellees, and submitted on briefs by Messrs. J. A. P. Campbell and Critz & Beckett for appellant and Messrs. Mayes & Harris for the appellees.

And on April 12th, 1897, the following order was entered:

WIRT ADAMS, State Rev. Ag't,
v. & ats.
Y. & M. V. R. R. Co. } 8629.

Remanded to the docket for reargument.

And on April 14, 1897, the following order was entered:

WIRT ADAMS, State Revenue Agent,
v. & ats.
YAZOO AND MISSISSIPPI VALLEY RAILROAD CO. ET AL. } 8629.

Argued orally by Messrs. J. A. P. Campbell and R. C. Beckett for the appellant.

And on April 15, 1897, the following order was entered:

WIRT ADAMS, State Revenue Agent,
v. & ats.
YAZOO AND MISSISSIPPI VALLEY RAILROAD CO. ET AL. } 8629.

Argued orally by Mr. R. C. Beckett for appellant and Mr. Edward Mayes for the appellees.

579 And on April 16th, 1897, the following order was entered:

WIRT ADAMS, State Revenue Agent,
v. & ats.
YAZOO & MISSISSIPPI VALLEY RAILROAD CO. ET AL. } 8629.

Argued orally by Mr. Edward Mayes for appellees.

And on April 17th, 1897, the following order was entered:

WIRT ADAMS, State Revenue Agent,
v. & ats.
YAZOO AND MISSISSIPPI VALLEY RAILROAD CO. ET AL. } 8629.

Argued orally by Mr. F. A. Critz for appellant and submitted on briefs by Messrs. Critz & Beckett and J. A. P. Campbell for the appellant and cross-appellee, and Messrs. Mayes & Harris for appellees and cross-appellants.

And on May 17th, 1897, the following order was entered:

WIRT ADAMS, State Revenue Agent,
v. & ats.
YAZOO & MISSISSIPPI VALLEY RAILROAD CO. ET AL. } 8629.

Ordered that this cause be remanded to the docket for a reargument, and that the cause be continued to the next term of this court.

580 STATE OF MISSISSIPPI,
County of Hinds, First District.

In the Supreme Court, at October Term, 1897.

YAZOO & MISSISSIPPI VALLEY R. R. CO. ET AL.
v.
WIRT ADAMS, State Revenue Agent. } On Cross-appeal.

The Yazoo & Mississippi Valley R. R. Co. and The Illinois Central R. R. Co., cross-appellants, assign the following additional point for error:

1. Court below erred in allowing interest on the taxes recovered in entering judgment therefor.

Respectfully submitted.

MAYES & HARRIS,
Att'ys for Cross-app'll'ts.

Endorsed: Filed Dec. 13, 1897. E. W. Brown, clerk, by C. C. Campbell, D. C.

581 On December the 23rd, 1897, the following order was entered:

WIRT ADAMS, State Rev. Ag't,
v.
YAZOO & MISSISSIPPI VALLEY RAILROAD CO. ET AL. } 8629.

Argued orally by Messrs. J. A. P. Campbell and R. C. Beckett for the appellant, and Mr. Edward Mayes for the appellees.

And on December the 24th, 1897, the following order was entered:

WIRT ADAMS, State Revenue Agent,
v.
YAZOO & MISSISSIPPI VALLEY RAILROAD CO. ET AL. } 8629.

Argued orally by Mr. Edward Mayes for the appellees, and Mr. F. A. Critz for the appellant, and submitted on briefs by Messrs. J. A. P. Campbell and Critz & Beckett for the appellant, and Messrs. Mayes & Harris for the appellees.

And on the 10th day of June, 1898, the following final judgment was entered in said cause:

WIRT ADAMS, State Revenue Agent,
v. & ats.
YAZOO & MISSISSIPPI VALLEY RAILROAD CO. ET AL. } 8629.

This cause having been submitted at a former term of this court on the record herein from the circuit court of Hinds county, 1st district, and this court, having sufficiently examined and considered the same and being of opinion that there is error therein, doth order and adjudge that the judgment of said circuit court rendered in this cause at the July term thereof, A. D. 1896, on the 25th day of July, 1896, be, and the same is hereby, reversed, both on the appeal and the cross-appeal, and cause remanded, and that the appellees do pay the costs of this appeal, to be taxed, &c.

582 And on June 30, 1898, the following was filed:

WIRT ADAMS, State Rev. Ag't, }
v. } 8629.
Y. & M. V. R. R. CO. ET AL. }

Summary of the Court's Holdings.

WHITFIELD, *J.*:

First. Because of the inconsistent, compromise verdict, the judgment is reversed, and cause remanded, on the appeal and the cross-appeal.

Second. The Lambert case is *res adjudicata* as to the taxes for the year 1892 on all the property that originally belonged to the N. J. & Columbus R. R. Co., which was in Adams county, and being *res adjudicata*, it is, as to that, beyond our power to overrule it.

Third. The Lambert case is not *res adjudicata* as to any of the other taxes here involved, on the property that once belonged to the N. J. & Columbus R. R. Co., or on any of the other property here involved.

Fourth. The Lambert case did decide that § 180 of the constitution of 1890, did not cut off the exemption from taxation asserted in this case, on the ground that this is a case of mere merger, and not of consolidation; that the resultant corporation was not a new corporation, and applied the principles of Whitworth *v.* Tennessee, 117 U. S.—which is, beyond all controversy, a clear case of simple merger, and not of consolidation, taking merger proper to mean the absorption of one corporation, by another, the autonomy of the absorbing corporation being preserved, without the formation of a new company, and consolidation proper to mean such union of two corporations as results in a third new corporation, under whatever name. We hold that the clear legislative purpose was—(using the words in the sense indicated)—*consolidation, and not merger*, yet consolidation in such sense as to result in the formation of a new corporation; and besides, that what was *actually* done here was necessarily the creation of a new corporation, and not mere merger; that, hence, the principles of the Whitworth case do not apply, but the principles of Keokuk *v.* Mo., 152 U. S., do apply; that, consequently the constitution of 1890, § 180, cut off the exemption; that the Lambert case cannot be upheld, and should be, and is hereby overruled. If it be conceded that the purpose aimed at by the articles of agreement of the R. R. Co., was mere merger, it is not to be permitted that the Co. could overthrow the purpose of the legislature to authorize consolidation and not merger, nor to name that, merger, which the actual things done show, was consolidation. Consolidation is a privilege, to be exercised or not—not a contract. § 181 of the constitution, and § 279 of the schedule thereto, merely mean that so long as corporations existing at the adoption of the constitution having *then* exemptions, or other "rights," should have them "continue," so long as such corporations retained the *precise corporate existence they then had.* The new corporation here, takes

its life as from a new grant of corporate life from the date of the consolidation.

But we hold further, that the 21st section of the Mobile & Northwestern R. R. Co.'s charter was an effort to secure—as is expressly recited in its face—an irrepealable grant of exemption, and violative of the constitution of 1869, § 13, art. 12, and § 20, art. 12, even as construed in Miss. Mills *v.* Cook, 56 Miss. The exemption claimed in Miss. Mills *v.* Cook had no irrepealable feature.

But again, we hold, that such section violated said clauses of said constitution, even had it not been irrepealable. Miss. Mills *v.* Cook, turned upon some supposed magical distinction in the particular connection, between the words "subject" and "subjected," and sacrificed a great constitutional principle to a piece of mere verbal jugglery. Precisely the same clause, using precisely the same word "subject" occurs in the constitutions of Florida and Arkansas and the supreme courts of both States held, in precisely identical contention, that the clause forbade exemption from taxation of "corporations for pecuniary profit," and both of these decisions were on this identical proposition, affirmed by the U. S. Supreme Court. St. Louis, &c., *v.* Berry, 41 Ark., 509; 113 U. S., 475; and L. & N. R. R. Co. *v.* Palmes, 19 Fla., 231, and 109 U. S., 253, 254. And this construction is reaffirmed in Keokuk, &c., *v.* Missouri, 152 U. S., 310, 311. The word "subject" should have been given its plain, popular signification, occurring in the connection it did, in a great popular instrument—the Constitution—the very signification attached to it by the Supreme Court of the United States. We prefer to align ourselves now with that court in this matter, and overrule Miss. Mills *v.* Cook on that point.

It passes all understanding how the court could gravely hold, in Miss. Mills *v.* Cook, that a solemn declaration in the constitution of a State—its organic law—formulating fundamentally great lines of public policy—that "the property of all corporations for pecuniary profit" should be subject to taxation *the same as that of individuals*, added no new feature, but merely stated what was the law before and without the declaration, to wit: that the "property of corporations for pecuniary profit" was *liable* to taxation. All the world knew that before!

583 Judge Campbell, in his dissenting opinion, in Beck *v.* Allen, 58 Miss., at p. 177, most wisely said: "Subtilty and refinement and astuteness are not admissible to explain away an expression of the sovereign will. The framers of the Constitution, and the people who adopted it, must be understood to have intended the words employed in that sense most likely to arise from them on first reading them." Doubtless the rule of *stare decisis* is a wise rule, and one not likely to be infringed. But instances justifying its disregard find manifold illustration in the reports. And surely, stronger reasons for not applying it can never arise than, where, as here, to disregard it, restores to the sovereign the exercise of one of the highest attributes of sovereignty—the taxing power, and merely requires that corporations for pecuniary profit, constantly demanding and securing the protection of the Government, shall also bear

their just share of the burdens of taxation. We feel, therefore, confident of the propriety of overruling, as we now expressly do—the Lambert case, and the case of Cook *v.* Miss. Mills, *supra*. There are other views leading to the same conclusion, which we may embrace in the opinion yet to be filed. What we have said, is a mere summary of the holdings set forth.

Reversed and remanded.

WOODS, *C. J.*, dissents and submits this mere outline of the grounds of his dissent. His dissenting opinion will be filed after the opinion of the majority of the court shall have been prepared and filed.

1. The decision of this court in the case of Natchez, Jackson and Columbus Railroad Co. *v.* James W. Lambert, tax collector, 70 Miss., is *res adjudicata* as to the taxes sought to be recovered on the property of the N., J. and C. R'd Co. for the years 1891–'2. My brethren admit that that decision is *res adjudicata* as to the property of the railroad in the county of Adams. How they distinguish between the property in Adams county and that in the other counties through which the line of that railroad runs, is utterly incomprehensible. The question in the case was not whether the railroad's property in Adams county was exempt from taxation, but whether all the property of that railroad was liable for taxes.

2. The decision in the Lambert case is *res adjudicata* as to claim now propounded by the State for taxes on all the property of the N., J. and C. railroad for the subsequent years 1893, 1894 and 1895. The parties to the former litigation and those to the present are the same, the issue—the question—is the same, the exemption or non-exemption of that railroad from taxation, and under all authorities in such case, a prior judgment is *res adjudicata*, and is a good defense to a second suit. But this very question was determined, in perfect accord with the foregoing view, by the Supreme Court of the United States in the case of New Orleans *v.* Citizens' Bank, 167 U. S., 571. No opinion of any court of last resort holding a contrary view has been unearthed by any one after most exhaustive search.

3. As to the property, other than that of the Natchez, Jackson and Columbus railroad, for which exemption is claimed in this suit, the sound doctrine of *stare decisis* is of striking application, under the decision of the Lambert case. That decision established a rule of property, and under the view entertained by my brethren, that rule is utterly disregarded, the rights of the defendant thereunder denied any recognition, and its property deliberately burdened in an enormous sum.

4. It may well be contended that, as to *all* the property of the Yazoo and Mississippi Valley railroad, for which exemption is claimed, the Lambert decision is *res adjudicata*. The parties in the Lambert suit and this are the same, and the issues the same. The questions in the Lambert case were, has the consolidation by merger of the L., N. O. & T., with the Y. and M. V. R'd (the N., J. & C. having been theretofore absorbed by the L., N. O. and T., by pur-

chase) destroyed the exemption claimed by the L., N. O. and T. railroad on its property; and was that exemption conferred by the charter valid, or violative of the constitution of 1869? Those are exactly the questions involved in the case before us now, and in a controversy between the same parties.

5. But that all the property of all of the railroads entering into and forming the Yazoo and Mississippi Valley railroad, whose charters gave them the exemption now claimed, should be protected from the imposition of taxes amounting to a half million of dollars, or more, under the righteous rule of *stare decisis*, seems to be too clear to the judicial mind to require argumentation. Not only the Lambert case, decided more than five years ago, but also the case of Mississippi Mills *v.* Cook, 56 Miss., decided more than twenty years ago, declared the exemptions claimed repealable at the will of the legislature, and not violative of section 13, article 12, constitution of 1869. In both cases, the charter exemptions were carefully considered and their character declared and the constitutional provisions, with which they were supposed to conflict, expounded and clearly interpreted.

Since the decision of Cook's case, which, besides defining the character of the exemptions claimed, then and now, and dis-
584 tinctly declaring them not in violation of the constitution then in force declared a rule of property, the charters were granted under which the Y. & M. V. R'd Company here claims the exemptions set up. It was undoubtedly, in large part, because of these exemption features in the charters thus granted, after the decision in the Cook case, and in reliance upon that decision, that the appellees constituent members, having such charter exemptions, came into the State, constructed long lines of railway and expended millions of their money. While the railroads knew, of course, that their exemptions were subject to repeal, they could not have foreseen that this repeal would be made, by judicial legislation. If ever there was a case in which the doctrine of *stare decisis* should be observed, this is the case.

It is worthy of serious consideration that the majority of the court should pay deference to the opinions of two courts of sister States in constructing the words "subject to taxation," contained in the constitutions of their States, and treat with almost contemptuous indifference the opinion of the very remarkably able court of this State which, twenty years ago, after elaborate consideration, in separate opinions of each of the judges, differently interpreted those words, all of the judges thoroughly agreeing that this exemption was not in conflict with that provision of the constitution of 1869, which declared that the property of corporations for pecuniary profit shall be subject to taxation the same as that of individuals. The spectacle thus presented to the legal mind is both humiliating and amazing, as it strikes me.

6. It will be difficult to harmonize the opinion of the majority of the court with the saving clause of the 181 section of our constitution of 1890. "Exemptions from taxation to which corporations are legally entitled at the adoption of this constitution, shall remain in

full force and effect for the time of such exemptions as expressed in their respective charters, or by general laws, unless sooner repealed by the legislature" is the clear and explicit language of that 181 section. Undoubtedly, under the case of Miss. Mills *v.* Cook, and numerous later decisions following and reaffirming that case, this railroad company was legally entitled to the exemption claimed. The highest court in the State had so declared, and this saving clause was inserted by the constitutional convention with full knowledge of the Miss. Mills case, and those following it, and the exemption has never been repealed by the legislature.

Can this court do that by judicial legislation which the constitution declares shall be done by the legislature only?

7. The Lambert and the Cook decisions are themselves supported by reason and authority, and should not be overruled. It is lamentable if no opinions, however supported in reason or by authority, and no matter what rights may have arisen under them, are to be permitted to stand simply because not in agreement with the personal views of succeeding judges. No greater reproach can be fixed upon the judiciary, no greater calamity can befall the State than to have it understood that, with every change in the mere membership of the court of final resort, the law as solemnly declared by former courts, composed of different membership, is to be unsettled, and again and again unsettled, by every succeeding court, simply to enable new judges to exploit their peculiar views. In such case, all notion of stability and fixedness is gone, and absolute uncertainty and endless confusion will be introduced into our jurisprudence.

From such a condition I recoil, and am therefore compelled to dissent from the conclusion reached by my brethren. I have the profoundest respect for my brethren, and I disclaim any desire or purpose to reflect upon them or their course, in any degree whatever. But I must follow the voice of my own conscience, and the command of my own judgment.

585 STATE OF MISSISSIPPI:

In the Supreme Court.

WIRT ADAMS, Revenue Agent,
v.
YAZOO & MISSISSIPPI VALLEY COMPANY ET AL. } 8629.

Comes The Yazoo & Mississippi Valley Railroad Company and The Illinois Central Railroad Company, appellees and cross-appellants herein, and move the court to withhold the mandate herein until they can have a reasonable time to present a suggestion of error in the opinion herein rendered.

MAYES & HARRIS,
For the R. Road Companies.

Endorsed: Filed June 23rd, 1898. E. W. Brown, clerk.

And on the 25th day of June, 1898, the following order appears:

WIRT ADAMS, State Revenue Agent,
v.
YAZOO & M. V. R. R. CO. ET AL. } 8629.

Came counsel for appellees and, by leave of court, withdrew their motion to withhold mandate.

586 And on June 27, 1898, the following suggestion of errors was filed:

STATE OF MISSISSIPPI,
County of Hinds, First District.

In Supreme Court, at the March Term, 1895.

WIRT ADAMS, State Revenue Agent, Appellant,
v.
YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY ET AL., Appellees,

and

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY ET AL., Cross-appellants,
v.
WIRT ADAMS, State Revenue Agent, Cross-appellee.

Suggestion of Errors.

Come The Yazoo & Mississippi Valley Railroad Company and The Illinois Central Railroad Company, the appellees and the cross-appellants in the cause above entitled, and respectfully suggest error in the decision of the court herein rendered on the 21st inst. in said cause, and as grounds of their suggestion submit as follows, to wit: We shall not undertake, in this suggestion of errors, to go into the minute details of the very many questions which have been presented in this cause and were argued *in extenso* in the printed brief which we have filed heretofore, but shall content ourselves with indicating concisely the salient features of fundamental error which seem to us to have been committed by the court herein.

The decision of the court, as announced in its outline opinion, filed in this cause in conformity to the statutes of this State, in the construction announced in regard to the effect of the consolidation between the Yazoo & Mississippi Valley Railroad Company and the Louisville, New Orleans & Texas Railway Company, and in regard to the effect of section 180 of the constitution of Mississippi and section 279 thereof upon such consolidation and upon the privilege at that time enjoyed by the Louisville, New Orleans
587 & Texas Railway Company under and by virtue of section 5 of the act of 1882, and the overruling of the Lambert case, and the overruling of the case of The Mississippi Mills *v.* Cook, 56

Mississippi, we maintain, in brief, to be a violation of the rights guaranteed to the said railroad companies by the Constitution of the United States.

We claim that those State constitutional provisions so interpreted and this decision in its effect impair the obligation of the contract rights of said companies, their creditors & stockholders, and also that it deprives said companies, their creditors & stockholders, of their property without due process of law, and also that it denies to them the equal protection of the law, each of which is forbidden by the Constitution of the United States.

In order to put the court in possession of our views upon this subject, especially in its relation to the Constitution of the United States, we call the attention of the court as follows briefly to the legislative and judicial history of these transactions, all of which more fully appears in the record before the court:

On the first day of November, 1869, the constitution of the State of Mississippi, known as the constitution of 1869, became operative. One of its sections was section 13, art. 12, as follows: "The property of all corporations for pecuniary profits shall be subject to taxation the same as that of individuals."

Shortly thereafter, in 1870, the legislature of this State passed the charter of the Mobile & Northwestern Railroad Company, which contained the celebrated section 21 thereof which is repeatedly set forth in the record herein.

At the same session of the legislature section 21 of the Mobile & Northwestern charter was, by another act of the legislature, made applicable to various companies; amongst others, to the Memphis & Vicksburg Railroad Company and the Natchez, Jackson & Columbus Railroad Company.

At the April term, 1878, twenty years ago, this court de-
588 cided the celebrated case of The Mississippi Mills *v.* Cook, which in its present decision the court now undertakes to overrule. In that case it was determined that section 13 of article 12, above quoted, did not mean that the property of corporations should be taxed and it did not mean to announce the abstract proposition that such property was taxable, but that it did mean and meant only that such property should always remain subject to the power of the legislature to impose taxes upon it and such power should not be contracted away, but that exemptions might be granted, subject always to the power of the legislature to repeal such exemption at any time it saw proper.

This case was not only decided twenty years ago, but it has been expressly followed, and the principle of it has been recognized and applied in numerous cases scattered through the twenty years which have followed its rendition until now. See McCulloch *v.* Stone, 64 Miss., decide- at the October term, 1886; R. R. Co. *v.* Thomas, 65 Miss., October term, 1888; Bank *v.* Worrell, 67 Mississippi, October term, 1889; Attalla County *v.* Kelley and Railway Co. *v.* Taylor, 68 Miss., October term, 1890; Railroad Company *v.* Lambert, 70 Mississippi, March term, 1893.

In the year 1880 a new code was adopted in the State of Missis-

sippi, on- of the provisions of which subjected all the railroads in the State to taxation.

On March 3rd, 1882, was passed the act which constitutes the the charter of the Louisville, New Orleans & Texas Railway Company, with an amendment adopted in March, 1884, and said act of 1882 contained within it as section 5, but as an independent and origiaal enactment, the 21st section of the Mobile & Northwestern charter.

At the same session of the legislature in 1882 was also incorporated the railroad company which we know as "the Baton Rouge Company." The Louisville, New Orleans & Texas Railway Company was formed in 1884 by the consolidation of the Memphis & Vicksburg Railroad Company and the Baton Rouge com-
589 pany with a Tennessee company and a Louisiana company under and by virtue of the acts aforesaid. The construction of their railroad was begun in the summer of 1882, and the through connection between the various working gangs was made in the latter part of the year 1884.

In the year 1890 the act of that year was passed whereby the Natchez, Jackson & Columbus Railroad Company was authorized to sell its franchises, rights, etc., and in said year ir did sell the same by deed of conveyance to the Louisville, New Orleans & Texas Railway Company.

Then came the adoption of the existing constitution of Mississippi, including sections 180 and 279 aforesaid, in the year 1890, on Nov. 1st. Afterward, in July, 1892, the Illinois Central Railroad Company purchased first-mortgage bonds of the L., N. O. & T. to the amount of thirteen millions and second and third mortgage bonds to the amount of eight millions of each, and the Miss. Valley Company purchased the stock of the L., N. O. & T. as set forth in this record.

Afterward, in October, 1892, the Louisville, New Orleans & Texas Railway Company and the Yazoo & Mississippi Valley Railroad Company were consolidated as is set forth in the declaration in this cause and appears in the record herein, such consolidation being the consolidation in question.

Thereafter, in the latter part of the year 1892, the sheriff of Adams county, in the State of Mississippi, undertook to collect privilege and ad valorem taxes on the property of the Natchez, Jackson & Columbus Railroad Company, and his attempt was resisted by injunction filed by the Yazoo & Mississippi Valley Railroad Company (and one of these parties) and by the Natchez, Jackson & Columbus Railroad Company, such bill being the suit known as the Lambert suit and now overruled in this cause.

That suit was decided adversely to the railroad companies in the court below, but on appeal to this court, by its decision rendered at the March term, 1893, this court held that the privilege con-
590 ferred upon the Natchez, Jackson & Columbus Railroad Company, to which section 21 of the Mobile & Northwestern Railroad Company had been likewise extended, was not lost, either by the sale of 1890 or by the consolidation of 1892, and in the very opinion which this court has now rendered the court ad-

mits the fact that the Lambert case did decide that the consolidation of 1892 was a merger merely, and that the point was decided as we here now stated, and the court now undertakes to avoid the operation of that decision, not by qualifying and discriminating, but by the overruling of the Lambert case expressly.

In holding that the privilege conferred on the Louisville, New Orleans & Texas Railway Company was an exemption from taxation subject to the 13th section of article XII of the constitution of 1869, and that the provisions of the constitution of 1890 had anything to do with it (that is, the provisions on taxation of corporate property), and overruling the Mississippi Mills case, the court is impairing the obligation of a contract, indeed several contracts, protected by the Federal Constitution.

Section 21 of the charter of the Mobile and Northwestern Railroad Company did not grant an exemption from taxation. It did not even profess to do so. The scheme was of entirely different character. It proceeded on the theory of a regular assessment for taxation and a liability for taxes imposed by that assessment, which liability so incurred might, under certain conditions precedent, be discharged or paid in a certain way—that is, by the company so liable to the taxes to those creditors of the company whose debts were construction debts, instead of being paid to the usual collecting officers of the State and of the counties and towns. The company was not relieved from paying taxes; it was only authorized to pay in a certain way; they were to be paid none the less. As the act itself recited, the State expected to receive (as it has received) great benefit from the construction of the road in the Mississippi bottom, and it was willing to aid in the construction. The aid so
591 extended was, in effect, exactly the same as if the State had made an appropriation of money to be paid each year equal to the total taxes for which the company would be liable for twenty-five years and *ahd* coupled the appropriation with a condition that the money so appropriated should be by the company applied to the payment of its construction debt. Why not the State give an aid and measure the extent of that aid by the amount of taxes payable by the company? If that was the desire of the legislature, why, then, require the vain and useless thing of a collection of the money in fact and a subsequent independent repayment of an equal sum to the company? Nor is that all. If the appropriation had been so framed as to require the actual collection of the money first and its subsequent repayment to the company for the purposes indicated, two other troubles would have existed which were avoided by the shape given to the law: 1, the company receiving the appropriation might or might not in good faith afterwards apply the money to the payment of construction debt, while — the act as framed the payment to the construction debt had actually to be made by the company before ever it could get its tax receipts from the State collection officers; and, secondly, the statute was so drawn as to place the incidence of the aid so extended not upon the State alone, as would have been the case if the appropriation had been made payable from the State treasury in a sum equal to the total taxes, but upon the

State and the counties and towns benefitted in proportion to the benefit conferred.

We insist that it was not an exemption from taxation at all, but that the actual payment in cash of the taxes assessed was required and has been made. Only the taxes were made payable in an unusual direction and in an unusual way, which was entirely within the power of the legislature. In fact, the State was parting with nothing by this scheme. There was no road, and what it gave was contingent entirely on the road's building. Financially it was only
the postponement of a profit until a future day in order to
592 secure the creation of what yield the profit after that day and
might never yield it otherwise; and as to the method of the disbursement of the amount annually appropriated in aid, through the company itself, that was sagacious and shrewd, because it secured the company's special knowledge and assistance in the determination of what were true construction debts and in the amount of those debts which were to be extinguished by the appropriation made.

The scheme and agreement, then, was not one of exemption. It was one of payment in special mode to certain indicated payees, in whose aid, as well as in the aid of the company, the State made what was in effect a standing appropriation for twenty-five years, and the provisions about exemptions in the constitution of 1869 and 1890 and the Mississippi Mills case had nothing whatever to say to it.

Suppose it to be true that the matter was given that shape in or— to avoid the constitutional provision of 1869, what difference does it make? This court cannot impute dishonest motives to the legislature. If the plan selected was not an exemption, if it was not a surrender by the legislature of its taxing power, what difference what were the motives that led the legislature to do this thing? The thing was not immoral in itself. It was eminently wise and has proven most fortunate in its result. What good reason is there why, if the legislature could not do one thing in aid of the project, it should not do something else? Is the court ready to hold that because the constitution may prohibit the legislature to lend aid in a certain way it is thereby debarred the *the* right to lend him aid in any way? Yet this is the effect of the court's argument.

We know of no reason and of no decision, even in States where the legislature has no right to make an exemption in aid, why or that it may not pay money out of the treasury in a lump sum before the improvement is begun in order to secure it or pay out money annually during the construction. What greater legal objection can
there be or what constitutional obstacle to the legislature's
593 securing a public benefit by paying for it out of the public
treasury than to its buying anything which the public needs? If the State had agreed to appropriate a bonus of $1,000,000 a year for twenty-five years on condition of the building and continued operation of the railroad, it would unquestionably have been valid; and, if so, how can the cautionary details that the amount appropriated is made variable, fixed by the amount of taxes payable (that is

in proportion to the values created by the road) and is made payable to a particular class of persons who have a great equity and made payable in a certain mode—how can those cautionary and wise details materially affect the power of the legislature or the essence of the transaction? To hold that it does is to hold that what the legislature may do without safeguards is unconstitutional if safeguarded.

The court will remember that this statute was not pleaded as a statute of exemption. This is manifest from a reference to the plea itself in the record. The plea is one of payment made in accordance with the statute, and the plaintiff's third replication to that plea distinctly put in issue the fact of payment of such sums of money during the current years respectively.

The effect of the court's present decision is to make the company pay those taxes twice, first to the construction creditors under the statute, secondly to the revenue agent under the proposed judgment herein.

We therefore claim that not only does the decision impair the obligation of our contract by converting a contract of continuing appropriation into an exemption, and thereby bringing it under a constitutional rule not properly applicable to it, but also it is a deprivation of property without due process of law and a denial of equal protection of the law by forcing by the company of the payment of taxes already paid in conformity to the statute.

The court will remember that the statute spoken of above as section twenty-one of the Mobile & Northwestern charter was
594 afterwards enacted independently in 1882 as section V of the Louisville, New Orleans and Texas charter, and it is referred to here under the designation of section 21 only because that was the first appearance of the statute in our legislature and was adopted in the L., N. O. & T. charter under that designation.

We now pass to a different proposition: Suppose it be true that section 21 (sec. V of the act of 1882) be, as this court treats it, in fact, an exemption and liable to be dealt with as such, then still we maintain that the decision of this court in overruling the Mississippi case and in condemning it by the provisions of the constitution of 1869 and by the provisions of the constitution of 1890, as they have done, violates the provisions of the Constitution of the United States:

1. By impairing the obligation of several contracts.

2. By depriving the railroad companies and their stockholders and their creditors of their property without due process of law.

3. By denying to said companies and their stockholders and their creditors the equal protection of the laws.

Considering the statute as a statute of exemptions, what was the history of these transactions and how does this decision operate?

Section 13, art. XII, of the constitution of 1869 became operative in November, 1869.

The Mississippi Mills case was decided in 1878. By that decision the constitutional provision was construed. It was determined by this court the final expositor of the meaning of the State constitution to be that the legislature was not denied the power to make ex-

emptions, but only that it was denied the power to make exemptions which should constitute contracts so that a subsequent legislature would be deprived of the power to tax. With that decision standing in full force, unchallenged and unqualified, the act of 1882 was passed and accepted, which constitutes the charter of the L., N. O. & T. Company. Section V of that act (sec. 21 of the Mobile and Northwestern) was therefore passed by the legislature and accepted
595 by the company in the light of that decision, and the construction placed by this court on the constitution (a direct adjudication of the constitutionality of the statute) was under all the rules of construction a part of the act itself and of the contract of incorporation.

The companies so incorporated then go to work and in 1882 to 1886, with that decision standing as the law of the State, they expend, as shown by the records of this case, nearly twenty millions of dollars in the construction of these roads.

The Mississippi Mills case was either directly or expressly affirmed and its decision accepted and recognized as existing law *sub silentio*, as not within the field of discussion any more, in the following decisions of this court: McCulloch *v.* Stone, 64 Miss., October term, 1886; Railroad Company *v.* Thomas, 65 Miss., October term, 1888; Bank *v.* Worrell, 67 Miss., October term, 1889; Attalla County *v.* Kelley and Railroad Co. *v.* Taylor, 68 Miss., October term, 1890.

After all these decisions, six in number, covering twelve years of judicial history of this State, in July, 1892, reposing thereon, the Illinois Central Railroad Company purchases, as shown by the record herein, bonds of the L., N. O. & T. Co. as follows:

$13,805,000 of the first-mortgage of 1886.

$8,731,000 of the second-mortgage of 1886.

$8,347,000 of the third-mortgage bonds of 1886.

On which bonds the second and third mortgages were dependent upon the net earnings of the road over operating expenses and taxes for their interest, the third mortgages not even being cumulative from year to year on the basis of profits, but depending on the earnings of each several year.

At the same time and under the same conditions the Miss. Valley Company (not the railroad company, but a promoting corporation) purchased nearly all of the stock of the L., N. O. & T. Company.

And moreover, depending on said decisions, the two companies, the L., N. O. & T. and the Y. & M. V. Co., consolidated in
596 October, 1892, and cast their lots together. The companies in their corporate capacity acted, the stockholders acted, and a consolidation was made. It is certain that such action was taken in view of the then expounded law, as announced by the supreme court of this State. How else?

And in March, 1893, that exposition was reaffirmed in respect to this very company's property; in respect to this very statute; in respect to this very consolidation of 1892, as this court in its present opinion admits, and now, for the first time in this case, in June, 1898, this court proposes to overrule the Mississippi Mills case; to

impart a totally new meaning to the constitution of 1869; to ridicule and belittle the decision of the court in that case; to overrule all of the six cases which followed it, over twenty years of recognized judicial construction; to give to all of these business transactions and contracts a force and significance and pecuniary value different from what they were declared to have when transacted; to subject *to* the second and third mortgage bonds purchased by the Illinois Central and all other purchasers thereof, and also the stock purchased by the Miss. Valley Company in 1892, to a fixed and preferred tax charge of $100,000 per annum, to which they were judicially declared to be not subject when they were purchased; to subject the stockholders of Y. & M. V. stock who went into the consolidation of 1892 with the L., N. O. & T. to a tax-expense account against the property brought into the consolidation by that company, to which it was judicially declared to be not subject at the time of the consolidation of $100,000 per annum; to affect the "new company" itself by such a charge, etc., etc. It would be an useless consumption of time to attempt to run out all of the consequences of this decision. The foregoing considerations are examples, and examples of a most startling character.

It is no answer to the foregoing propositions to say that the Mississippi Mills case itself held that the "exemption" was revocable. That is true, but it is an essentially different thing. The de-
597 cision was that an exemption could be revoked by the legislature, and the legislature has never revoked it. It was never contemplated that the thing could or would be done by a judicial decision, which the chief justice calls "legislation," retroactive over twenty years and subverting millions upon millions of property rights which had vested under the law as declared.

For these reasons, meagrely outlined, we insist that the decision, and the effect announced by it as that of the two constitutions, impairs the obligation of contracts which were made in contemplation of the announced law at the time of their making; that they deprive the companies and the holders of their bonds and the holders of their stock and of their property without due process of law, and at the same time deprives them of the equal protection of the law.

Nor is that all: The Lambert case was decided in March term, 1893, and now, after more than five years, this court proposes to overrule that case also. Is it not a rule of property? Have people not been buying and selling these bonds and this stock under it for five years? And this court expressly admits that the Lambert case did hold the validity of the exemption; did hold the continuance of the "exemption;" did hold the consolidation to be a merger, and that a new company was not formed; did hold that the consolidation of 1892 made no change in the status, and admits that in order to reach the result now declared it is necessary to overrule that case. In the face of such facts where is the security for property right? On what basis can men buy and sell? If it be not the function of the Constitution of the United States to protect people from such subversion of the declared law, whether by legis-

lative or judicial action, then what is the function of that Constitution?

We pass to another proposition: In holding that the consolidation of 1892 was not such a consolidation as operated by way of merger, but created a new company, and in overruling the
598 Lambert case on that point, and in holding that it was not *res adjudicata* on that point, this court in this decision, which brings, by that process of reasoning, the Y. & M. V. Railroad Company subject to section 180 of the constitution of 1890, impairs the obligation of the contract of consolidation between these companies and the contract right of their stockholders, and deprives the companies and stockholders of the property without due process of law, and deprives them of the equal protection of the laws.

We deny the correctness of the construction of the charters of the companies announced by the court, to the effect that they contemplate only a consolidation by way of extinction of both of the constituent companies and the formation of a new company, and we affirm that such charters constituted authority in the consolidated companies to consolidate after either manner.

And the undisputed testimony herein is that the companies intended not to form a new company, but to consolidate by way of merger, retaining the autonomy of the Y. & M. V. Company. It is expressly so stipulated in the contract of consolidation, and the undisputed testimony of Mr. Welling is that, as a fact, the stockholders of the L., N. O. & T. have never surrendered their stock in that company to this very day, or rather up to the day of the trial in the court below.

And this court in the Lambert case, in which this point was adjudicated and involved by necessity, adjudged that such was the effect of the consolidation, and that the constitution of 1890, sec. 180, had nothing to say to it.

But now over goes the Lambert case after five years, and a new phase is given to the whole matter.

In no State in this Union have the charter rights of corporations and the rights of stockholders in corporations growing out of the charters been more vigilantly and jealously guarded than in the State of Mississippi. Our law has long been settled that such charters constitute contracts, and the whole charter and all
599 of its provisions constitute contracts; that a charter cannot be parcelled out and this or that feature held to be incidental and unessential, but it is all contract, each and every provision. Whatever may be the law of some other States, the law of Mississippi has been, until this decision, that the consolidation clauses of a charter are as much part of the essential frame of the charter contract as any other clauses, and the effect of a consolidation, when made, is to be determined by those charters as they were framed. It was not possible, even by constitutional amendment or the adoption of a new constitution, to attach any other or different consequences to such a consolidation, even though the consolidation be not made until after the new constitution, than would have attached under the charters before the constitutional charge—than would be

possible by such new constitution to change any other contract features of the pre-existent charters.

And we affirm that the effect of the consolidation of 1892 must be determined by reference alone to the charters of the consolidating companies and the existing general law, constitutional and statutory, at the time when such charters were granted. The constitution of 1890 could not under the constitution of the United States affect the question at all. The State could not by such constitution impress a new will upon the pre-existent right of the companies to consolidate, with certain incidents therefrom, and declare new incidents and new consequences.

Moreover, the State did not undertake to do so. Section 279 of the constitution expressly denies that idea. It expressly reserves all the privileges of existing charters, and we insist that the court has greatly erred in the construction which it has given to that section. It was not the intent of the constitution of 1890 to affect in any way either the contract rights or mere privileges theretofore granted; its intention was prospective wholly. But this decision gives a very different effect, and an effect which would be violative of the Federal Constitution as to contract and due process of law and equal protection of the law.

What we contend for above in this regard was by this court in the Lambert case, decided five years ago, expressly decided to be the law, and under that decision all sorts of interests have vested and liabilities been incurred; but now this court, in this decision, while admitting such to be the decision in the Lambert case, undertakes to overrule that case in order to declare a totally different rule. We claim protection of the Federal Constitution as stated above.

Respectfully submitted.

MAYES & HARRIS,
Att'ys for I. C. & Y. & M. V Co.'s.

600 Supreme Court of Mississippi.

I, E. W. Brown, clerk of said court, do hereby certify that it is the practice of the court, where suggestions of error are denied or overruled, to return same without endorsement thereon and without an order of entry on the minutes of the court denying or overruling the same, and that the suggestion of error in the case of Wirt Adams, State revenue agent, *v. & als.* Y. & M. V. R. R. Co. took this course in the recent trial of said cause in case No. 8629, of the March term, 1898.

Given under my hand and the seal of said court this the 22nd day of March, 1899.

[Seal Supreme Court, State of Mississippi.]

E. W. BROWN, *Clerk.*

STATE OF MISSISSIPPI,
601 *County of Hinds, First District.*

In the Supreme Court, at March Term, 1898.

WIRT ADAMS, State Revenue Agent, Appellant,
v.
THE YAZOO & MISS. VALLEY R. R. CO. ET AL., Appellees,

and

YAZOO & MISS. VALLEY R. R. CO. ET AL., Cross-appellant,
v.
WIRT ADAMS, State Revenue Agent, Cross-appellee.

Comes The Yazoo & Mississippi Valley Railroad Company and The Illinois Central Railroad Company, appellees and cross-appellants herein, and move the court that it withhold its mandate in this cause to the court below until the opinion of the court herein shall have been prepared and filed in order that such mandate shall be accompanied by a copy of such opinion as in the statute is in such case provided.

Respectfully submitted.

MAYES & HARRIS,
Att'ys for Motion.

Endorsed: 8629. Filed June 30, 1898. E. W. Brown, clerk, by C. C. Campbell, D. C.

And on July 1st, 1898, the following order was rendered on the above motion:

WIRT ADAMS, Rev. Ag't, &c.,
v.
Y. & M. V. R. R. CO. ET AL. } 8629.

The court, having sufficiently examined and considered the motion of appellees to withhold the mandate, &c., doth order that said motion be denied.

602 Pleas and proceedings had and done at a regular term of the circuit court in and for the first district of Hinds county, Mississippi, begun and held at the court-room, in the city of Jackson, on the third Monday, being the 20th day, of June, 1898, before the Hon. Robert Powell, judge of the 7th judicial district of the State of Mississippi and presiding judge of said court.

Be it remembered that on the 4th day of July, 1898, there was filed in the clerk's office of said court a mandate from the supreme court of the State of Mississippi, which, with the endorsements thereon, is in words and figures following, to wit:

The State of Mississippi to the honorable the circuit court of Hinds county, 1st district, Greeting:

Whereas on the 20th day of June, 1898, the same being a day of the regular term of our supreme court, begun and held in the court-

room, in the capitol, in the city of Jackson, in said State, on the 1st Monday of March, in the year of our Lord 1898, the following final judgment was rendered by our supreme court, to wit:

WIRT ADAMS, State Rev. Ag't,
vs.
YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY ET AL. } No. 8629.

This cause having been submitted at a former term of this court on the record herein from the circuit court of Hinds county, first district, and this court, having sufficiently examined and considered the same and being of opinion that there is error therein, doth order and adjudge that the judgment of said circuit court rendered in this cause at the July term thereof, A. D. 1896, on the 25th day of July, 1896, be, and the same is hereby, reversed, both on the appeal and cross-appeal, and cause remanded, and that the appellees do pay the costs of this appeal, to be taxed, &c.

You are, therefore, hereby commanded that such execution and further proceedings be had in said cause as according to right and justice, the judgment of our supreme court and the law of the land, ought to be had.

Witness the Hon. Thomas H. Woods, chief justice of our supreme court, also the signature of the clerk, and the seal of said court hereunto affixed, at Jackson, this the 2nd day of July, A. D. 1898.

[SEAL.] E. W. BROWN, *Clerk*,
By C. C. CAMPBELL, *D. C.*

Endorsed: Filed July 4, 1898. F. B. Neal, clerk, by W. J. Brown, Jr., D. C.

603 *First Special Bill of Exceptions.*

STATE OF MISSISSIPPI, }
Hinds County, First District. }

In the Circuit Court, June Term, 1898.

WIRT ADAMS, State Revenue Agent,
vs.
YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY ET AL. } 2788.

Be it remembered that this day, being Monday, the 4th day of July, 1898, the third and last week of the term of this court, came on to be heard the above-entitled cause, and the defendants being called and appeared, by their counsel, and made inquiry of the court whether or not the mandate of the supreme court had been presented and filed in the court, and being informed that it had been so presented and filed, made inquiry further as to when it had been so presented, and were informed by the clerk of the court that it had been presented and filed on this day.

Whereupon the said defendants objected to any action or proceeding in this cause at this term of the court, for the reason that the document accompanying the said mandate was not an opinion of

the supreme court of the State of Mississippi, conformable to section 4381 of the Annotated Code of 1892, but that the said document showed on its face that it was a mere syllabus of an opinion which the court announced its intention, as is apparent on the said document itself, to file at a future date.

Whereupon counsel for the plaintiff stated that the defendants had on Thursday, the 30th June preceding, made a motion in the supreme court itself to the effect that the said supreme court withheld its mandate until said opinion should be prepared and filed, and that the said supreme court had overruled such motion, and this the counsel for defendant admitted to be true.

Whereupon the counsel for the defendants stated further that, in overruling said motion, the chief justice delivered no written opinion thereupon, and announced the overruling of said motion verbally from the bench, and stated in said announcement that the abstract filed by the majority of the court would stand for the opinion of the court for the present, and this the counsel for the plaintiff admitted to be true.

Whereupon the court overruled the objection of the defendants and ordered the said cause to be proceeded with, and the defendants excepted. The court making inquiry what the defendants had to say further in the cause, the defendants then inquired of the court when this cause had been reinstated upon the dockets of the court, and was informed by the clerk that the said cause had been reinstated upon the dockets of this court on this day.

Whereupon the defendants objected to the taking of any steps in this cause at this term of the court, for the reason that two weeks of the term had gone by, and this was the third and last week of the term, and this court has not the power under the statutes of this State, which require the trial docket to be made up before the term of the court begins, to send a cause to trial without the consent of parties thereto by docketing the cause on this day.

That the mandate of the supreme court shows on its face that the decision rendered by the supreme court was not rendered until after the term of this court had begun, and that the said cause could not be docketed properly at this term under the circumstances or called peremptorily for trial until the next term of this court.

The court overruled said objection and ordered the cause to be proceeded with; to which the defendants excepted.

And to the action of the court in overruling the objection of the defendants made first above and to the action of the court in overruling the objection of the defendants last above, as to time of said orders and rulings of the court, the said defendants tender this their special bill of exceptions, which is hereby signed and made a part of this record in this cause, this the 6th day of July, 1898.

Allowed.

ROB'T POWELL, *Judge.*

Endorsed: Filed July 7, 1898. F. B. Neal, clerk, by W. J. Brown, Jr., D. C.

604 *Bond and Petition for Removal to U. S. Court.*

STATE OF MISSISSIPPI,
County of Hinds, First District.

In the Circuit Court, at the June Term, 1898.

WIRT ADAMS, State Rev. Agent,
v.
THE YAZOO & MISSISSIPPI VALLEY RAILROAD Company *et al.*
} Petition for Removal to U. S. Court.

To the Honorable Robert Powell, judge of the circuit court, etc.:

Your petitioners, The Yazoo & Mississippi Valley Railroad Company and The Illinois Central Railroad Company, respectfully show to this honorable court that they are the only defendants in this suit, which is of a civil nature, and that the matter and amount in dispute in this cause exceeds the sum and value of two thousand dollars, exclusive of interest and costs.

Your petitioners further aver that this cause, as between the plaintiff and both of these petitioners, arises under the Constitution and laws of the United States, as your petitioners will now proceed to show.

On the first day of December, 1869, the people of the State of Mississippi adopted a constitution, commonly known since that date as the constitution of 1869, by which the then existing constitution was displaced and abrogated. One provision of said constitution was section 13 of article XII, which is as follows:

"The property of all corporations for pecuniary profits shall be subject to taxation the same as that of individuals."

Shortly thereafter the legislature of the State of Mississippi, on the 20th day of July, 1870, incorporated the Mobile and North Western Railroad Company, and of that charter of incorporation the 21st section was in words and figures as follows, to wit:

"SECTION 21. Be it enacted, That in consideration of the construction of the railroads provided for herein, and of the great benefit which the State will receive in the development of its agricultural resources by means of said railroads as works of internal improvement, and also of the increased value which will thereby be added to the property of the State, thus enabling the State to greatly increase its revenue without additional and burdensome taxa-
605 tion upon the people, the State hereby agrees with said company (and which agreement is irrepealable) that all taxes to which said company shall be subject for the period of thirty years, are hereby appropriated and set apart, and shall be applied to the payment of the debts and liabilities which the said company may have incurred in the construction of said road, or for money borrowed by said company upon lands or otherwise, to be used in constructing said road, or paying debts incurred by said company in constructing the same; and it shall be the duty of the tax collector

in every county in each and every year, to give the said company a receipt in full for the amount of said taxes upon receiving from said company an affidavit made by the president or cashier of said company, that the amount of said taxes have actually and in good faith been paid and applied by said company during the year, in the payment of the debts incurred, or money borrowed as aforesaid, and which receipt so given shall be in full of all taxes, county, State and municipal, to which said company shall be subject; provided, however, that whenever the profits of said company shall enable it to declare and pay to the stockholders an annual dividend of eight per cent. upon its capital stock over and above the payment of its debts and liabilities, then the appropriation of the taxes aforesaid shall cease, and said taxes shall be paid by said company to the tax collector, to be by him paid over as required by law" (Charter Book, p. 172; Acts 1870, p. 268).

At the same session of the legislature of said State, on the 8th day of August, 1870, that body passed another act, entitled "An act supplemental to the acts of incorporation of certain railroad companies," whereby the benefit of said section 21 of the charter of the Mobile and North Western Railroad Company was extended to and conferred on certain other railroad companies there-fore incorporating but not yet building their proposed roads, and amongst them the Vicksburg & Memphis Railroad Company and to the Natchez and Jackson Railroad Company (afterwards styed the Natchez, Jackson and Columbus Railroad Company).

At the April term, 1878, of the supreme court of the State of Mississippi that court decided in a certain cause, since widely known amongst the members of the bar of said State as the Mississippi Mills case, in which was litigated and determined the meaning of the foregoing provision in the said constitution of 1869, and by that decision the said supreme court announced and declared the true meaning of said provision to be:

(1) Not a mere declaration that corporate property should be liable to be taxed the same as that of individuals, and (2) not a declaration that it should be actually subjected to such taxation, so that the legislature was denied the power to grant exemptions, as theretofore, but (3) that the legislature should not thereafter have the power to make grants of exemptions which should be contracts irrepealable by subsequent legislatures, and that the matter of corporate taxation should always be controllable by the legislatures successively.

This decision, rendered twenty years ago, has remained unchallenged and unmodified until now, and not only so, but it has been expressly followed or its principle applied without express citation in many subsequent decisions of the said supreme court, to wit, in McCulloch *v.* Stone, 64 Miss., decided at the October term, 1886; in Railroad Company *v.* Thomas, 65 Miss., decided at the October term, 1888; in Bank *v.* Worrall, 67 Miss., decided at the October term, 1889; in Attala County *v.* Kelly and in Railroad Co. *v.* Taylor, 68 Miss., decided at the October term, 1890, and in Railroad Company *v.* Lambert, 70 Miss., decided at the March term, 1893.

And ever since that decision the practical construction, contemporaneous in character, by the various departments of the State, legislative and executive, has been in accordance therewith until now.

In the year 1890 a new code was adopted in this State, one of the provisions of which subjected all railroads in this State to taxation, and thereby all outstanding exemptions were terminated, except such as were by contract right antedating said constitution of 1869.

On the 3rd day of March, 1882, was passed by the legislature of said State an act which constitutes the charter of a railroad company known as the Louisville, New Orleans and Texas Railway
606 Company, together with an amendment, not material here, adopted in March, 1884. The said act of 1882 contained in it as section V thereof a provision granting to the company to be organized under the act as a new and independent grant by reference to it the said section 21 of the Mobile and Northwestern charter and the benefits thereof as fully as if the same were set forth in said act of 1882 as section 5 thereof. Said act authorized, as amended, the company chartered thereby to be formed out of the Vicksburg & Memphis Company aforesaid and any other railroad companies of this State or of any other State or States of the Union. Accepting the terms and offers of said act of 1882, so amended, the said Vicksburg & Memphis Company and three other railroad companies undertook the construction of a railroad from Memphis, in the State of Tennessee, to New Orleans, in the State of Louisiana, by way of Vicksburg, in this State, and got the same through in the year 1884, expending thereon many millions of dollars, and forming by their consolidation, in accordance with the terms of said act as amended, in the year 1884, the said Louisville, New Orleans & Texas Railway Company.

The said railroad was not constructed or equipped by the said company itself, for it had not the means to do so. But it was constructed and equipped by a construction company which furnished the necessary money and had the work done and the equipment supplied and received therefor as its compensation from the railroad company the entire capital stock of the company, five millions of dollars in amount, and, moreover, the bonds of said Louisville, New Orleans and Texas Railway Company to the amount of many millions of dollars. Some of said bonds were first-mortgage bonds, binding the property of the said company. Others were second-mortgage bonds, which bound, amongst other things, the income of the company remaining after discharging the operating expenses of the road and the interest on the first mortgage and taxes. Others were third-mortgage bonds, which bound, amongst other things, the income of the road remaining after discharging the operating expenses and the interest on the first and second mortgages and taxes, the last class of bonds being non-accumulating, by which is meant that the income out of which the interest of any given year might be paid should be the income of that year only and not income of any other year.

In the year 1890 the legislature of said State passed an act whereby the said Natchez, Jackson & Columbus Railroad Company was empowered to sell its property, with all its rights, franchises, privileges, and immunities, and in that same year it did sell the same by deed of conveyance to the said Louisville, New Orleans and Texas Railway Company.

On the 1st of November, 1890, the people of the State of Mississippi, in convention, adopted the new and present constitution of the State, by which the constitution of 1869 was abrogated and superseded.

Afterwards, in July, 1892, the Illinois Central Railroad Company, a citizen and corporation of the State of Illinois, operating a railroad line in this State under lease, purchased of the foregoing mortgage bonds as follows: Of the first mortgages, thirteen millions of dollars; of the second and third mortgages, eight millions each; and, also, the Mississippi Valley Company, a Mississippi corporation (not the Yazoo & Mississippi Valley Railroad Company, but a different corporation), purchased almost all of the said Louisville, New Orleans & Texas Railway stock, in each instance paying large value therefor.

And afterwards, in October, 1892, the said Louisville, New Orleans and Texas Railway Company and the Yazoo & Mississippi Valley Railroad Company (the latter being a railroad company incorporated by the State of Mississippi in the year 1882), by virtue of the authority conferred upon them in their respective charters, were consolidated by way of merger, so that the existence of the former company was merged and sunken in that of the latter, and the existence of the latter company was continued unbroken, and no new company was formed. By said consolidation the former company carried into the consolidated company as part of its assets and property the railroad which had been railroad of the Natchez, Jackson and Columbus Company, together with the privilege of said section 21 thereunto pertaining; all of which had been acquired by said Louisville, New Orleans and Texas Company by and through the purchase of 1890, as stated above.

607 Thereafter, in the early part of the year 1893, a certain Lambert, sheriff of Adams county, in said State, undertook to collect privilege and ad valorem taxes on the property that had been the property of the said Natchez, Jackson & Columbus Railroad Company, and your petitioner, The Yazoo & Mississippi Valley Railroad Company aforesaid, and the Natchez, Jackson & Columbus Railroad Company, which was still in existence, enjoined the said collections, and on their bill of injunction such proceedings were had that the cause was appealed by said companies to the supreme court of this State and was decided by said court at the March term, 1893. In said decision the Mississippi Mills case was reaffirmed. It was furthermore decided that the effect of the section 21 aforesaid was that of a disguised exemption; that it was valid; that by the sale of 1890 it passed to the Louisville, New Orleans & Texas Railway Company, and that by the consolidation of 1892 the said Louisville, New Orleans & Texas Company carried into it the con-

solidated Yazoo & Mississippi Valley Railroad Company, your petitioner; that the consolidation of 1892 operated by way of merger and did not form a new company; that such consolidation did not bring the consolidated company under the provisions of the constitution of 1890, section 180 or other; that the constitution of 1890 left the whole matter just where it found it and did not affect it in any way; and the demand and claim of said sheriff was defeated.

Thereafter this plaintiff, on the 7th day of December, 1893, brought in this court his action at law, claiming of your petitioners (asserting a liability of the Illinois Central Company, on the idea that it was the purchaser and owner of the railroad property taxable) ad valorem and privilege taxes for the year 1892 on the property that had been property of the Louisville, New Orleans and Texas Railway Company (not including that purchased of the Natchez Company), amounting to about $100,000.

And afterwards, about the 18th day of December, 1894, he brought another suit of similar nature for the taxes of 1893 and of 1894, amounting to about $195,000.

And afterwards, about the 1st day of January, 1896, he brought another suit of similar character for the taxes of 1895, amounting to about $125,000.

And afterwards, by order of this court, said three suits were consolidated into one, being the same cause in which this petition is filed, and were subsequently tried as one. Said trial resulted in a verdict and judgment for the defendants, your petitioners, as to the taxes of 1892, 1893, and 1894, but a verdict and judgment in favor of the plaintiff as to the taxes of 1895, amounting to about $88,000. The plaintiff thereupon took an appeal to the supreme court of this State, and your petitioners took a cross-appeal from the judgment against them.

The result of such appeal and cross-appeal was not announced by said supreme court until Monday, the 20th day of June, 1898, and when the decision was announced it was as follows, the opinion of the court being in the words and figures:

"Circuit Court, Hinds County, Robert Powell, Judge.

"WIRT ADAMS, Rev. Agent,
v.
Y. & M. V. R. R. Co. ET AL. } 8629.

"J. A. P. Campbell and Critz & Beckett for appellant; Mayes & Harris for appellees.

"WHITFIELD, *J.*:

"First. Because of the inconsistent, compromise verdict the judgment is reversed and cause remanded on the appeal and the cross-appeal.

"Second. The Lambert case is *res adjudicata* as to the taxes for the year 1892 on all the property that originally belonged to the N., J. & Columbus R. R. Co. which was in Adams county, and, being *res adjudicata*, it is as to that beyond our power to overrule it.

"Third. The Lambert case is not *res adjudicata* as to any of the other taxes here involved on the property that once belonged to the N., J. & Columbus R. R. Co. or on any of the other property here involved.

"Fourth. The Lambert case did decide that § 180 of the
608 constitution of 1890 did not cut off the exemption from taxation asserted in this case, on the ground that this is a case of mere merger and not of consolidation; that the resultant corporation was not a new corporation, and applied the principles of Whitworth *v.* Tennessee, 117 U. S., which is, beyond all controversy, a clear case of simple merger and not of consolidation, taking merger proper to mean the absorption of one corporation by another, the autonomy of the absorbing corporation being preserved without the formation of a new company, and consolidation proper to mean such union of two corporations as results in a third new corporation, under whatever name. We hold that the clear legislative purpose was (using the words in the sense indicated) consolidation and not merger, yet consolidation in such sense as to result in the formation of a new corporation; and, besides, that what was actually done here was necessarily the creation of a new corporation and not mere merger; that hence the principles of the Whitworth case do not apply, but the principles of Keokuk *v.* Mo., 152 U. S., do apply; that consequently the constitution of 1890, § 180, cut off the exemption; that the Lambert case cannot be upheld and should be, and is hereby, overruled.

"If it be conceded that the purpose aimed at by the articles of agreement of the R. R. Co. was mere merger, it is not to be permitted that the Co. could overthrow the purpose of the legislature to authorize consolidation and not merger, nor to name that merger which the actual things done show was consolidation. Consolidation is a privilege to be exercised or not, not a contract. § 181 of the constitution and § 279 of the schedule thereto merely mean that so long as corporations existing at the adoption of the constitution, having then exemptions or other rights, should have them continue so long as such corporations retained the precise corporate existence they then had. The new corporation here takes its life as from a new grant of corporate life from the date of the consolidation.

"But we hold further that the 21st section of the Mobile & North Western R. R. Co.'s charter was an effort to secure, as is expressly recited in its face, an irrepealable grant of exemption and violative of the constitution of 1869, § 13, art. 12, and sec. 20, art. 12, even as construed in Miss. Mills *v.* Cook, 56 Miss. The exemption claimed in Miss. Mills *v.* Cook had no irrepealable feature.

"But again we hold that such section violated said clauses of said constitution, even had it not been irrepealable. Miss. Mills *v.* Cook turned upon some supposed magical distinction in the particular connection between the words 'subject' and 'subjected,' and sacrificed a great constitutional principle to a piece of mere verbal jugglery. Precisely the same clause, using precisely the same word 'subject,' occurs in the constitutions of Florida and Arkansas, and the supreme courts of both States held, in precisely identical con-

tention, that the clause forbade exemption from taxation of 'corporations for pecuniary profit,' and both of these decisions were on this identical proposition affirmed by the U. S. Supreme Court, St. Louis, &c., *v.* Berry, 41 Ark., 509; 113 U. S., 475, and L. & N. R. R. Co. *v.* Palmes, 19 Fla., 231, and 109 U. S., 253, 254, and this construction is reaffirmed in Keokuk, &c., *v.* Missouri, 152 U. S., 310, 311. The word subject should have been given its plain, popular signification, occurring in the connection it did in a great popular instrument, the constitution, the very signification attached to it by the Supreme Court of the United States. We prefer to align ourselves now with that court in this matter, and overrule Miss. Mills *v.* Cook on that point.

"It passes all understanding how the court could gravely hold in Miss. Mills *v.* Cook that a solemn declaration in the constitution of a State, its organic law, formulating fundamentally great lines of public policy, that 'the property of all corporations for pecuniary profit' should be subject to taxation the same as that of individuals, added no new feature, but merely stated what was the law before and without the declaration, to wit, that the property of corporations for pecuniary profit was liable to taxation. All the world knew that before.

"Judge Campbell, in his dissenting opinion in Beck *v.* Allen, 58 Miss., at p. 177, most wisely said: 'Subtilty and refinement and astuteness are not admissible to explain away an expression of the sovereign will. The framers of the constitution and the
609 people who adopted it must be understood to have intended the words employed in that sense most likely to arise from them on first reading them.' Doubtless the rule of *stare decisis* is a wise rule and one not lightly to be infringed, but instances justifying its disregard find manifold illustration in the reports.

"And, surely, stronger reasons for not applying it can never arise than where, as here, to disregard it restores to the sovereign the exercise of one of the highest attributes of sovereignty—the taxing power—and merely requires that corporations, for pecuniary profit, constantly demanding and securing protection of the Government, shall also bear their just share of the burdens of taxation. We feel, therefore, confident of the propriety of overruling, as we now expressly do, the Lambert case and the case of Cook *v.* Miss. Mills, *supra*.

"There are other views leading to the same conclusion which we may embrace in the opinion yet to be filed. What we have said is a mere summary of the holdings set forth.

"Reversed and remanded.

"WOODS, C. J., dissents and submits this mere outline of the grounds of his dissent. His dissenting opinion will be filed after the opinion of the majority of the court shall have been prepared and filed.

"1. The decision of this court in the case of Natchez, Jackson & Columbus Railroad Co. *v.* James W. Lambert, tax collector, 70 Miss., is *res adjudicata* as to the taxes sought to be recovered on the

property of the N., J. & C. R'd Co. for the years 1891-'2. My brethren admit that that decision is *res adjudicata* as to the property of the railroad in the county of Adams. How they distinguish between the property in Adams county and that in the other counties through which the line of that railroad runs is utterly incomprehensible. The question in the case was not whether the railroad's property in Adams county was exempt from taxation, but whether all the property of that railroad was liable for taxes.

"2. The decision in the Lambert case is *res adjudicata* as to claim now propounded by the State for taxes on all the property of the N., J. & C. railroad for the subsequent years 1893, 1894, and 1895. The parties to the former litigation and those to the present are the same; the issue—the question—is the same, the exemption or non-exemption of that railroad from taxation; and under all the authorities in such case a prior judgment is *res adjudicata* and is a good defense to a second suit; but this very question was determined in perfect accord with the foregoing view by the Supreme Court of the United States in the case of New Orleans *v.* Citizens' Bank, 167 U. S., 571. No opinion of any court of last resort holding a contrary view has been unearthed by any one after most exhaustive search.

"3. As to the property other than that of the Natchez, Jackson & Columbus railroad, for which exemption is claimed in this suit, the sound doctrine of *stare decisis* is of striking application under the decision of the Lambert case. That decision established a rule of property, and under the view entertained by my brethren that rule is utterly disregarded, the rights of the defendant thereunder denied any recognition, and its property deliberately burdened in an enormous sum.

"4. It may well be contended that as to all the property of the Yazoo & Mississippi Valley railroad for which exemption is claimed the Lambert decision is *res adjudicata*. The parties in the Lambert suit and this are the same and the issues the same. The questions in the Lambert case were, Has the consolidation by merger of the L., N. O. & T. with the Y. & M. V. R'd (the N., J. & C. having been heretofore absorbed by the L., N. O. & T. by purchase) destroyed the exemption claimed by the L., N. O. & T. railroad on its property, and was that exemption conferred by the charter valid or violative by the constitution of 1869? Those are exactly the questions involved in the case before us now and in a controversy between the same parties.

"5. But that all the property of all of the railroads entering into and forming the Yazoo & Mississippi Valley railroad, whose charters gave them the exemption now claimed, should be protected from the imposition of taxes amounting to a half million of dollars or more, under the righteous rule of *stare decisis*, seems to be too clear to the judicial mind to require argumentation. Not only the Lambert case, decided more than five years ago, but also the case
610 of Mississippi Mills *v.* Cook, 56 Miss., decided more than twenty years ago, declared the exemptions claimed repealable at the will of the legislature and not violative of section 13, article 12, constitution of 1869. In both cases the charter exemptions were

carefully considered and their character declared, and the constitutional provisions with which they were supposed to conflict expounded and clearly interpreted.

"Since the decision of Cook's case, which, besides defining the character of the exemptions claimed, then and now, and distinctly declaring them not in violation of the constitution then in force, declared a rule of property, the charters were granted under which the Y. & M. V. R'd Company here claims the exemptions set up. It was undoubtedly, in large part, because of these exemption features in the charters thus granted after the decision in the Cook case, and in reliance upon that decision, that the appellees, constituent members, having such charter exemptions, came into the State, constructed long lines of railway, and expended millions of their money. While the railroads knew, of course, that their exemptions were subject to repeal, they could not have for-seen that this repeal would be made by judicial legislation. If ever there was a case in which the doctrine of *stare decisis* should be observed, this is the case.

"It is worthy of serious consideration that the majority of the court should pay deference to the opinions of two courts of sister States in construcfing the words 'subject to taxation' contained in the constitutions of their States, and treat with almost contemptuous indifference the opinion of the very remarkably able court of this State which, twenty years ago, after elaborate consideration in separate opinions of each of the judges, differently interpreted those words, all of the judges thoroughly agreeing that this exemption was not in conflict with that provision of the constitution of 1869 which declared that the property of corporations for pecuniary profit shall be subject to taxation the same as that of individuals. The spectacle thus presented to the legal mind is both humiliating and amazing, as it strikes me.

"6. It will be difficult to harmonize the opinion of the majority of the court with the saving clause of the 181 section of our constitution of 1890. 'Exemptions from taxation to which corporations are legally entitled at the adoption of this constitution, shall remain in full force and effect for the time of such exemptions as expressed in their respective charters, or by general laws, unless sooner repealed by the legislature' is the clear and explicit language of that 181 section. Undoubtedly, under the case of Miss. Mills *v.* Cook and numerous later decisions following and reaffirming that case, this railroad company was legally entitled to the exemption claimed. The highest court in the State had so declared, and this saving clause was inserted by the constitutional convention with full knowledge of the Miss. Mills case and those following it, and the exemption has never been repealed by the legislature.

"Can this court do that by judicial legislation which the constitution declares shall be done by the legislature only?

"7. The Lambert and the Cook decisions are themselves supported by reason and authority and should not be overruled. It is lamentable if no opinion-, however supported in reason or by authority, and no matter what right may have arisen under them, are

to be permitted to stand simply because not in agreement with the personal views of succeeding judges. No greater reproach can be fixed upon the judiciary, no greater calamity can befall the State than to have it understood that, with every change in the mere membership of the court of final resort, the law as solemnly declared by former courts, composed of different membership, is to be unsettled and again and again unsettled by every succeeding court simply to enable new judges to exploit their views. In such case all notion of stability and fixedness is gone, and absolute uncertainty and endless confusion will be introduced into our jurisprudence.

"From such a condition I recoil, and am therefore compelled to dissent from the conclusion reached by my brethren. I have the profoundest respect for my brethren, and I disclaim any desire or purpose to reflect upon them or their course in any degree whatever, but I must follow the voi-e of my own conscience and the command of my own judgment."

611 This decision is made by a divided court. The chief justice dissented in vigorous terms, and declared that it was judicial legislation and subversive of the settled constitutional law of the State for twenty years. His dissenting opinion, herewith exhibited, is adopted as part of this petition. It not only overruled the Lambert case, after declaring in express terms that the theory of your petitioners in their defense in this case about the meaning and effect of the Lambert case was correct, but it also reached back over twenty years of settled judicial construction of the constitution of 1869 and after the people of this State had adopted a new constitution, framed in the light of that construction, and overruled the Mississippi Mills case. It put an entirely new aspect on the law by which this case is to be settled and judgment is to be rendered if this cause be permitted to remain in the State courts, and it presents several Federal questions of paramount importance in the case:

First. In holding that the privilege enjoyed by the Louisville, New Orleans & Texas Railway Company in and by section V of its charter, the act aforesaid of 1882, was not a contract, but a mere exemption, and therefore subject to the taxation provisions of the constitutions of 1869 and of 1890, whereby the obligation of said charter as between the said company and the Yazoo & Mississippi Valley Railroad Company, its successors thereto, and the State is impaired.

Secondly. In holding as above stated and then overruling the said Mississippi Mills case, decided in 1878, and on the faith of which the said Louisville, New Orleans & Texas Railway Company accepted its charter in 1882 and expended millions of dollars in the building and equipping of its road, whereby not only is the obligation of the contract between said company and the State impaired, but also that between the company and its stockholders and those between the company and its various classes of bondholders; and, moreover, the said company and the Yazoo and Mississippi Valley Railroad Company, its successors, are deprived of their prop-

erty without due process of law, and they are each denied the equal protection of the laws.

As an example, merely, of one instance your petitioners point out to your honor the fact that the record in this cause shows that the holders of the second and third mortgage bonds of the Louisville, New Orleans & Texas Company, which aggregate twenty millions of dollars, are dependent entirely for their interest on the net earnings of the company after paying operating expenses, first-mortgage interest, and taxes. Those bonds were negotiated and sold after the decision of the Mississippi Mills case, whereby it was declared in effect the so-called "exemption" was valid, and that for twenty-five years these taxes would not have to be paid. The net earnings of the company have never enabled it yet to pay the entire interest of even the second-mortgage bonds. By this decision a charge of taxes amounting to about $100,000 per annum is, by retroactive judicial decision, thus laid upon the fund, already inadequate, to which those bondholders who bought under the Mississippi Mills case must look for their income.

Thirdly. In overruling the Lambert case after the same has been standing for five years as the law of the company's existence, and by a decision which expressly admits the meaning of the Lambert case to be fundamentally different from what they now declare; and after it has long been a rule of property and all kinds of contract rights and obligations have fixed under it this decision again impairs the obligation of the contracts of the companies in all directions and deprives the companies and its bondholders and creditors and stockholders of their property without due process of law and deprives them, each and all, of the equal protection of the laws.

Fourthly. In holding that the consolidation of 1892 operated by way of extinction of both of the consolidating companies and the formation of a new company, and not by way of merger continuing the autonomy of the Yazoo & Mississippi Valley Railroad Company. The said decision impairs the obligation of the contract embodied in the charters of said consolidating companies between said companies and the State, and, moreover, it impairs the obligation of the contract of consolidation itself as between the said consoli-
612 dating companies and as between the stockholders of said companies and as between the said companies and their stockholders and their creditors.

Fifthly. In holding as last above set forth, and, further, that such consolidation brought the pretended new company subject to the provision of the constitution of 1890, said decision impairs the obligation of all of the contracts indicated above, and, moreover, deprives said companies and said pretended new company and the stockholders above indicated and the creditors above indicated of their property without due process of law, and, moreover, denies to each and every of them the equal protection of the laws.

And your petitioners desire to remove this suit into the next circuit court of the United States in and for the southern district of Mississippi, to be holden at Jackson, in said district.

And your petitioners offer herewith good and sufficient surety for their entering in the circuit court of the United States for the said district on the first day of its next session a copy of the record in this suit and for paying all costs that may be awarded by the said circuit court of the United States if said court shall hold that this suit was wrongfully and improperly remover thereto.

And your petitioners thereofre pray that the said durety and said bond may be accepted; that this suit may be removed into the next circuit court of the United States aforesaid, pursuant to the statutes of the United States in such case made and provided, and that no further proceedings may be had therein in this court.

And your petitioners further aver that the said decision herein complained of as made by the said supreme court of Mississippi in this cause was not rendered until Monday, the 20th day of this current month of June, 1898; that under the rules of said court your petitioners were and are entitled to the residue of the then current term of said supreme court in which to file a suggestion of errors in said court; that such suggestion of errors was duly filed by your petitioners on Monday, the 27th of said month, in due time and before the adjournment of said term of said supreme court; that said suggestion of errors is at the time of the filing of this petition still pending and undetermined, and that this petition is filed in this court and in this cause before any mandate has been sent down from the said supreme court notifying this court to proceed in this cause.

And your petitioners will ever pray.

THE YAZOO & MISSISSIPPI VALLEY R'D CO.
THE ILLINOIS CENTRAL RAILROAD CO.

MAYES & HARRIS,
Attorneys for Petitioners.

Endorsed: Filed June 27, 1898. F. B. Neal, clerk, by W. J. Brown, Jr., D. C.

Bond for Removal.

STATE OF MISSISSIPPI,
Hinds County, First District.

In the Circuit Court, at the June Term, 1898.

WIRT ADAMS, State Revenue Agent,
v.
THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY ET AL.

Know all men by these presents that we, the Yazoo & Mississippi Valley Railroad Company and the Illinois Central Railroad Company, as principals, and John Hart and J. M. Stone, as sureties, are holden and firmly bound unto Wirt Adams, State revenue agent for the State of Mississippi, in the penal sum of five hundred dollars; for the payment of which, well and truly to be made, unto him and his successors in office, we bind ourselves, our successors, our

heirs, representatives, and assigns, jointly and severally, firmly by these presents.

Upon condition, nevertheless, that whereas the principals
613 have filed their petition in the circuit court of the State of Mississippi in and for the county of Hinds, first district, for the removal of a certain cause therein pending, numbered on the trial docket of said court as number 2788, consolidated, wherein the said Wirt Adams, as such State revenue agent, is plaintiff and the said principals are defendants, to the circuit court of the United States in and for the southern district of Mississippi, to be holden at Jackson, in said district:

Now, if the said principals shall enter in the said circuit court of the United States on the first day of its next session a copy of the record in said suit and shall well and truly pay all costs that may be awarded by the said circuit court of the United States if said court shall hold that said suit was wrongfully and improperly removed thereto, then this obligation shall be void; otherwise it shall remain in full force and virtue.

In witness whereof we have hereunto set our hands this — day of June, 1898.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY,
By EDWARD MAYES, *Att'y.*
THE ILLINOIS CENTRAL RAILROAD COMPANY,
By EDWARD MAYES, *Att'y.*
JOHN HART.
J. M. STONE.

Endorsed: Filed June 27, 1898. F. B. Neal, clerk, by W. J. Brown, Jr., D. C.

Motion to Transfer to U. S. Circuit Court.

WIRT ADAMS, State Revenue Agent,
vs.
YAZOO & MISSISSIPPI VALLEY R. R. CO. ET AL. } 2788. Consol.

Come the defendants, The Yazoo & Mississippi Valley Railroad Company and The Illinois Central Railroad Company, and move the court for the removal of this cause into the circuit court of the United States to be holden at Jackson, in and for the southern district of Mississippi, for the reasons as set forth in their petition herein filed to that end.

MAYES & HARRIS,
Att'ys for Defendant-.

CRITZ & BECKETT, *Contra.*

Endorsed: Filed and entered July 4, 1898. F. B. Neal, clerk, by W. J. Brown, Jr., D. C.

Motion Overruled.

June Term, 1898.

JULY 4TH, 1898.

WIRT ADAMS, State Rev. Ag't,
vs.
YAZOO & MISS. VALLEY R. R. CO. ET AL. } 2788. Consol.

This cause coming on to be heard this day upon the petition and motion for removal to the circuit court of the United States for the southern district of Mississippi, and the court having heard the argument of counsel and having duly considered the same, it is considered by the court and so ordered and adjudged that said motion be overruled and the prayer of said petition be denied; to which action of the court the defendant excepted, and its exception was allowed.

614 *Affidavit for Continuance.*

STATE OF MISSISSIPPI,
County of Hinds, First District.

In the Circuit Court, at the June Term, 1898.

WIRT ADAMS, State Rev. Agent,
vs.
YAZOO & MISS. VALLEY RAILROAD CO. ET AL. } 2788. Consol.

Comes the defendants, The Yazoo & Mississippi Valley Railroad Company and The Illinois Central Railroad Company, and move the court for a continuance of this cause until the next term of this court, and for reasons for such continuance assign the following, to wit:

1. Said defendants refer to their petition for removal of this cause into the circuit court of the United States in and for the southern district of Mississippi and adopt the same as a part of this motion and application for a continuance as if the same were herein written in full, so adopting the same for the purpose of showing the course and history of this cause up to this date and showing the exigency which has arisen therein and the new questions raised in this cause and the fundamentally different attitude given to it by the said decision of the supreme court of this State rendered in this cause on the 20th day of June, 1898.

2. Petitioners further state that the said decision by the said supreme court of this State rendered in this cause was not made by them until the hour of three o'clock or later on the afternoon of Monday, the 20th day of June, 1898, which was several hours after this term of this court had begun; and, further, that the mandate of said supreme court, with the abstract of points decided thereunto attached, was not presented in this court or filed therein, nor was

the cause reinstated upon the dockets of this court until Monday, the 4th day of July, 1898.

3. That when the said decision of the supreme court was announced by which the Mississippi Mills case, 56 Mississippi, and the Lambert case, 70 Mississippi, were overruled and totally new views of the law and of the rights of these defendants in this cause were announced by said supreme court, and grave questions of constitutional right and law were thereby imported into the cause arising under the Constitution of the United States, it became necessary to formulate and construct an entirely new set of defensive pleadings in the cause to meet such unexpected and subversive decision of the supreme court and said new aspect of this cause thereby created; that the counsel in said cause have been diligently engaged in preparing as well as they were able the pleadings in their view necessary to present such issues and questions, working upon the same in the night-time as well as the day, and on Sunday as well as week-days, but have not as yet been able to complete the same according to their views, nor to prepare those that have been completed with the degree of deliberation and accuracy reasonably demanded by the important interests therein involved and the complicated and numerous questions which they conceive to be raised by such decision; that part of the time of counsel has been consumed by attendance upon this court in other cases and part consumed in attendance upon the chancery court of Coahoma county in other legal matters, and such time as counsel has been able to command has been diligently applied for the purpose herein indicated and other branches of the necessary preparation of this cause.

4. That The Yazoo & Mississippi Valley Railroad Company is the defendant in this cause, whose charter and charter rights are primarily involved in said cause, and that it is upon said company that the incidence of what judgment may be recovered herein will really fall. It is substantially the real defendant in this case, being the company which will have the money to pay if final judgment shall go against these defendants; that the principal counsel of said defendant, The Yazoo & Mississippi Valley Railroad Company, in the State of Mississippi, is the Hon. W. G. Yerger, of Greenville, who is the district attorney of said company
615 and exercises general supervision over and is responsible for the litigation of said company, and such counsel has been consulted in the management of this cause heretofore, and was present and personally participated in the trial of the same when the same was tried in this court, and the said defendant desires his presence and participation both in the preparation of said pleadings and in the actual trial of said cause whenever the same shall be tried, and is unwilling that the said pleadings shall be finally filed or that the said cause shall be finally tried without the judgment and advice and aid of said counsel. Said counsel has been connected with the affairs of said company and of its predecessor, the Louisville, New Orleans & Texas Railway Company, for many years past and is especially familiar with its legal and business history. The said Hon. W. G. Yerger, defendants are informed and believe, is now ill

and has been ill quite a number of days past, exactly how many days is not known to said company, and the certificate of Dr. R. S. Tombs, a physician, is hereto attached and made a part of this application, showing the illness of the said counsel and his inability to be present at this court.

Also there is hereto attached a telegram addressed by said Yerger, on the 2nd day of this month, to Edward Mayes, of counsel in this cause, which is germain to this application and is believed to be true, and is adopted as part hereof. Said defendants are unwilling to go to trial of said cause in the absence of their said counsel.

Hon. Jas. Fentress is the principal solicitor for said defendants in this cause and resides in the city of Chicago, and desires to take part in the preparation of such pleadings and instructions necessary to be asked for the jury in order to present properly and adequately the questions and points herein involved, but has been entirely unable, as said telegram indicates, to come south for such purpose for the following reasons, namely, to say nothing about the heavy demands of his ordinary work: The Hon. C. V. Gwin, who was the district attorney for the northern district of Illinois of the said railway company, died suddenly of apoplexy, in Chicago, a day or two after the rendition of the decision aforesaid, leaving very important, urgent matters that required attention, and by his death his duties and work, as well as those pertaining to Judge Fentress' own office, were immediately cast upon the said James Fentress, who has not yet been able to supply the place of said Gwin; and, in addition to that, the new revenue system inaugurated as a war measure by the Congress of the United States went into force on the first day of this month, creating an immense, important, and urgent demand for the services of said Fentress in Chicago as the general adviser in connection with said work, taxes and revenues of the whole system of the Illinois Central railroad, and creating an *im*mergency and exigency of an extraordinary and exceptional character.

5. Defendants inform the court that the cause now to be tried in the new shape and aspect given to it by said decision of June 20th involves in effect much more than appears on the face of the record therein. There is another case dependent hereon on the docket of this court, in which the same questions and facts arise involving the taxes for the year 1896, amounting to $100,000. There is a second case in the same attitude, also on the docket of this court, involving the taxes of 1897, also amounting to $100,000. There is a bill in chancery, pending in the chancery court of Hinds county, for the taxes from the year 1886 up to 1891, inclusive, depending on the same questions and substantially on the same testimony, except that the question of the effect of the consolidation of 1892 does not figure therein, said taxes amounting to more than $400,000. There is another bill in chancery, pending in the same court, filed by the same complainant, involving the same questions of law and substantially similar questions of fact, whereby is demanded taxes for the time 1886 to 1892, of the Natchez branch, being the same line of railroad that was involved in the Lambert case, amounting to about $125,000. There is another proceeding, inaugurated by

the complainant herein before the railroad commission, based upon said decision, as defendants understand it, and that portion thereof which overrules the Mississippi Mills case especially, whereby is demanded taxes on what is known as the Aberdeen branch of the Illinois Central railroad, running from Durant to Aberdeen,
616 and known as the Canton, Aberdeen & Nashville railway, for the years 1886 to 1897, inclusive, the amount involved therein determinable by what assessments the said railroad commission shall hereafter make, all of said demands and causes being directly related to and dependent on this case and the principles thereof in such manner as is well understood to the members of the legal profession.

Defendants are not now prepared to make any showing as to the absence of witnesses, for the reason that their principal work and difficulty at the present stage of the cause is the preparation of the pleadings themselves, out of which will grow the issues to be tried. As stated above, in their opinion new and important pleas are needed to meet the new conditions of the case, and these pleas are themselves not ready; and counsel cannot tell what course the counsel of the plaintiff will take in respect to these pleas when they shall be filed, whether they will demur to them or take issue of fact on them or plead in confession and avoidance. They do not yet know what will be necessary to prove or disprove or who will be the witnesses neede- on the trial.

Many facts which counsel know in a general way, and believe to be important to the just and proper disposal of this case, they yet do not know in such manner as to be able to testify to as witnesses, nor do they know exactly by what witnesses in the employment of the defendants, whose employés are changing from time to time, they can prove in such specific manner as the law requires, and the said counsel need a reasonable time after the issues are developed in which to examine into the ways and means of proving the same.

The issues made by the pleadings now on file are inadequate and insufficient to the fair and proper trial of this cause under the recent decision of the supreme court, and counsel believe that a repleader must be ordered as to them, and they do not yet know what shape that series of pleadings will finally take.

Defendants are unwilling to go to trial in this cause, in view of its importance, until the pleadings which are to dispose of the same finally shall have been examined and approved and settled by their leading counsel herein, Judges Fentress and Yerger; and even if the court were to refuse them this privilege and require that the pleadings should be settled at this court, late as the term now is, it would, in the opinion of counsel, be impossible to prepare and settle the pleadings, even as counsel may be able to settle them, in time for a fair and full trial of the cause.

Such pleadings as are presented must be based on the facts of the history, financial and other, of said Louisville, New Orleans and Texas Railway Company and of the Yazoo & Mississippi Valley Railway Company and of the Illinois Central Railway Company; and counsel

here need a reasonable time for conference with the officers and managers of the affairs of such companies in order to advise themselves of any details of fact which they knew in a general way to enable them to construct pleadings properly, and especially is that true in respect to the affairs of the Louisville, New Orleans & Texas Railway Company, which are involved in this litigation from the year 1886 to 1892, the officers and managers of which are not in the employment nor under the control of either of the defendants and are resident in the city of New York.

EDWARD MAYES, *Of Counsel for Def'ts.*
YAZOO & MISS. VALLEY RAILROAD CO.,
By MAYES & HARRIS, *Att'ys.*
ILLINOIS CENTRAL RAILROAD CO.,
By MAYES & HARRIS, *Att'ys.*

Sworn to and subscribed before me this July 5, 1898.

F. B. NEAL, *Clerk,*
By W. J. BROWN, JR., *D. C.*

EXHIBITS.

GREENVILLE, 7, 2, 1898.

To Edward Mayes, Jackson:

I have just received following telegram from Hon. Jas. Fentress, dated today: "Critz & Beckett are attempting to force Mayes into a trial on Monday; back tax case; it is an outrage. Gwin's death and consequent imperative duties on me here prevent my going to Jackson at this time. You, the district attorney, who ought to be there with Mayes to try the case, are sick. Telegraph Mayes
617 and, if necessary, telegraph certificate of physician of your inability to go there, and ask a continuance of case to next term of court." I am physically unable to come to Jackson and engage in the trial of the revenue suit, having been indisposed for several weeks. I forward you by both wire and mail today certificate of my attending physician to above effect for the purpose of enabling you to secure a continuance of the above case to next term of court, if possible. Should you apply for continuance, advise result thereof.

WM. G. YERGER.

GREENVILLE, MISS., *July* 2, 1898.

This certifies that Hon. W. G. Yerger is under my treatment, and that his physical condition is such as to prevent his attending court in Jackson next week and inadvisable for him to have any physical or mental strain for some weeks.

Very respectfully, R. S. TOOMBS, M. D.

Endorsed: Filed July 5th, 1898. F. B. Neal, clerk, by W. J. Brown, Jr., D. C.

Answer to Application for Continuance.

THE STATE OF MISSISSIPPI,
County of Hinds, First District.

Circuit Court, June Term, 1898.

WIRT ADAMS, State Revenue Agent,
vs.
THE YAZOO & MISS. VALLEY RAILROAD CO. ET AL. } 2788, Consol.

Answer to affidavit for continuance.

The plaintiff, Wirt Adams, State revenue agent, in answer to defendants' application for continuance, says:

1st. It is true that this case was not decided in supreme court till June 20th, 1898, and the mandate of that court was not filed in this court till July 4th, 1898, but on Thursday, the 23rd day of June, 1898, Critz & Beckett gave notice to Mr. Mayes, attorney for defendants, that they, Critz & Beckett, would insist upon a trial of this case at this term, and they then told them they would see Judge Powell and ask him to set the case for trial on Thursday, June 30th, 1898. They did make this request of Judge Powell, who set the case for trial Monday morning, July 4th, 1898, of which they gave Mr. Mayes notice on Friday, June 24th. The mandate was withheld one week to give defendants an opportunty, under the rules of that court, to file a suggestion of errors. Such suggestion was filed and overruled, Defendants afterwards filed a motion before that court asking it to withhold its mandate in this case until the opinion of that court was prepared and filed in order that a copy of that opinion might accompany the mandate to this court. This motion the supreme court overruled upon the ground that the paper attached to the mandate now filed in this court should stand for the opinion of that court for the present. The order overruling this motion was made by the supreme court on Friday, July 1st, 1898.

2nd. That Mess. Mayes & Harris, attorneys for the defendants, are both present, and Hon. Tim E. Cooper, also attorney for defendants, partner of Hon. Jas. Fentress, is also present in court, assisting Messrs. Mayes & Harris in the defense; that Mr. Mayes, of the firm of Mayes & Harris, has had entire actual control and management of this litigation for defendants, both in the circuit and supreme courts, from its commencement, in 1893, up to this time. He has filed all the pleadings for defendants. There has been long and bitter litigation over the pleadings, extending through several terms, and in all this litigation Mr. Mayes alone appeared for the defendants. Not a single step has been taken in the case without Mr. Mayes' presence. He conducted the trial upon the merits for the defense in the circuit court, Hon. Wm. Yerger being present assisting him. The case was argued three times before the supreme court, the entire arguments for the defendants being made each time by Mr. Mayes, who filed an elaborate and exhaustive

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brief of over 400 printed pages, the only brief filed in the supreme court for the defendants. Hon. Wm. Yerger was present at but one of said three arguments in the supreme court and took no part therein. Hon. James Fentress has never been present at the trial of a single issue in the case in either court.

3rd. On or about June 30th, 1898, it was agreed between Mr. Mayes, as attorney for defendants, and myself, as attorney for plaintiff, that in case a new trial should be had we should use as evidence upon such new trial the record of the evidence of witnesses as taken by the stenographer on the former trial, and thus dispense with the trouble of bringing the witnesses back. This agreement was made at Mr. Mayes' request and is still in force.

FRANK A. CRITZ.

Sworn to and subscribed before me this July 5th, 1898.

F. B. NEAL, *Clerk*,
By W. J. BROWN, JR., *D. C.*

Endorsed: Filed July 5th, 1898. F. B. Neal, clerk, by W. J. Brown, Jr., D. C.

619 *2nd Special Bill of Exceptions.*

STATE OF MISSISSIPPI,
Hinds County, First District.

In the Circuit Court, at the June Term, 1898.

WIRT ADAMS, State Revenue Agent,
v.
THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY ET AL.

Be it remembered that this day, being Tuesday, the 5th day of July, 1898, and a day of the third week of this term of said court, came on to be heard the above-entitled cause on the application of the defendants for a continuance thereof until the next term of this court for the reasons set forth in the affidavit of Edward Mayes, of counsel herein, on file; which affidavit is in words and figures as follows:

(For affidavit see page 12 of this record.)

And the plaintiffs filed a counter-affidavit as follows:

(For counter-affidavit see page 15 of this record.)

And the court, having duly considered said application, doth overrule the same and refuse said continuance for the reason that, in the opinion of the court, the interests of the defendants are not imperilled by the absence of the counsel referred to in said affidavit, the counsel present being sufficiently able and fully familiar with the matters and things herein involved.

To such action of the court the defendants each excepted and tender this their special bill of exceptions, which is hereby signed

and made a part of the record in open court this the day above written.

Allowed. ROB'T POWELL, *Judge.*

Endorsed: Filed July 7, 1898. F. B. Neal, clerk, by W. J. Brown, Jr., D. C.

Pleas of Yazoo & Mississippi Valley Railroad Company.

STATE OF MISSISSIPPI,
Hinds County, First District.

In the Circuit Court, at the June Term, 1898.

WIRT ADAMS, State Revenue Agent, Plaintiff,
vs.
THE YAZOO & MISS. VALLEY RAILROAD COMPANY *et al.*, Defendants. } 2788. Consol.

Comes the defendant The Yazoo & Mississippi Valley Railroad Company, leave of court having been first obtained, and for its further plea in this behalf says, as to all the taxes herein demanded except those assessed upon and claimed because of the railroads and property described in the declaration as the "special charter" and the "Helena branch" and the "Bayou Sara branch," that the said Louisville, New Orleans & Texas Railway Company was authorized by and organized under and its railroad was constructed and equipped at a cost and expenditure of many millions of dollars under an act of the legislature of the State of Mississippi entitled "An act to authorize the Memphis & Vicksburg Railroad Company and the Mississippi Valley and Ship Island Railroad Company to effect a consolidation," approved March 3rd, 1882, as amended by said act of March 15th, 1884; that section 5 of said act of 1882 was in words and figures following, to wit:

"SEC. 5. Be it further enacted, That the provisions of the twenty-first section of an act entitled 'An act to incorporate the Mobile and North Western railroad" approved July 20, 1870, is hereby made to apply to the said consolidated company, and for that purpose the said section is hereby declared to be a part of this act, and this section shall be construed as though the said twenty-first section was specifically and fully set out hereon; but this section shall not be in force for a longer time than twenty-five years from the approval of this act."

That the said twenty-first section so referred to and incorporated into said act of 1882 as part of the fifth section thereof was
620 in words and figures as follows:

"SECTION 21. Be it enacted, that in consideration of the construction of the railroads provided for herein, and of the great benefit which the State will receive in the development of its agricultural resources by means of said railroads as works of internal improve

ment, and also of the increased value, which will thereby be added to the property of the State, thus enabling the State to greatly increase its revenue without additional burdensome taxation upon the people, the State hereby agrees with said company (and which agreement is irrepealable) that all taxes to which said company shall be subject for the period of thirty years, are hereby appropriated and set apart, and shall be applied to the payment of the debts and liabilities which the said company may have incurred in the construction of said road, or for money borrowed by said company upon lands or otherwise, to be used in constructing said road, or paying debts incurred by said company in constructing the same; and it shall be the duty of the tax collector in every county in each and every year, to give to said company a receipt in full for the amount of said taxes upon receiving from said company an affidavit made by the president or cashier of said company, that the amount of said taxes have actually and in good faith been paid and applied by said company during the year, in the payment of debts incurred, or money borrowed as aforesaid, and which receipt so given shall be in full of all taxes, county, State and municipal, to which said company shall be subject: Provided, however, that whenever the profits of said company shall enable it to declare and pay to the stockholders an annual dividend of eight per cent. upon its capital stock over and above the payment of its debts and liabilities, then the appropriation of the taxes aforesaid shall cease, and said taxes shall be paid by said company to the tax collector, to be by him paid over as required by law."

That said act of 1882, as amended by said act of 1884, was accepted by the said Louisville, New Orleans and Texas Railway Company as its charter, and said railroad was constructed and equipped thereunder; and said charter did constitute a contract between said railroad company and the State of Mississippi, wherein and whereby, by and through the said section five, adopting the said section twenty-one, it was contracted irrepealably for a period of twenty-five years from the approval of said act—that is, until the 3rd day of March, 1907—that, in consideration of the construction of the railroads provided for in said act and of the great benefit which the State would receive therefrom, as set forth in said section, the State agreed and contracted that all of the taxes to which said company should be subject should be and were appropriated and set apart and directed to be applied by said company to the payment of the debts and liabilities which the said company should incur in constructing said railroad and to the repayment of monies borrowed by said company, upon lands or otherwise, to be used in constructing said road and to the payment of debts incurred by said company in constructing the same.

That the said company did, in consideration of the said charter and contract by and with said State and relying thereupon, undertake the construction and equipment of said railroad contemplated by said act, and did construct and equip the same, and did continuously operate the same as contemplated by said act until the consolidation mentioned in the said declaration, and this defendant,

The Yazoo & Mississippi Valley Railroad Company, has operated the same since that time until the beginning of this suit; and in the construction thereof, conformably to the intent and meaning of said act, the said Louisville, New Orleans & Texas Railway Company did incur enormous debts and liabilities and did borrow large sums of money to be used in such construction and so used, and did pay large debts incurred in constructing the same as contemplated by said act.

That in and during the years 1892 and 1893 and 1894 and 1894, respectively, in each and every of said years, the said Yazoo & Mississippi Valley Railroad Company did, pursuant to said section of said act and said contract of appropriation, pay said taxes, to the full extent thereof, in the payment of debts and liabilities which the said Louisville, New Orleans & Texas Railway Company had incurred in the construction of said road and in payment of money
621 borrowed by said Louisville, New Orleans & Texas Railway Company to be used in such construction and so used, and in payment of debts incurred by said Louisville, New Orleans & Texas Railway Company in such construction and during the said years 1892, 1893, 1894, and 1895, and in due and proper time the Yazoo & Mississippi Valley Railroad Company delievered to the tax collector of each and every of said counties an affidavit made by the president of said company or by the cashier thereof that the amount of said taxes had actually and in good faith been paid and applied by said company (or as to the year 1892 by said Louisville, New Orleans & Texas Railway Company) during said years 1892, 1893, 1894, and 1895 in payment of the debts incurred by the said Louisville, New Orleans & Texas Railway Company in the construction of its said railroad, or money borrowed by said last-named company upon lands or otherwise to be used in constructing said road or paying debts incurred by said last-names company in constructing the same; whereupon the said several tax collectors did each and every one give to defendant a receipt in full for the amount of said taxes respectively, excepting, however, as aforesaid, as to these parts of said railroad and the taxes payable thereon described in said declaration and named therein as the "special charter" and the "Helena branch" and the "Bayou Sara branch."

That on or about the 24th day of October, 1892, the said Louisville, New Orleans & Texas Railway Company was consolidated with and merged in the said defendant, The Yazoo & Mississippi Valley Railroad Company, by the act and deed of the said two companies, as authorized by their charters, by which said consolidation the existence of the said Louisville, New Orleans and Texas Railway Company was merged into that of the said Yazoo & Mississippi Valley Railroad Company without creating any new company or disturbing or breaking the continuous existence of the latter company, and the said payments of taxes were made in the year 1892 partly by said Louisville, New Orleans & Texas Railway Company and partly by said Yazoo & Mississippi Valley Railroad Company as consolidated, and by the latter company as consolidated in and for the years 1893 and 1894 and 1895.

That it is not true, as in said declaration is falsely alleged, that on or about July 21st, 1892, or at any other time, all the railroads and property of said Louisville, New Orleans & Texas Railway Company *was* purchased by the Illinois Central Railroad Company or any part thereof; nor is it true, as in said declaration is falsely alleged, that on or about the 25 day of October, 1892, or at any other time, the said Illinois Central Railroad Company turned over, delivered to, and merged all said property and railroads of said Louisville, New Orleans & Texas Railway Company or any part thereof into the railroad system and property of the said Yazoo & Mississippi Valley Railroad Company; nor is it true, as in said declaration is falsely alleged, that the said Illinois Central Railroad Company then and there owned and controlled the said railroad system and property of said Yazoo & Mississippi Valley Railroad Company to any other extent or degree than that it held and operated under a lease for a term of years a portion of railway between Jackson, Miss., and Parsons, in Grenada county, which was constructed by said Yazoo & Mississippi Valley Railroad Company several years before said consolidation and which forms no part of the railroads and property hereinbefore mentioned; nor is it true, as in said declaration is falsely alleged, that in said October, 1892, or at any other time, the said Yazoo & Mississippi Valley Railroad Company began and has since continued operating all said railroads and railroad system of said Louisville, New Orleans & Texas Railway Company or any part thereof under the direction and control of the said Illinois Central Railroad Company; nor is it true, as falsely alleged, that the said Illinois Central Railroad Company did at any time or in any way become liable for or undertake to pay or assume the liabilities, debts, or obligations of the said Louisville, New Orleans & Texas Railway Company or any of them.

All of which defendant is ready to verify; wherefore it prays judgment, &c.

MAYES & HARRIS,
Att'ys for Def'ts.

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3rd Plea.

And for a further plea to the said declaration, leave of court having been first obtained, comes the defendant The Yazoo & Mississippi Valley Railroad Company, and as to all the taxes herein demanded, except those assessed upon and claimed because of the railroads and property described in the declaration as the "special charter" and the "Helena branch" and the "Bayou Sara branch," says that the said Louisville, New Orleans & Texas Railway Company was authorized by and organized under and its railroad was constructed and equipped at a cost and expenditure of many millions of dollars under an act of the legislature of the State of Mississippi entitled An act to authorize the Memphis & Vicksburg Railroad Company and the Mississippi Valley and Ship Island Railroad Company to effect a consolidation, approved March 3rd, 1882, as amended by said act of March 15th, 1884; that section five of said act of 1882 was in words and figures as follows:

"SEC. 5. Be it further enacted, That the provisions of the twenty-first section of an act entitled 'An act to incorporate the Mobile and North Western railroad,' approved July 20, 1870, is hereby made to apply to the said consolidated company, and for that purpose the said section is hereby declared to be a part of this act, and this section shall be construed as though the said twenty-first section was specifically and fully set out herein; but this section shall not be in force for a longer time than twenty-five years from the approval of this act."

That the said twenty-first section as referred to and made a part of and incorporated into said fifth section of said act of 1882 was in words and figures as follows:

"SECTION 21. Be it enacted, That in consideration of the construction of the railroads provided for herein, and of the great benefit which the State will receive in the development of its agricultural resources by means of said railroads as works of internal improvement, and also of the increased value which will thereby be added to the property of the State, thus enabling the State to greatly increase its revenue without additional and burdensome taxation upon the people, the State hereby agrees with said company, (and which agreement is irrepealable) that all taxes to which said company shall be subject for the period of thirty years, are hereby appropriated and set apart, and shall be applied to the payment of the debts and liabilities which the said company may have incurred in the construction of said road, or for money borrowed by said company upon lands or otherwise, to be used in constructing said road, or paying debts incurred by said company in constructing the same; and it shall be the duty of the tax collector in every county in each and every year, to give to said company a receipt in full for the amount of said taxes upon receiving from said company an affidavit made by the president or cashier of said company, that the amount of said taxes have actually and in good faith been paid and applied by said company during the year, in payment of the debts incurred, or money borrowed as aforesaid, and which receipt so given shall be in full of all taxes, county, State and municipal, to which said company shall be subject; provided, however, that whenever the profits of said company shall enable it to declare and pay to the stockholders an annual dividend of eight per cent. upon its capital stock over and above the payment of its debts and liabilities, then the appropriation of the taxes aforesaid shall cease, and said taxes shall be paid by said company to the tax collector, to be by him paid over as required by law."

That said act of 1882, as amended by the said act of 1884, was accepted by the said Louisville, New Orleans & Texas Railway Company as its charter, and said railroad was constructed and equipped thereunder, and said charter did constitute a contract between the said railroad company and the said State of Mississippi, wherein and whereby, by and through said section five, adopting the said section twenty-one, it was contracted irrepealably for twenty-five years from the approval of said act—that is, until the 3rd day of March, 1907; that in consideration of the construction of the rail-

roads provided for in said act and of the great benefit which the State would receive therefrom, as set forth in said section, the State agreed and contracted that all of the taxes to which
623 said company should be subject should be and were appropriated and set apart and directed to be applied by said company to the payment of the debts and liabilities which the said company should incur in constructing said railroad, and to the payment of monies borrowed by said company upon lands or otherwise to be used in constructing said railroad, and to the payment of debts incurred by said company in constructing the same; that the said company did, in consideration of the said charter and contract by and with the said State and relying thereupon, undertake the construction and equipment of said railroad contemplated by said act, and did construct and equip the same, and did continuously operate the same, as contemplated by said act, until the consolidation mentioned in the said declaration, and this defendant, The Yazoo & Mississippi Valley Railroad Company, has operated the same since that time until the beginning of this suit, and in the construction thereof, conformably to the intent and meaning of said act, the said Louisville, New Orleans & Texas Railway Company did incur enormous debts and liabilities, and did borrow large sums of money to be used in such construction and so used, and did pay large debts incurred in constructing the same, as contemplated by said act.

That on or about the 24th day of October, 1892, the said Louisville, New Orleans and Texas Railway Company was consolidated with and merged in the defendant The Yazoo & Mississippi Valley Railroad Company by the act and deed of the said two companies, as authorized by their charters, by which said consolidation the existence of the said Louisville, New Orleans and Texas Railway Company was merged into that of the said Yazoo and Mississippi Valley Railway Company without creating any new company or disturbing or breaking the continuous existence of the latter company; that proceeding under the said section five, adopting the said section twenty-one, and in conformity thereto, as to all of the railroads and property in said declaration mentioned and all of the taxes payable thereon, as set forth in said declaration, except those parts of said railroad described in said declaration and named therein as "the special charter" and "the Helena branch" and the "Bayou Sara branch" and the taxes payable thereon during the said years 1892, 1893, 1894, and 1895, and in due and proper time the Yazoo & Mississippi Valley Railroad Company delivered to the tax collector of each and every of said counties an affidavit made by the president of said company or by the cashier thereof that the amount of said taxes had actually and in good faith been paid and applied by said company (or in the year 1892 by said Louisville, New Orleans & Texas Railway Company) during said years 1892, 1893, 1894, and 1895, in payment of the debts incurred by said Louisville, New Orleans & Texas Railway Company in the construction of its said railroad or money borrowed by said last-named company upon lands or otherwise to be used in constructing said road

or paying debts incurred by said last-named company in constructing the same; whereupon the said several tax collectors did each and every one give to defendant a receipt in full for the amount of said taxes respectively, excepting, as aforesaid, as to those said parts of said railroad described in said declaration and named therein as the "special charter" and the "Helena branch" and the "Bayou Sara branch" and the taxes thereon.

That it is not true, as in said declaration is falsely alleged, that on or about July 21st, 1892, or at any other time all the railroads and property of said Louisville, New Orleans and Texas Railway Company *was* purchased by the Illinois Central Railroad Company or any part thereof; nor is it true, as in said declaration is falsely alleged, that on or about the 25th day of October, 1892, or at any other time the said Illinois Central Railroad Company turned over, delivered to, and merged all said property and railroads of said Louisville, New Orleans & Texas Railway Company or any part thereof into the railroad system and property of the said Yazoo & Mississippi Valley Railroad Company; nor is it true, as in said declaration is falsely alleged, that the said Illinois Central Railroad Company then and there owned and controlled the said railroad system and property of said Yazoo & Mississippi Valley Railroad Company to any other extent or degree than that it held and operated a portion of railway between Jackson, Miss., and Parsons, in Grenada county, which was constructed by said Yazoo & Mississippi Valley Railroad Company several years before said con-
624 solidation and which forms no part of the railroads and property hereinbefore mentioned under a lease for a term of years; nor is it true, as in said declaration is falsely alleged, that in said October, 1892, or at any other time the said Yazoo & Mississippi Valley Railroad Company began and has since continued operating all said railroads and railroad system of said Louisville, New Orleans and Texas Railway Company or any part thereof under the direction and control of the said Illinois Central Railroad Company, nor is it true, as falsely alleged, that the said Illinois Central Railroad Company did at any time or in any way become liable for or undertake to pay or assume the liabilities, debts, or obligations of the said Louisville, New Orleans & Texas Railway Company or any of them.

All of which said defendant is ready to verify; wherefore it prays judgment, &c.

MAYES & HARRIS,
Att'ys for Def't.

4th Plea.

And for a further plea to the said declaration, leave of the court being first obtained, comes the defendant The Yazoo & Mississippi Valley Railroad Company, and as to all the taxes herein demanded, except those assessed upon and claimed because of the railroads and property described in the declaration as the "special charter" and the "Helena branch" and the "Bayou Sara branch," says:

That on the 1st day of December, 1869, the people of the State of

Mississippi adopted their constitution of that year and date, by which the then existing constitution was displaced and abrogated; that section 13 of article XII of said constitution was in these words: "The property of all corporations for pecuniary profits shall be subject to taxation the same as that of individuals."

That on the 20th day of July, 1870, the legislature of the State of Mississippi passed an act entitled "An act to incorporate the Mobile and North Western Railroad Company," of which act section twenty-one was in the words and figures following, to wit:

"SECTION 21. Be it enacted, That in consideration of the construction of the railroads provided for herein, and of the great benefit which the State will receive in the development of its agricultural resources by means of said railroads as works of internal improvement, and also of the increased value which will thereby be added to the property of the State, thus enabling the State to greatly increase its revenue without additional and burdensome taxation upon the people, the State hereby agrees with said company (and which agreement is irrepealable) that all taxes to which said company shall be subject for the period of thirty years, are hereby appropriated and set apart, and shall be applied to the payment of the debts and liabilities which the said company may have incur-ed in the construction of said road, or for money borrowed by said company upon lands or otherwise, to be used in constructing said road, or paying debts incurred by said company in constructing the same; and it shall be the duty of the tax-collector in every county in each and every year, to give to said company a receipt in full for the amount of said taxes upon receiving from said company an affidavit made by the president or cashier of said company, that the amount of said taxes *have* actually and in good faith been paid and applied by said company during the year, in payment of debts incurred, or money borrowed as aforesaid, and which receipt so given shall be in full of all taxes, county, State and municipal, to which said company shall be subject; provided, however, that whenever the profits of said company shall enable it to declare and pay to the stockholders an annual dividend of eight per cent. upon its capital stock over and above the payment of its debts and liabilities, then the appropriation of the taxes aforesaid shall cease, and said taxes shall be paid by said company to the tax-collector, to be by him paid over as required by law."

That on the 8th day of August, 1870, the same legislature passed another act, entitled "An act supplemental to the acts of incorporation of certain railroad companies," by which the provisions of said twenty-first section of the said Mobile and North Western
625 Company were extended to certain other railroad companies of said State, amongst them to the Natchez & Jackson (afterwards the Natchez, Jackson and Columbus) Railroad Company.

That at the April term, 1878, the supreme court of the said State decided the case reported in the 56th volume of Mississippi reports, under the style of Mississippi Mills *v.* Cook, tax collector, in which it was determined that the said provision of the constitution of 1869, set forth above, did not require that the property of corporations for

pecuniary profit should be taxed, but only meant that such property should remain subject to taxation at the will of the legislatures of the State; that no legislature could by contract or privilege of exemption thereafter made place such property beyond the taxing power of any succeeding legislature or of itself, but that such contract or privilege could, when thereafter granted by any legislature, be repealed by any legislature.

That such decision, rendered twenty years ago, has remained unchallenged and unmodified until the 20th day of June, 1898; that it has been either expressly followed or its principle applied without express citation in many subsequent decisions of the said supreme court, to wit, in McCulloch *v.* Stone, 64 Miss., decided in 1886; in Railroad Company *v.* Thomas, 65 Miss., decided in 1888; in Bank *v.* Worrall, 67 Miss., decided in 1889; in Attala County *v.* Kelly and in Railway Company *v.* Taylor, 68 Miss., decided in 1890; in Railroad Company *v.* Lambert, 70 Miss., decided in 1893, being the settled and unquestioned law of the State ever since its making.

That ever since such decision its construction of the constitution has been recognized and followed in all the departments of the State government, legislative and executive, and plainly recognized and followed by the constitutional convention of said State in the year 1890 in the formation and adoption of the new constitution of that year.

On the 3rd day of March, 1882, the legislature of said State passed the act entitled "An act to authorize the Memphis & Vicksburg Railroad Company and the Mississippi Valley and Ship Island Railroad Company to effect a consolidation," said companies being two companies theretofore chartered by said State, which had until then failed to construct the railroads contemplated by their respective charters, and section five of said act of 1882 was in the words and figures as follows:

"SEC. 5. Be it further enacted; That the provisions of the twenty-first section of an act entitled, An act to incorporate the Mobile & North Western railroad, approved July 20, 1870, is hereby made to apply to the said consolidated company, and for that purpose the said section is hereby declared to be part of this act, and this section shall be construed as though the twenty-first section was specially and fully set out herein; but this section shall not be in force for a longer time than twenty-five years from the approval of this act."

That thereafter said act of 1882 was amended by the act approved March 15th, 1884, mentioned in the declaration herein. Accepting the terms and offers of the act of 1882 aforesaid, so amended, a consolidation was effected in the year 1884 between said Memphis & Vicksburg Railroad Company and the three other companies, as set forth in the declaration herein, and thereby the Louisville, New Orleans & Texas Railway Company was formed as a new company, with the said act of 1882 as amended by the said act of 1884 as its charter and the charters of its constituent members, as provided in section 1 of said act of 1882.

That, proceeding under said charter and under said section five

as a part thereof, the said Louisville, New Orleans & Texas Railway Company proceeded to construct and equip the railroads contemplated in said acts, beginning the construction thereof in the year 1882 and making the connection of track through Memphis, in the State of Tennessee, to New Orleans, in the State of Louisiana, by way of Vicksburg, in the said State of Mississippi, over the route prescribed in said acts, in the latter part of the year 1884, and adding branches thereto, as authorized by said acts and contemplated therein, from time to time, until and in the year 1891, at an immense expenditure of money and by the incurring of enormous liabilities and by borrowing for such purposes large sums of money, all as authorized by and contemplated in said acts, all of the railroads and property mentioned in this declaration and about the taxes upon which this defendant is sued herein being part and parcel of
626 the railroad so built and constructed under and by virtue of such authority, except those parts mentioned in the declaration and described as the "special charter" and the "Helena branch" and the "Bayou Sara branch," which were constructed by other companies under other charters and were purchased by said company.

That in the construction and equipment of said railroad and other necessary costs incident to such enterprise the said railroad company borrowed money and so used the same for such purposes and incurred liabilities and made payments, using bonds and stock for such payments, all as authorized by its said charters, so that the stock and bonds issued by it for such payments and for such borrowed money and in discharge of the liabilities so incurred amounted in the year 1884 to more than four million dollars of stock and more than twelve million dollars of first-mortgage bonds and more than nine million dollars of income mortgage bonds which were subordinated to the said first-mortgage bonds, and for such purposes aforesaid, as authorized by said charter, in subsequent years other stock and bonds were issued from time to time in the extension and development of said railroad and its betterment for its public uses, until in the year 1890 the total issuance of stock had reached the amount of five million dollars, and of first-mortgage bonds the sum of over sixteen millions of dollars, and of second-mortgage bonds the sum of over nine million dollars, and of income bonds the sum of ten million dollars, all of which bonds and stock had been placed on the money markets of the world and large amounts thereof were sold and disposed of to various parties, citizens of other States than Mississippi, and of Europe, who bought the same in the usual course of trade and for value and without notice.

On the 1st day of November, 1890, the people of the State of Mississippi, in con-ention assembled, adopted a new constitution, which became operative on that day, and of which section 181 expressly declared that "the property of all private corporations for pecuniary gain shall be taxed in the same way and to the same extent as the property of individuals," thus by plain enactment recognizing the interpretation placed by the Mississippi Mills case upon the constitution of 1869 and changing the rule so as actually to require taxa-

tion by changing the language of the provision; but in the same connection it is also provided that "exemptions from taxation to which corporations are legally entitled at the adoption of this constitution shall remain in full force and effect for the time of such exemptions as expressed in their respective charters or by general law unless sooner repealed by the legislature," thus expressly recognizing and retaining the validity of the exemption already granted under the constitution of 1869, since as to those contained in charters anterior to 1869 the legislature could not repeal the same and the constitutional convention could not, and such provisions would be as to them wholly unnecessary and nugatory.

Afterwards, in January, 1891, was decided by the said supreme court of said State the case of The Louisville, New Orleans and Texas Railway Company *v.* Taylor, reported in 68th Mississippi Reports, in which case a sheriff and tax collector of the county of Panola was endeavoring to collect certain taxes from the said county. The said court adjudicated expressly that the said company so formed as aforesaid was entitled to the privilege called therein an "exemption" contained in the said section twenty-one, which was declared to be conferred upon the consolidated railways by said act of 1882.

That continuously and habitually all of the executive officers of the State and of its counties and towns and all departments of the State government recognized and acted upon the right and title of the said Louisville, New Orleans and Texas Railway Company to the said privilege of the said section twenty one (that is, section five of the act of 1882) from the formation of said company until and during the year 1892. During all of such period the several tax collectors whose duty it was to collect taxes habitually and without objection and as a mere matter of course delivered to the said company the tax receipts provided for in said section on the presentation of the affidavits therein provided for, and at various sessions of the legislature during said period members thereof introduced bills for the purpose of repealing said privilege of said section,
627 but each successive legislature at which such efforts were made refused to repeal the same.

Afterwards, in or about the month of July, 1892, this defendant, The Illinois Central Railroad Company, a citizen and corporation of the State of Illinois, purchased of the mortgage bonds aforesaid as follows: Of the first-mortgage bonds the amount of thirteen million dollars; of the second-mortgage bonds the sum of over eight million- of dollars, and of the income bonds the sum of over eight millions of dollars, paying a large price therefor, and at or about the same time the Mississippi Valley Company, a corporation of the State of Mississippi, but of whose capital stock the defendant The Illinois Central Railroad Company held almost all, purchased nearly four million dollars of said capital stock of the Louisville, New Orleans and Texas Railway Company, and both of said purchasing corporations made their said purchases contemplating and relying on the said privilege of said section five (or twenty-one) in said act of 1882, and upon the said settled rule of law in respect

thereto, as expounded in the said Mississippi Mills case, and the subsequent cases aforesaid following the same, and on said section 181 of the constitution of 1890, and on the said Taylor case above cited, and upon the said uniform recognition of said right by all departments and officers of said State, as aforesaid, as a very material element of value in their said purchases and a material inducement thereto.

That afterwards, to wit, on the 24th day of October, 1892, this defendant, The Yazoo & Mississippi Valley Railroad Company, and the said Louisville, New Orleans and Texas Railroad Company, by virtue of the authority conferred upon them in and by their respective charyers, were consolidated with each other by way of a merger, so that the existence of the latter company was merged and sunken inn that of the former, and the existence of the former, this defendant, continued unbroken and no new company was formed; that in making such consolidation with the said Louisville, New Orleans & Texas Railway Company the latter company brought into the consolidation its property, rights, franchises, privileges, and immunities, including the privilege of said section five of the act of 1882, and the consolidated company, this defendant, assumed its debts and liabilities, and in making such consolidation with said Louisville, New Orleans & Texas Railway Company this defendant, The Yazoo & Mississippi Valley Railroad Company, contemplated and relied on the said privilege of section five (or twenty-one) in said act of 1882, and upon the said settled rule of law in respect thereto as exp-unded in the said Mississippi Mills case, and the subsequent cases aforesaid following the same, and on said section 181 of the constitution of 1890, and on the said Taylor case above cited, and upon the said uniform recognition of said right by all of the officers and departments of said State, as aforesaid, such privilege being a very material element of value in the said consolidation and a material inducement to this defendant, The Yazoo & Mississippi Valley Railroad Company, to make the same with the said Louisville, New Orleans and Texas Railway Company.

By said consolidation the said Louisville, New Orleans & Texas Railway Company carried into the consolidated company, as part of its assets and property, the line of railroad between Jackson, Mississippi, and the city of Natchez, in said State, which had been the railroad of the Natchez, Jackson and Columbus Railroad Company aforesaid, together with the privilege of said section twenty-one, which had been by the act of 1870, aforesaid, extended to that company as aforesaid, and which the said company had by its deed conveyed to the said Louisville, New Orleans & Texas Railway Company in the year 1890, under and by virtue of an act of the legislature of the said State of that year specially authorizing such sale and conveyance.

In the month of January, 1893, one Lambert, sheriff of Adams county, in said State, undertook to collect privilege and ad valorem taxes on the property in Adams county that had been the property of said Natchez, Jackson and Columbus Railroad Company, as aforesaid, in disregard of said right under said section twenty-one, and this

defendant, The Yazoo and Mississippi Valley Railroad Company, as consolidated, and the said Natchez, Jackson and Columbus Railroad Company enjoined such collection, setting up the privilege aforesaid, and said cause having been taken by them to the said supreme court on appeal from an adverse decision by the chancellor in the court below, the said supreme court, in the case of Railroad *v.*
628 Lambert, 70 Miss. Reports, decided at the March term, 1893, adjudged that the said consolidation of 1892 operated by way of merger only, and did not form a new company subject to section 180 of the constitution of 1890, and that the so-called exemption (that is to say, the privilege conferred by said section twenty-one) not only passed by the sale of 1890 to the said Louisville, New Orleans & Texas Railway Company, but also, by said consolidation of 1892, passed as property and privilege of the said last-named company into the consolidated company, and appertained to this defendant, The Yazoo & Mississippi Valley Railroad Company, and in said decision the said Mississippi Mills case was again expressly reaffirmed, and the demand and claim of said sheriff and tax collector were denied.

Further, that on the faith of the decision in the Mississippi Mills case aforesaid and said other cases named following the same, and of the said section 181 of the constitution of 1890, and of the said Taylor case, and of the said Lambert case, and of the said uniform recognition of said right and privilege by all of the officers and departments of said State, as aforesaid, the said defendant, The Yazoo & Mississippi Valley Railroad Company, executed on the 24th day of May, 1893, a certain mortgage, a copy of which is herewith filed as Exhibit A, upon the said railroads and property that were of the former Louisville, New Orleans and Texas Railway Company, including the income therefrom, to secure the amount of twenty-five millions of dollars of mortgage bonds of the Illinois Central Railroad Company, then about to be put on the market and sold, and which were immediately thereafter placed upon the market and sold to innocent purchasers, any and every where, in the usual course of such business, for value and without notice of the claim now advanced in this cause, who took and bought the same, relying upon the said decisions and the said recognition and course of dealing of said officers and departments; and the said defendant, The Illinois Central Railroad Company, after the said Lambert case was decided, and relying upon the same, and relying upon said mortgage, the scope and value of which was directly affected by that decision, and relying upon the property and income in and by such mortgage pledged as security for said bonds, to which said Illinois Central Railroad Company could and did look as a safeguard and protection to it against its own liability on said bonds to the purchasers and holders thereof, did issue and become liable on large amounts of such bonds for the use and benefit of said Yazoo & Mississippi Valley Railroad Company, as consolidated, to wit, for the purpose of paying its floating debts and for the purpose of improving, developing, extending, equipping, and otherwise bettering its railroad and outfit, all as stipulated to be done in

said deed of mortgage; and a part of the security of such mortgage, as shown on the face thereof, is the income annually derived from the railroad property that was — property of the said Louisville, New Orleans and Texas Railway Company, which income was and is pledged as security and was and is the only fund provided for the payment of the coupons of the second-mortgage bonds and the coupons of the income mortgage bonds of said last-named company under the said mortgages of 1886 and earlier date, such income being the net income left after paying off operating expenses and the interest on the first-mortgage bonds and taxes, and such net income being never at any time sufficient to pay off the whole of the coupons of said second-mortgage bonds nor any of the coupons of said income mortgage bonds, and the interest on said income mortgage bonds being non-accumulative, but payable only out of the net income, as aforesaid, of the same year in which the coupons mature; and the collection by this suit of the taxes demanded would directly deprive the holders of said second-mortgage bonds and income bonds of *y*heir incomes therefrom and of this defendant, the said Yazoo & Mississippi Valley Railroad Company, of its ability to pay anything on such interest on such bonds and would imperil the safety of such bonds and the coupons thereof.

And after the decision of said Lambert case this defendant, The Yazoo & Mississippi Valley Railroad Company, relying upon said decision and the adjudications thereof, continued for five years, until the 20th day of June, 1898, to conduct its business upon the principle of said decision, that it was not a new company, but the original Yazoo & Mississippi Valley Railroad Company of 1882,
and made many contracts and incurred numerous obliga-
629 tions, and paid off and discharged many debts and liabilities,
and especially paid to the holders of construction debts of the said Louisville, New Orleans and Texas Railway Company in full the taxes for the years 1893, 1894, and 1895, as provided in said section five of the act of 1882, and transacted all of its business upon that basis, the items of which are too numerous to undertake to set forth in this plea, and again, especially relying on said Mississippi Mills case, and on sec. 181 of the constitution of 1890, and said Taylor case in 1892, and on the *same and on the* said Lambert case in 1893 and 1894 and 1895, the said Yazoo & Mississippi Valley Railroad Company did in such years, having in its hands in each year a balance of $200,000 of net earnings, as aforesaid, for each such year after payment of operating expenses and taxes and interest on first-mortgage bonds, pay the same over as such net balance to holders of coupons on said mortgage bonds in amount of $200,000 per annum, out of which amounts so respectively paid out said Yazoo & Mississippi *V*alley Railroad Company, by its contract with such bondholders, had the right to pay off all assessed taxes and would have paid off these taxes except for such decisions and section of constitution, and such coupons so paid were liabilities only against the said net income of said Yazoo & Mississippi Valley Railroad Company and were not liabilities against said company.

Thereafter this plaintiff, proceeding under the authority claimed

to be conferred upon him by chapter 126 of the Annotated Code of 1892, which became operative on the 2nd day of April, 1892, on the — day of ——, 1893, brought in this court his action at law, demanding of defendants taxes alleged to be due to the State and the several counties named and the several municipalities named in his declaration under and by virtue of the revenue laws of said Annotated Code, which became operative on said 2nd day of April, 1892, on the property that had been property of the said Louisville, New Orleans & Texas Railway Company, not including the property that had been property of the said Natchez, Jackson and Columbus Railroad Company, and for the privilege of operating the same money amounting to about the sum of $109,000 00, all for the year 1892. Afterwards, proceeding under the authority claimed to be conferred upon him by the act of the year 1894, enlarging and defining his powers as such agent, he brought a second action, under a similar pretence of right, under the same revenue laws, demanding similar taxes on the same property for the years 1893 and 1894.

Afterwards he brought a third action, under a similar pretense of right and authority, demanding similar taxes on the same property for the year 1895, said action being brought on the — day of ——, 1896.

Afterwards, by order of this court, said three suits were consolidated into one, being this cause, and were subsequently tried as one. Said trial resulted in a verdict and judgment for the defendants as to the taxes of 1892, 1893, and 1894, but in a verdict and judgment in favor of the plaintiff as to the taxes of 1895, amounting to about $88,000.00, from which decision the plaintiff appealed to said supreme court and the defendants prosecuted a cross-appeal. Said appeal and cross-appeal were decided by said supreme court on Monday, the 20th day of June, 1898, and the said court reversed the judgment of this court on both the appeal and the cross-appeal, and it held and adjudged that the said section 13 of article XII of the constitution of 1869 meant that the property of corporations for pecuniary profits should be actually taxed and not merely subject to taxation at the will of the legislature; that the said twenty-first section of the said Mobile and North Western charter and said section five of the said act of 1882 were void *ab initio*, and the case of the Mississippi Mills *v.* Cook aforesaid was expressly overruled, and all of its subsequent cognate cases aforesaid were overruled by necessary consequence, including the said Taylor case. It was further adjudged that the said consolidation of 1892 operated to extinguish both of the consolidating companies and not by way of merger, and created a new company subject to section 180 of the constitution of 1890, and the said Lambert case was also expressly overruled; wherefore the said privilege of section five of the act of 1882 would not have come to the said defendant, The Yazoo & Mississippi Valley Railroad Company, even if the said section had not been void under the constitution of 1869, as aforesaid.

630 Up to the day of said decision—that is, until said 20th of June, 1898—the said recognition of the right of the defendant,

the said Yazoo & Mississippi Valley Railroad Company, to avail itself of and to have the benefit of said section five and said course of dealing in respect thereto had been continued by the tax collectors of said State and counties, and said receipts contemplated by said section had been regularly delivered to the said defendant on the presentation of the required affidavits, and at the sessions of the legislature held in the years 1894, 1896, and 1898 renewed efforts had been made to repeal the said privilege of said section; but the legislature again and each time refused to do so.

And up to said day of such decision the bonds aforesaid of the Louisville, New Orleans and Texas Railway Company and of the Illinois Central railroad, secured as aforesaid, and the stock of the said Louisville, New Orleans & Texas Railway Company remained and continued on the money markets, and were being bought and sold for value largely and by innocent purchasers without notice. The holders of the said second-mortgage bonds and of said income bonds of the Louisville, New Orleans & Texas Railway Company have no resource or security for the payment of their coupons of interest except the earned income of said road after payment of the interest on first-mortgage bonds and operating expenses and taxes, and so far as the said income bonds are concerned, that income must be earned during the current year in order that the coupons shall be payable at all. The earnings of the said road have never been large enough to enable it to pay the interest in full of the second-mortgage bonds on the basis as stated above, nor to pay any interest on the income bonds, or to pay any dividends to stockholders, and the direct effect of said decision is to place a burden of about one hundred thousand dollars per annum upon an income already insufficient to meet the interest as aforesaid, or to pay dividends on the capital stock, in disregard of the said privilege of said section five and under statutes enacted subsequent thereto.

That this suit by the plaintiff and the said decision of June 20th, 1898, are violative of section 10, article 1, of the Constitution of the United States, which forbids any State to pass any law impairing the obligation of a contract, and do impair the obligation of contracts as follows:

(1) The contract between the said Louisville, New Orleans & Texas Railway Company and its successor, this defendant, The Yazoo & Mississippi Valley Railroad Company, and the State of Mississippi, embodied in the said act of 1882, as amended by the act of 1884 aforesaid, and especially in said section five of said act of 1882; (2) the contract, between the said Louisville, New Orleans & Texas Railway Company and its stockholders, including said Mississippi Valley Company, as embodied in said acts and section, and their subscriptions thereunder to and for stock of said company and purchases thereof; (3) the contract between said Louisville, New Orleans & Texas Railway Company and the trustees of its first, second, and income mortgages aforesaid and the many and various purchasers of the several bonds secured by said several mortgages, including defendant The Illinois Central Railroad Company, as embodied in and affected by the said acts and section, and the mort-

gages and bonds made and issued thereunder; (4) the contract of consolidation of 1884, by which the said Louisville, New Orleans & Texas Railway Company was formed, as set forth in the declaration herein; (5) the contract of consolidation of 1892 aforesaid between said Louisville, New Orleans & Texas Railway Company and the Yazoo & Mississippi Valley Company, and the many contracts made and liabilities incurred by the said Yazoo & Mississippi Valley Company thereunder as aforesaid; (6) the mortgage contract of the 24th of May, 1893, above set forth, and the contract of the trustee thereunder and that of the Illinois Central Railroad Company thereunder, and the contracts of the various holders and purchasers of the bonds thereby secured and the security of the said Illinois Central Railroad Company thereunder, as hereinbefore stated.

That this suit by the plaintiff and the said decision of June 20th, 1898, are violative of section 1 of the 14th amendment to the Constitution of the United States, which forbids any State to deprive any person of property without due process of law, or to deny any person within its jurisdiction the equal protection of the laws; both of which are done
631 by said suit and decision as follows: (1) By requiring and forcing this defendant, The Yazoo & Mississippi Valley Railroad Company, to pay anew and for the second time in currency for the benefit of the said State and of the counties and municipalities named in said declaration the same identical taxes amounting to about $100,000.00 per annum for the years 1886 to 1897, inclusive, which it and its predecessor, the said Louisville, New Orleans & Texas Railway Company, from year to year as due, have paid to their construction creditors, as designated by the said section five in the act of 1882, such payments being made when the said supreme court had declared that it was right and lawful so to make the same, and in reliance upon said declaration and the common action and holding of all officers and departments of the State as aforesaid; (2) by requiring and forcing this defendant, The Yazoo & Mississippi Valley Railroad Company, to pay in taxes for the years 1886 to 1907, inclusive, a sum of not less than $100,000.00 per annum, which sum the legislature of said State, as an inducement to the said Louisville, New Orleans & Texas Railway Company to construct said railroad, declared should not be paid except in the manner indicated in said section five of the act of 1882, such declaration and legislation being made and had and the same being accepted by the said Louisville, New Orleans & Texas Railway Company and afterwards by this defendant, The Yazoo & Mississippi Valley Railroad Company, and acted upon by them, as stated hereinbefore, at a time when the said supreme court had declared and settled that such declaration and legislation was valid and binding, and so continued to declare for more than twenty years, such requirement not being by the will and order of the legislature in the premises, but only by a total and sudden revolution in the judicial construction of the constitution of the State; (3) by taking away by retroactive judicial legislation of a large part of the security held by purchasers and holders of the aforesaid bonds of the

Louisville, New Orleans & Texas Railway Company (including the defendant The Illinois Central Railroad Company), and also of the purchasers and holders of the Illinois Central bonds aforesaid; (4) by depriving the said Illinois Central Railroad Company of a large part of the security and protection which it held under the said mortgage of 1893, as aforesaid; (5) by taking away from the holders of stock in the former Louisville, New Orleans & Texas Railway Company (including said Mississippi Valley Company) and of stock in the Yazoo & Mississippi Valley Company, Consolidated, a large part of the net income of the said railroad, out of which alone they can obtain dividends, by judicial change of construction, made since they acquired their several shares of stock; (6) by depriving said Yazoo & Mississippi Valley Railroad Company of its contract status by the consolidation of 1892 as the original company of 1882, thus denying to the consolidated companies the right to contract in such matter as they may desire, in disregard of their charter privileges in that respect.

That, proceeding under said section five, adopting said section twenty one, and in conformity thereto, as to all of the railroads and property in said declaration mentioned (except as to the said special charter and Helena branch and Bayou Sara branch) and all of the taxes payable thereon, as set forth in said declaration, during the said year 1892, the said Louisville, New Orleans & Texas Railway Company and the Yazoo & Mississippi Valley Railroad Company, in due and proper time during the years 1893, 1894, and 1895, and in due and proper time the said last-named company paid said taxes to the full extent thereof in the payment of debts and liabilities which the said Louisville, New Orleans & Texas Railway Company had incurred in the construction of said road and in payment of money borrowed by said last-named company to be used in such construction and so used and in payment of debts incurred by said last-named company in such construction, and also on due and proper time in each of said years respectively the Yazoo & Mississippi Valley Railroad Company delivered to the tax collector of each and every of said counties an affidavit, made by the president of said company or by the cashier thereof, that the amount of said taxes had actually and in good faith been paid and applied by said company (or as to the year 1892 by said Louisville, New Orleans & Texas Railway Company) during said years 1892, 1893, 1894, and 1895 in payment of debts incurred by the said Louisville,
632 New Orleans & Texas Railway Company in the construction of its railroad or money borrowed by said last-named company upon lands or otherwise to be used in constructing said road or paying debts incurred by said last-named company in constructing the same, whereupon the said several tax collectors did, each and every one, give to defendant a receipt in full for the amount of said taxes respectively, excepting as aforesaid; that it is not true, as in said declaration is falsely alleged, that on or about July 21st, 1892, or at any other time, all the railroads and property of said Louisville, New Orleans & Texas Railway Company *was* purchased by the Illinois Central Railroad Company, or any part thereof; nor

is it true, as in said declaration is falsely alleged, that on or about the 25th day of October, 1892, or at any other time the said Illinois Central Railroad Company turned over, delivered to, and merged all said property and railroads of said Louisville, New Orleans & Texas Railway Company or any part thereof into the railroad system and property of the said Yazoo & Mississippi Valley Railroad Company; nor is it true, as in said declaration is falsely alleged, that the said Illinois Central Railroad Company then and there owned and controlled the said railroad system and property of said Yazoo & Mississippi Valley Railroad Company to any other extent and degree than that it held and operated under a lease for a term of years a portion of railway between Jackson, Miss., and Parsons, in Grenada county, which was constructed by said Yazoo & Mississippi Valley Railroad Company several years before said consolidation, and which forms no part of the railroads and property hereinbefore mentioned; nor is it true, as in said declaration is falsely alleged, that in October, 1892, or at any other time, the said Yazoo & Mississippi Valley Railroad Company began and has since continued operating all said railroads and railroad system of said Louisville, New Orleans & Texas Railway Company or any part thereof under the direction and control of the said Illinois Central Railroad Company; nor is it true, as falsely alleged, that the said Illinois Central Railroad Company did, at any time or in any way, become liable for or undertake to pay or assume the liabilities, debts, or obligations of the said Louisville, New Orleans & Texas Railway Company or any of them.

All of which the defendant is ready to verify. Wherefore it prays judgment, &c.

MAYES & HARRIS,
Att'ys for Def't.

5th Plea.

And for a further plea to said declaration, leave of the court being first obtained, comes the defendant The Yazoo & Mississippi Valley Railroad Company, and as to all the taxes herein demanded, except those assessed upon and claimed because of the railroads and property described in the declaration as the "special charter," the "Helena branch," and the "Bayou Sara branch," says:

1. That the said Louisville, New Orleans & Texas Railway Company was authorized by and organized under an act of the legislature of the State of Mississippi entitled "An act to authorize the Memphis & Vicksburg Railroad Company, and the Mississippi Valley and Ship Island Railroad Company to affect a consolidation," approved March 3rd, 1882, as amended by the said act of March 15th, 1884.

2. That on or about the 24th day of October, 1892, the said Louisville, New Orleans & Texas Railway Company was consolidated with and merged in the said defendant, The Yazoo & Mississippi Valley Railroad Company, by the act and deed of the said two companies, as authorized by their respective charters, such consolidation, by express agreement in said deed of consolidation, operating

by way of merger of the existence of the Louisville, New Orleans & Texas Railway Company into that of the Yazoo & Mississippi Valley Railroad Company and continuing the existence of the last-named company unbroken and not forming any new company; all under the rule laid down by the Supreme Court of the United States in the case of Whitworth *v.* Tennessee, 117 United States Reports; that by said consolidation the said Louisville, New Orleans & Texas Railway Company carried into the consolidated
633 company as part of its property a certain line of railroad extending from the city of Jackson to the city of Natchez, in said State, and which said L., N. O. & T. Co. had purchased in the year 1870, by authority of an act of the legislature passed in that year to that end, from the Natchez, Jackson & Columbus Railroad Company, whereby said railroad became, in October, 1892, property of this defendant, The Yazoo & Mississippi Valley Railroad Company, as consolidated. Afterwards, to wit, in January, 1893, one Lambert, sheriff and tax collector of Adams county, in said State, undertook to collect taxes, both privilege and ad valorem, for the years 1891 and 1892, on such railroad property in Adams county, notwithstanding the fact, which was the fact, that the legislature of the State of Mississippi had, by the act approved August 8th, 1870, and entitled "An act supplemental to the acts of incorporation of certain railroad companies," extended to the said Natchez, Jackson & Columbus Railroad Company the full privilege of the section numbered twenty-one of the act of July 20, 1870, entitled "An act to incorporate the Mobile & North Western Railroad Company," and said privilege had, by said act of 1890 and the said sale thereunder, passed with said railroad to said Louisville, New Orleans & Texas Railway Company, and by said consolidation of 1892 to the said defendant, The Yazoo & Mississippi Valley Railroad Company.

Thereupon the defendant The Yazoo & Mississippi Valley Railroad Company and the said Natchez, Jackson & Columbus Railroad Company filed in the chancery court of Adams county their two bills in chancery, uniting in the same, in one of which they enjoined the said sheriff from collecting the said privilege taxes, and in the other they enjoined him from collecting the said ad valorem taxes; said bills, amongst other things, set up the facts herein stated, and set up and insisted upon the identical articles of consolidation, and exhibited the same therewith which are set up in and exhibited with this declaration. The sheriff demurred to said bills, and the chancellor sustained said demurrers and dismissed said bills, from which judgments this said defendant, The Yazoo & Mississippi Valley Railroad Company, and the said Natchez, Jackson & Columbus Railroad Company prosecuted their appeal to the supreme court of said State. On said appeal the State of Mississippi appeared formally, and was represented by the Honl. Frank Johnston, the attorney general of the State, who took charge of the case and argued the same both orally and by written brief. In said litigation and on said appeal the same identical questions and points were raised by the plaintiff in his pleadings herein and by the decision of the supreme court

herein on the 20th of June, 1898, were involved and were presented and were decided as to the effect of the same consolidation of October 24th, 1892, between the said Louisville, New Orleans & Texas Railway Company and the Yazoo & Mississippi Valley Railroad Company. It was contended that, as to the said taxes of both 1891 and 1892, the privilege of said section twenty-one had been lost by said sale of 1890, and that even if not so, so far as the taxes for 1892 were concerned, the said privilege was lost by said consolidation of 1892; that such consolidation created a new corporation which, being created under the constitution of 1890, became subject to its provisions about taxation of corporate property, and could not take the said privilege, and in such cases the said supreme court adjudged and finally decided that the said consolidation of 1892 did operate only by way of merger, and that the existence of the original Yazoo & Mississippi Valley Railroad Company of 1882 was not extinguished thereby, and that no new company was formed thereby, and that the same was not in any way affected by the constitution of 1890, and that the said privilege was not lost thereby. To said litigation and adjudication the said State of Mississippi was a party, being represented in the first instance by its duly authorized officer, the sheriff and tax collector, who was by law authorized to recover taxes by suit, and in the said supreme court by the attorney general, who appeared for the State avowedly, and this defendant, The Yazoo & Mississippi Valley Railroad Company, being one of the two litigants adverse to the State, the said other railroad company being in fact only a formal party to cover a doubt entertained as to which company was the proper one to tender the statutory affidavits under said section twenty-one. Said decision and judgment was and is *res adjudicata* as against said State and all of its municipal subdivisions in questions of taxation, as to the constitutionality of
634 said section five of the act of 1882 (section 21 aforesaid) and as to the effect of said consolidation of 1892 under the said constitution of 1890, and it is hereby pleaded as such.

And the decision of the said supreme court in this cause, rendered on the said 20th day of June, 1898, whereby it was declared that said consolidation of 1892 did form a new company and did cause the loss of said privilege, and the attempted overruling of said Lambert case and this suit, so far as it embraces that question, are violative of the rights of the said defendant, The Yazoo & Mississippi Valley Railroad Company, secured by the fourteenth amendment to the Constitution of the United States, in that they are an effort to deprive said company of its property without due process of law and to deprive said company of the equal protection of the laws; also they are an effort to impair the obligation of the said contract of consolidation and of all the contracts made since said consolidation by said consolidated company, by which it *and* is bound or by which others were and are bound to it, and into which contracts the nature of said consolidated company enters as an element of their obligation.

3. That, excepting as to those taxes assessed upon and claimed because of the railroad and property described in the declaration as

the special charter and the Helena branch and the Bayou Sara branch during the said years 1892, 1893, 1894, and 1895 and in due and proper time, the Yazoo & Mississippi Valley Railroad Company delivered to the tax collector of each and every of said counties an affidavit made by the president of said company or by the cashier thereof that the amount of said taxes had actually and in good faith been paid and applied by said company (or, as to the year 1892, by said Louisville, New Orleans & Texas Railway Company) during said years 1892, 1893, 1894, and 1895 in payment of the debts incurred by the said Louisville, New Orleans & Texas Railway Company in the construction of its said railroad or money borrowed by said last-named company upon lands or otherwise to be used in constructing said road or paying debts incurred by said last-named company in constructing the same; whereupon the said several tax collectors did each and every one give to defendant a receipt in full for the amount of said taxes respectively.

4. That it is not true, as in said declaration is falsely alleged, that on or about July 21st, 1892, or at any other time all the railroads and property of said Louisville, New Orleans & Texas Railway Company *was* purchased by the Illinois Central Railroad Company or any part thereof; nor is it true, as in said declaration is falsely alleged, that on or about the 25th day of October, 1892, or at any other time the said Illinois Central Railroad Company turned over, delivered to, and merged all said property and railroads of said Louisville, New Orleans & Texas Railway Company or any part thereof into the railroad system and property of the said Yazoo & Mississippi Valley Railroad Company; nor is it true, as in said declaration is falsely alleged, that the said Illinois Central Railroad Company then and there owned and controlled the said railroad system and property of said Yazoo & Mississippi Valley Railroad Company to any other extent and degree than that it held and operated under a lease for a term of years a portion of railroad running from Jackson, Miss., to Parsons, in Grenada county, which was constructed by said Y. & M. V. R. R. Co. several years before said consolidation and forms no part of the railroad property described in said declaration; nor is it true, as in said declaration is falsely alleged, that in said October, 1892, or at any other time the said Yazoo & Mississippi Valley Railroad Company began and has since continued operating all said railroads and railroad system of said Louisville, New Orleans & Texas Railway Company or any part thereof under the direction and control of the said Illinois Central Railroad Company; nor is it true, as falsely alleged, that the said Illinois Central Railroad Company did at any time or in any way become liable for or undertake to pay or assume the liabilities, debts, or obligations of the said Louisville, New Orleans & Texas Railway Company or any of them.

All of which the defendant is ready to verify. Wherefore it prays judgment, &c.

MAYES & HARRIS,
Att'ys for Def't.

635 *6th Plea.*

And for a further plea to the said declaration, leave of court having been first obtained, comes the defendant The Yazoo & Mississippi Valley Railroad Company and, as to all of the taxes herein demanded, except those assessed upon and claimed because of the railroads and property described in the declaration as "special charter" and the "Helena branch" and the "Bayou Sara branch," *and* says:

That on the first day of December, 1869, the people of the State of Mississippi adopted a constitution, commonly known since that time as the constitution of 1869, by which the then existing constitution was displaced and abrogated. One provision of said constitution was section 13, article XII, which provided that "the property of all corporations for pecuniary profits shall be subject to taxation the same as that of individuals." Another pr-vision was section 20, article XII, which is as follows:

"SEC. 20. Taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value to be ascertained by law."

Shortly thereafter the legislature of the State of Mississippi, on the 20th day of July, 1870, incorporated the Mobile & North Western Railroad Company, and of that charter of incorporation the twenty-first section was in words and figures as follows, to wit:

"SECTION 21. Be it enacted, That in consideration of the construction of the railroads provided for herein, and oft he great benefit which the State will receive in the development of its agricultural resources by means of said railroads as works of internal improvement, and also of the increased value which will thereby be added to the property of the State, thus enabling the State to greatly increase its revenue without additional and burdensone taxation upon the people, the State hereby agrees with said company (and which agreement is irrepealable), that all taxes to which said company shall be subject for the period of thirty years, are hereby appropriated and set apart, and shall be applied to the payment of the debts and liabilities which the said company may have incurred in the construction of said road, or for money borrowed by said company upon lands or otherwise, to be used in constructing said road, or paying debts incurred by said company in constructing the same; and it shall be the duty of the tax collector in every county in each and every year, to give to said company a receipt in full for the amount of said taxes upon receiving from said company an affidavit made by the president or cashier of said company, that the amount of said taxes have actually and in good faith been paid and applied by said company during the year, in payment of debts incurred, or money borrowed as aforesaid, and which receipt so given shall be in full of all taxes, county, State and municipal, to which said company shall be subject; provided, however, that whenever the profits of said company shall enable it to declare and pay to the stockholders an annual dividend of eight per cent., upon its capital stock over and above the payment of its debts and liabilities, then the appropriation of the taxes afore

said shall cease, and said taxes shall be paid by said company to the tax collector, to be by him paid over as required by law."

At the April term, 1878, of the supreme court of the State of Mississippi that court decided a certain cause, since widely known amongst the members of the bar of said State as the Mississippi Mills case, in which it was litigated and determined the meaning of the foregoing provisions in the said constitution of 1869, and by that decision the said supreme court announced and declared the true meaning of said provisions to be, (1) not a mere declaration that corporate property should be liable to be taxed the same as that of individuals, and (2) not a declaration that it should be actually subjected to such taxation so that the legislature was denied the power to grant exemptions as heretofore, but (3) that the legislature should not thereafter have the power to make grants or exemptions which should be contracts irrepealable by subsequent legislatures, and that the matter of corporate taxation should always be controlled by the legislatures successively.

This decision, rendered twenty years ago, has remained unchallenged and unmodified until now, and not only so, but it has been ex-
636 pressly followed or its principles applied without express citation in many subsequent decisions of the said supreme court, to wit, in McCulloch *v.* Stone, 64 Miss., decided at the October term, 1886; in Railroad Company *v.* Thomas, 65 Mississippi, decided at the October term, 1888; in Bank *v.* Worrall, 67 Mississippi, decided at the October term, 1887; in Attala County *v.* Kelly and in Railway Company *v.* Taylor, 68 Mississippi, decided at the October term, 1890, and in Railroad Company *v.* Lambert, 70 Mississippi, decided at the March term, 1893, and ever since the said decision of said Mississippi Mills case the practical construction, contemporaneous in character, by the various departments of the State, legislative, and executive, has been in accordance therewith until now. On the third day of March, 1882, was passed by the legislature of said State an act which constituted the charter of a railroad company known as the Louisville, New Orleans & Texas Railway Company, together with an amendment, not material here, adopted in March, 1884.

The said act of 1882 contained in it, as section five thereof, a provision granting to the company to be organized under the act, as a new and independent grant, by reference to it, the said section 21 of the Mobile & North Western charter and the benefits thereof, as fully as if the same were set forth in said act of 1882 as section 5 thereof. Said act is entitled "An act to authorize the Memphis and Vicksburg Railroad Company, and the Mississippi Valley and the Ship Island Railroad Company to effect a consolidation," and was approved March 3rd, 1882, and the act amendatory thereof of March 15th, 1884, is the act cited by plaintiff in his declaration herein.

Said act authorizes, as amended, the company chartered thereby to be formed out of the Vicksburg & Memphis Company aforesaid and any other railroad companies of this State or any other State or States of the Union.

Accepting the terms and offers of said act of 1882, so amended,

the said Vicksburg and Memphis Company and three other companies undertook the construction of a railroad from Memphis, in the State of Tennessee, to New Orleans, in the State of Louisiana, by way of Vicksburg, in this State, and got the same through in the year 1884, expending thereon many millions of dollars, and forming, by their consolidation, in accordance with the terms of said act as amended in the year 1884, the said Louisville, New Orleans & Texas Railway Company.

The said case of Taylor *v.* Railway Company, 68 Mississippi, decided at the October term, 1890, above, was a case in which the said Louisville, New Orleans & Texas Railway Company, formed as aforesaid, was one of the parties litigant, the other party being the sheriff and tax collector of Panola county, who had undertaken to collect taxes because of the railway property owned and in possession of said railroad company, and the supreme court in said case decided and adjudged, as theretofore it had been practically adjudged, that said section 5 of the act aforesaid, being chapter 555 of the Laws of 1882, was constitutional and effectual, and did pertain to and belong to the said railway company under and by virtue of the provisions of its charyer, and said claim and demand of the said sheriff in respect to the collection of said taxes was by said judgment refused, adjudicated against, and defeated.

Thereafter, in the month of October, 1892, the said Louisville, New Orleans & Texas Railway Company was consolidated with and merged into this defendant, The Yazoo & Mississippi Valley Railroad Company, in and by the articles of consolidation and agreement referred to and relied upon in the said plaintiff's declaration, such consolidation operating by way of merger. So that the existence of the said Louisville, New Orleans & Texas Railway Company was merged in that of this defendant, The Yazoo & Mississippi Valley Railroad Company, and the existence of the Yazoo and Mississippi — Railroad Company was continued unbroken and no new company was thereby formed.

In the subsequent case of Railroad Company *v.* Lambert, 70 Mississippi, decided at the March term, 1893, this defendant, The Yazoo & Mississippi Valley Railroad Company, as consolidated, was one of the litigants thereto resisting therein an effort of the sheriff of Adams county, in the State of Mississippi, proceeding in the name and by the authority of the State of Mississippi, to collect State taxes, amongst others, being its adversary, and the supreme court
637 of this State in and by such decision adjudged and determined that the legal effect of the consolidation aforesaid was as aforesaid, and that this defendant, the said Yazoo and Mississippi Valley Railroad Company, was entitled to the benefit of the said section 5 of the said act of 1882, and had not lost the same by virtue of such consolidation.

At various times and at various sessions of the legislature of the State of Mississippi efforts were made by members thereof to repeal the said privilege enjoyed by the said Louisville, New Orleans & Texas Railway Company, the constituent of this defendant, The Yazoo & Mississippi Valley Railroad Company, and also to repeal such privi-

lege, since such consolidation then owned and enjoyed by the Yazoo & Mississippi Valley Railroad company as consolidated, but the said legislatures of said State met each such effort by a continuous and persistent refusal to repeal the same and allowed the same to stand unrepealed and the same does stand unrepealed by the legislature to this day, such efforts and refusals being before and by the legislatures as following, to wit:

In the legislature of 1885, senate bill numbered 93, defeated by vote in senate Feb'y 22d, 1886.

In the legislature of 1888, senate bills numbered 84, amended by vote in senate Feb'y 10, 1888, and Feb'y 27th, respectively, so as to preserve and continue existing exemptions.

In the legislature of 1890, senate bill numbered 40, failed in house by adverse report of committee on ways and means Feb'y 21st, 1890.

In the legislature of 1894, house bill 162, lost in the senate Feb'y 10, 1894.

In the legislature of 1896, house bil- 358, lost by adverse report from committee Feb'y 22d, 1896.

In the legislature of 1898, —— bill —, lost by ——.

Section 181 of the constitution of 1890, adopted by the people of the State of Mississippi in convention on the first day of November, 1890, recognizes and continues the existence of such privilege and of similar privileges then lawfully existing in the State of Mississippi until thereafter repealed by the legislature thereof.

Relying upon the aforesaid legislation of the State of Mississippi in said section 5 of the said statute of 1882 as amended by the act of 1884, and upon the adjudications aforesaid, and upon the action of such various legislatures as aforesaid, and upon the action of such constitutional convention of 1890 as aforesaid, as the same was severally passed, adjudicated, and acted upon by said legislatures and provided by said constitution in their several dates and orders of event, the said railroad was constructed by the said Louisville, New Orleans & Texas Railway Company as set forth and equipped and operated until the time of such consolidation, and by such consolidation was turned into and became the property of this defendant, The Yazoo & Mississippi Valley Railroad Company, as consolidated, and accepted by the same as such in such consolidation, and has since been by the same maintained and operated until this date, and numerous and enormous obligations incurred and disbursements of money made on the faith thereof.

That in and during the year 1892 the said Louisville, New Orleans & Texas Railway Company and the said Yazoo & Mississippi Valley Railroad Company after such consolidation and in and during the years 1893, 1894, and 1895, respectively, the said Yazoo & Mississippi Valley Railroad Company did in each and every year of said years, relying as aforesaid upon said legislation and adjudications and refusal to repeal said privilege of said legislature and said constitutional enactment as aforesaid, pay the taxes aforesaid (except as aforesaid those demanded because of the said special charter and the said Helena branch and the said Bayou Sara branch) to the full ex-

tent thereof, in the payment of debts and liabilities which the said Louisville, New Orleans & Texas Railway Company had incurred in the construction of said road and in the payment of money borrowed by said Louisville, New Orleans & Texas Railway Company to be used in such construction and so used and in payment of debts incurred by said Louisville, New Orleans & Texas Railway Company in such construction, and excepting as to said special charter and Helena branch and Bayou Sara branch as aforesaid during the said years 1892, 1893, 1894, and 1895, and in due and proper time,

638 and relying as aforesaid, the Yazoo & Mississippi Valley Railroad Company delivered to the tax collector of each and every of said counties an affidavit made by the president of such company or by the cashier thereof that the amount of said taxes had actually and in good faith been paid and applied by said company (or, as to the year 1892, by the said Louisville, New Orleans & Texas Railway Company) during the said years 1892, 1893, 1894, and 1895 respectively in payment of the debts incurred by said Louisville, New Orleans & Texas Railway Company in the construction of its said railroad or money borrowed by said last-named company upon lands or otherwise to be used in constructing said road or paying debts incurred by said last-named company in constructing the same; whereupon said tax collectors did each and every one give to the defendant a receipt in full for the amount of said taxes respectively, which receipts the said defendant now holds, the same having never been called in or in anywise cancelled by any judicial procedure of said State.

Wherefore the defendants herein aver that the State of Mississippi and the various counties and municipalities mentioned in the plaintiff's declaration herein, the said plaintiff, as revenue agent, herein, each and all are estopped to claim and assert the said taxes severally and collectively, as herein demanded.

That it is not true, as in said declaration is falsely alleged, that on or about July 21st, 1892, or at any other time all the railroads and property of said Louisville, New Orleans & Texas Railway Company was purchased by the Illinois Central Railroad Company or any part thereof, as in said declaration is falsely alleged, — that on or about the 25th day of October, 1892, or at any other time the said Illinois Central Railroad Company turned over, delivered to, and merged all said property and railroads of said Louisville, New Orleans & Texas Railway Company or any part thereof into the railroad system and property of the said Yazoo & Mississippi Valley Railroad Company; nor is it true, as in said declaration is falsely alleged, that the said Illinois Central Railroad Company then and there owned and controlled the said railroad system and property of said Yazoo & Mississippi Valley Railroad Company to any other extent and degree than that it held and operated under a lease for a term of years a portion of railroad running from Jackson, Miss., to Parsons, in Grenada county, which was constructed several years before said consolidation by the Yazoo & Mississippi Valley Railroad Company and which forms no part of the railroad property mentioned in said declaration; nor is it true, as in said declaration

is falsely alleged, that in said October, 1892, or at any other time the said Yazoo & Mississippi Valley Railroad Company began and has since continued operating all said railroads and railroad system of said Louisville, New Orleans & Texas Railway Company or any part thereof under the direction and control of the said Illinois Central Railroad Company; nor is it true, as falsely alleged, that the said Illinois Central Railroad Company did at any time or in any way become liable for or undertake to pay or assume the liabilities, debts, or obligations of the said Louisville, New Orleans & Texas Railway Company or any of them.

All of which said defendant is ready to verify. Wherefore it prays judgment, &c.

MAYES & HARRIS,
Att'ys for Def't.

7th Plea.

Comes the defendant herein The Yazoo & Mississippi Valley Railroad Company and denies the wrong and injury when, etc., and, for a further plea to the said declaration as to the taxes therein demanded as assessed upon and due because of these portions of said railroad and property named and described in said declaration as the special charter and the Helena branch and the Bayou Sara branch, *and* says that all of such taxes were duly and regularly paid in currency by the defendant The Yazoo & Mississippi Valley Railroad Company in the years 1892, 1893, 1894, and 1895 respectively and before the bringing of the respective suits therefor, which have been consolidated into this case; and this the said defendant is ready to verify. Wherefore it prays judgment, etc.

MAYES & HARRIS,
Att'ys for Def't.

639 Endorsed: Filed July 6th, 1898. F. B. Neal, clerk, by W. J. Brown, Jr., D. C.

Pleas of Illinois Central Railroad Company.

STATE OF MISSISSIPPI,
Hinds County, First District.

In Circuit Court, at the June Term, 1898.

WIRT ADAMS, State Revenue Agent, Plaintiff,
v.
THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY ET AL., Defendants.

2nd Plea.

Comes the defendant The Illinois Central Railroad Company, leave of court having been first obtained, and, for its further plea in this behalf as to all the taxes herein demanded except those assessed upon and claimed because of the railroads and property described

in the declaration as the "special charter" and the "Helena branch" and the "Bayou Sara branch," says that the said Louisville, New Orleans & Texas Railway Company was authorized by and organized under and its railroad was constructed and equipped at a cost and expenditure of many millions of dollars under an act of the legislature of the State of Mississippi entitled "An act to authorize the Memphis and Vicksburg Railroad Company and the Mississippi Valley and Ship Island Railroad Company to affect a consolidation," approved March 3rd, 1882, as amended by said act of March 15th, 1884; that section 5 of said act of 1882 was in words and figures as follows, to wit:

SEC. 5. Be it further enacted, that the provisions of the twenty-first section of an act entitled, "An act to incorporate the Mobile and North Western railroad, approved July 20, 1870, is hereby made to apply to the said consolidated company, and for that purpose the said section is hereby declared to be a part of this act, and this section shall be construed as though the said twenty-first section was specifically and fully set out herein; but this section shall not be in force for a longer time than twenty-five years from the approval of this act."

That the said twenty-first section so referred to and incorporated into said act of 1882 as part of the fifth section thereof was in words and figures as follows:

"SECTION 21. Be it enacted, That in consideration of the construction of the railroads provided for herein, and of the great benefit which the State will receive in the development of its agricultural resources by means of said railroads as works of internal improvement, and also of the increased value which will thereby be added to the property of the State thus enabling the State to increase its revenue without additional and burdensome taxation upon the people, the State hereby agrees with said company (and which agreement is irrepealable) that all the taxes to which said company shall be subject for the period of thirty years, are hereby appropriated and set apart, and shall be applied to the payment of the debts and liabilities which the said company may have incurred in the construction of said road, or for money borrowed by said company upon lands or otherwise, to be used in construeting said road, or paying debts incurred by said company in constructing the same; and it shall be the duty of the tax collector in every county in each and every year, to give to said company a receipt in full for the amount of said taxes upon receiving from said company an affidavit made by the president or cashier of said company, that the amount of said taxes have actually and in good faith been paid and applied by said company during the year in payment of the debts incurred, or money borrowed as aforesaid, and which receipt so given shall be in full of all taxes, county, State and municipal, to which said company shall be subject; provided, however, that whenever the profits of said company shall enable it to declare and pay to the stockholders an annual dividend of eight per cent. upon its capital stock over and above the payment of its debts and liabilities, then

the appropriation of the taxes aforesaid shall cease, and said
640 taxes shall be paid by said company to the tax collector, to be by him paid over as required by law."

That said act of 1882 as amended by said act of 1884 was accepted by the said Louisville, New Orleans & Texas Railway Company as its charter, and said railroad was constructed and equipped thereunder, and said charter did constitute a contract between said railroad company and the State of Mississippi, wherein and whereby, by and through the said section five adopting the said section twenty-one, it was contracted irrepealably for a period of twenty-five years from the approval of said act—that is, until the 3rd day of March, 1907; that in consideration of the construction of the railroads provided for in said act and of the great benefit which the State would receive therefrom, as set forth in said section, the State agreed and contracted that all of the taxes to which said company should be subject should be and were appropriated and set apart and directed to be applied by said company to the payment of the debts and liabilities which the company should incur in constructing said railroad, and to the repayment of monies borrowed by said company upon lands or otherwise to be used in constructing said road, and to the payment of debts incurred by said company in constructing the same.

That the said company did, in consideration of the said charter and contract by and with said State and relying thereupon, undertake the construction and equipment of said railroad contemplated by said act, and did construct and equip the same and did continuously operate the same as contemplated by said act until the consolidation mentioned in the said declaration, and this defendant, The Yazoo & Mississippi Valley Railroad Company, has operated the same since that time until the beginning of this suit, and in the construction thereof, conformably to the intent and meaning of said act, the said Louisville, New Orleans & Texas Railway Company did incur enormous debts and liabilities and did borrow large sums of money to be used in such construction and so used, and did pay large debts incurred in constructing the same, as contemplated by said act.

That in and during the years 1892 and 1893 and 1894 and 1895, respectively, in each and every of said years the said Yazoo & Mississippi Valley Railroad Company did, pursuant to said section of said act and said contract of appropriation, pay said taxes to the full extent thereof in the payment of debts and liabilities which the said Louisville, New Orleans & Texas Railway Company had incurred in the construction of said road and in payment of money borrowed by said Louisville, New Orleans & Texas Railway Company to be used in such construction and so used, and in payment of debts incurred by said Louisville, New Orleans & Texas Railway Company in such construction, and during the said years 1892, 1893, 1894, and 1895, and in due and proper time, the Yazoo & Mississippi Valley Railroad Company delivered to the tax collector of each and every of said counties an affidavit made by the president of said company or by the cashier thereof that the amount of

said taxes had actually and in good faith been paid and applied by said company (or as to the year 1892 by said Louisville, New Orleans & Texas Railway Company) during the years 1892, 1893, 1894, and 1895 in payment of the debts incurred by the said Louisville, New Orleans & Texas Railway Company in the construction of its said railroad or money borrowed by said last-named company upon lands or otherwise to be used in constructing said road or paying debts incurred by said last-named company in constructing the same, whereupon the said several tax collectors did, each and every one, give to defendant a receipt in full for the amount of said taxes, respectively, excepting, however, as aforesaid, as to those parts of said railroad and the taxes payable thereon described in said declaration and named therein as the "special charter" and the "Helena branch" and the "Bayou Sara branch."

That on or about the 24th day of October, 1892, the said Louisville, New Orleans & Texas Railway Company was consolidated with and merged in the said defendant, The Yazoo & Mississippi Valley Railroad Company, by the act and deed of the said two companies as authorized by their charters, by which said consolidation the existence of the said Louisville, New Orleans & Texas Railway Company was merged into that of the said Yazoo & Mississippi Valley Railroad *Railroad* Company without creating any new company or disturbing or breaking the continuous existence of the latter company, and the said payments of taxes were made in the year 1892 partly by said Louisville, New Orleans & Texas Railway Company and partly by said Yazoo & Mississippi Valley Railroad Company as so consolidated, and by the latter company as consolidated in and for the years 1893 and 1894 and 1895.

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That it is not true, as in said declaration is falsely alleged, that on or about July 21st, 1892, or at any other time, all the railroads and property of said Louisville, New Orleans & Texas Railway Company *was* purchased by the Illinois Central Railroad Company or any part thereof; nor is it true, as in said declaration is falsely alleged, that on or about the 25th day of October, 1892, or at any other time, the said Illinois Central Railroad Company turned over, delivered to, and merged all said property and railroads of said Louisville, New Orleans & Texas Railway Company, or any part thereof, into the railroad system and property of the said Yazoo & Mississippi Valley Railroad Company; nor is it true, as in said declaration is falsely alleged, that the said Illinois Central Railroad Company then and there owned and controlled the said railroad system and property of said Yazoo & Mississippi Valley Railroad Company to any other extent and degree than that it held and operated a portion of railway between Jackson, Miss., and Parsons, in Grenada county, which was constructed by said Yazoo & Mississippi Valley Railroad Company several years before said consolidation, and which forms no part of the railroads and property hereinbefore mentioned, under a lease for a term of years; nor is it true, as in said declaration is falsely alleged, that in said October, 1892, or at any other time, the said Yazoo & Mississippi Valley Railroad

Company began and has since continued operating all said railroads and railroad system of said Louisville, New Orleans & Texas Railway Company, or any part thereof, under the direction and control of the said Illinois Central Railroad Company; nor is it true, as falsely alleged, that the said Illinois Central Railroad Company did at any time or in any way become liable for or undertake to pay or assume the liabilities, debts, or obligations of the said Louisville, New Orleans & Texas Railway Company or any of them.

All of which said defendant is ready to verify.

Wherefore, etc.

MAYES & HARRIS,
Att'ys for Def'ts.

3rd Plea.

And for a further plea to the said declaration, leave of the court having been first obtained, comes the defendant The Illinois Central Railroad Company, and as to all the taxes herein demanded, except those assessed upon and claimed because of the railroads and property described in the declaration as the "special charter" and the "Helena branch" and the "Bayou Sara branch," says that the said Louisville, New Orleans & Texas Railway Company was authorized by and organized under and its railroad was constructed and equipped at a cost and expenditure of many millions of dollars under an act of the legislature of the State of Mississippi entitled "An act to authorize the Memphis & Vicksburg Railroad Company and the Mississippi Valley and Ship Island Railroad Company to affect a consolidation," approved March 3rd, 1882, as amended by said act of March 15th, 1884; that section five of said act of 1882 was in words and figures as follows:

"SEC. 5. Be it further enacted, That the provisions of the twenty-first section of an act entitled 'An act to incorporate the Mobile & North Western Railroad Company,' approved July 20, 1870, is hereby made to apply to the said consolidated company, and for that purpose the said section is hereby declared to be a part of this act, and this section shall be construed as though the said twenty-first section was specifically and fully set out herein; but this section shall not be in force for a longer time than twenty-five years from the approval of this act."

That the said twenty-first section so referred to and made a part and incorporated into said fifth section of said act of 1882 was in words and figures as follows:

"SECTION 21. Be it enacted, That in consideration of the
642 construction of the railroads provided for herein, and of great benefit which the State will receive in the development of its agricultural resources by means of said railroads as works of internal improvement, and also of the increased value which will thereby be added to the property of the State thus enabling the State to greatly increase its revenue without additional and burdensome taxation upon the people, the State hereby agrees with said company (and which said agreement is irrepealable) that all the taxes to which said company shall be subject for the period of thirty

years, are hereby appropriated and set apart, and shall be applied to the payment of the debts and liabilities which the said company may have incurred in the construction of said road, or for money borrowed by said company upon lands or otherwise, to be used in constructing said road, or paying debts incurred by said company in constructing the same; and it shall be the duty of the tax collector in every county in each and every year, to give to said company a receipt in full for the amount of said taxes upon receiving from said company an affidavit made by the president or cashier of said company, that the amount of said taxes *have* actually and in good faith been paid and applied by said company during the year, in the payment of debts incurred or money borrowed as aforesaid, and which receipt so given shall be in full of all taxes, county, State and municipal to which said company shall be subject; provided, however, that whenever the profits of said company shall enable it to declare and pay to the stockholders an annual dividend of eight per cent. upon its capital stock over and above the payment of its debts and liabilities, then the appropriation of the taxes aforesaid shall cease, and said taxes shall be paid by said company to the tax collector, to be by him paid over as required by law."

The said act of 1882, as amended by said act of 1884, was accepted by the said Louisville, New Orleans & Texas Railway Company as its charter, and said railroad was constructed and equipped thereunder, and its said charter did constitute a contract between the said railroad company and the said State of Mississippi, wherein and whereby, by and through said section 5, adopting the said section twenty-one, it was contracted irrepealably for twenty-five years from the approval of this act—that is, until the 3rd day of March, 1907—that in consideration of the construction of the railroads provided for in said act and of the great benefit which the State would receive therefrom, as set forth in said section, the State agreed and contracted that all of the taxes to which said company should be subject should be and were appropriated and set apart and directed to be applied by said company to the payment of the debts and liabilities which the said company should incur in constructing said railroad and to the payment of monies borrowed by said company upon lands or otherwise to be used in constructing said railroad and to the payment of debts incurred by said company in constructing the same.

That the said company did, in consideration of the said charter and contract by and with said State, and relying thereupon, undertake the construction and equipment of said railroad contemplated by said act and did construct and equip the same and did continuously operate the same, as contemplated by said act, until the consolidation mentioned in said declaration, and this defendant, The Yazoo & Mississippi Valley Railroad Company, has operated the same since that time until the beginning of this suit, and in the construction thereof, conformably to the intent and meaning of this act, the said Louisville, New Orleans & Texas Railway Company did incur enormous debts and liabilities and did borrow large sums of money

to be used in such construction, and so used and did pay large debts incurred in constructing the same, as contemplated by said act.

That on or about the 24th day of October, 1892, the said Louisville, New Orleans & Texas Railway Company was consolidated with and merged in the defendant The Yazoo & Mississippi Valley Railroad Company by the act and deed of the said two companies, as authorized by their charters, by which consolidation the existence of the said Louisville, New Orleans & Texas Railway Company was merged into that of the Yazoo & Mississippi Valley Railroad Company without creating any new company or disturbing or breaking the continuous existence of the latter company.

643 That proceeding under the said section five, adopting said section twenty-one, and in conformity thereto, as to all of the railroads and property in said declaration mentioned and all of the taxes payable thereon, as set forth in said declaration, except those parts of said railroad described in said declaration and named therein as the "special charter" and the "Helena branch" and the "Bayou Sara branch" and the taxes payable thereon during the said years 1892, 1893, 1894, and 1895 and in due and proper time, the Yazoo & Mississippi Valley Railroad Company delivered to the tax collector of each and every of said counties an affidavit made by the president of said company or by the cashier thereof that the amount of said taxes had actually and in good faith been paid and applied by said company (or, as to the year 1892, by said Louisville, New Orleans & Texas Railway Company) during said years 1892, 1893, 1894, and 1895 in payment of the debts incurred by the said Louisville, New Orleans & Texas Railway Company in the construction of its said railroad or money borrowed by said last-named company upon lands or otherwise to be used in constructing said road or paying debts incurred by said last-named company in constructing the same; whereupon the said several tax collectors did each and every one give to defendant a receipt in full for the amount of said taxes respectively, excepting, however, as aforesaid, as to those parts of said railroad described in said declaration and named therein as the "special charter" and the "Helena branch" and the "Bayou Sara branch" and the taxes thereon.

That it is not true, as in said declaration is falsely alleged, that on or about July 21st, 1892, or at any other time all the railroads and property of said Louisville, New Orleans & Texas Railway Company *was* purchased by the Illinois Central Railroad Company or any part thereof; nor is it true, as in said declaration is falsely alleged, that on or about the 25th day of October, 1892, or at any other time the said Illinois Central Railroad Company turned over, delivered to, and merged all of said property and railroads of said Louisville, New Orleans & Texas Railway Company or any part thereof into the railroad system and property of the said Yazoo & Mississippi Valley Railroad Company; nor is it true, as in said declaration is falsely alleged, that the said Illinois Central Railroad Company then and there owned and controlled the said railroad system and property of said Yazoo & Mississippi Valley Railroad Company to any other extent and degree than that it held and

operated a portion of railway between Jackson, Miss., and Parsons, in Grenada county, which was constructed by said Yazoo & Mississippi Valley Railroad Company several years before said consolidation, and which forms no part of the railroads and property hereinbefore mentioned, under a lease for a term of years; nor is it true, as in said declaration is falsely alleged, that in said October, 1892, or at any other time the said Yazoo & Mississippi Valley Railroad Company began and has since continued operating all said railroads and railroad system of said Louisville, New Orleans & Texas Railway Company or any part thereof under the direction and control of the said Illinois Central Railroad Company; nor is it true, as falsely alleged, that the said Illinois Central Railroad Company did at any time or in any way become liable for or undertake to pay or assume the liabilities, debts, or obligations of the said Louisville, New Orleans & Texas Railway Company or any of them.

All of which this defendant is ready to verify; wherefore it prays judgment, &c.

MAYES & HARRIS,
Att'ys for Def't.

4th Plea.

And for a further plead to said declaration, leave of the court being first obtained, comes the defendant The Illinois Central Railroad Company, and, as to all the taxes herein demanded except those assessed upon and claimed because of the railroads and property described in the declaration as the "special charter" and the "Helena branch" and the "Bayou Sara branch," says that on the 1st day of December, 1869, the people of the State of Mississippi adopted their constitution of that year and date, by which
644 the then existing constitution was displaced and abrogated; that section 13 of art. 12 of said constitution was in these words: "The property of all corporations for pecuniary profits shall be subject to taxation the same as that of individuals."

That on the 20th day of July, 1870, the legislature of the State of Mississippi passed an act entitled "An act to incorporate the Mobile and North Western Railroad Company," of which act section twenty-one was in the words and figures following, to wit:

"SECTION 21. Be it enacted, That in consideration of the construction of the railroads provided for herein, and of the great benefit which the State will receive in the development of its agricultural resources by means of said railroads as works of internal improvement, and also of the increased value which will thereby be added to the property of the State, thus enabling the State to greatly increase its revenue without additional burdensome taxation upon the people (and which agreement is irrepealable) that all taxes to which said company shall be subject for the period of thirty years, are hereby appropriated and set apart, and shall be applied to the payment of the debts and liabilities which the said company may have incurred in the construction of said road, or for money borrowed by said company upon lands or otherwise, to be used in constructing said road, or paying debts incurred by said company in constructing the

same, and it shall be the duty of the tax collector in every county in each and every year, to give to said company a receipt in full for the amount of said taxes upon receiving from said company an affidavit made by the president or cashier of said company, that the amount of said taxes have actually and in good faith been paid and applied by said company during the year, in payment of the debts incurred or money borrowed as aforesaid, and which receipt so given shall be in full of all taxes, county, State and municipal, to which said company shall be subject; provided however, that whenever the profits of said company shall enable it to declare and pay to the stockholders an annual dividend of eight per cent. upon its capital stock over and above the payment of its debts and liabilities, then the appropriation of the taxes aforesaid shall cease, and said taxes shall be paid by said company to the tax collector, to be by him paid over as required by law."

That on the 8th day of August, 1870, the same legislature passed another act entitled "An act supplemental to the acts of incorporation of certain railroad companies," by which the provisions of said twenty-first section of the said Mobile and North Western Company were extended to certain other railroad companies of said State, amongst them to the Natchez & Jackson (afterwards the Natchez, Jackson and Columbus) Railroad Company.

That at the April term, 1878, the supreme court of the said State decided the case reported in the 56th volume of Mississippi Reports under the style of Mississippi Mills *v.* Cook, tax collector, in which it was determined that the said provision of the constitution of 1869, set forth above, did not require that the property of corporations for pecuniary profit should be taxed, but only meant that such property should remain subject to taxation at the will of the legislature of the State; that no legislature could by contract or privilege of exemption thereafter made place such property beyond the taxing power of any succeeding legislature or of itself, but that such contract or privilege could when thereafter granted by any legislature be repealed by any legislature.

That such decision rendered twenty years ago has remained unchallenged and unmodified until the 20th day of June, 1898; that it has been either expressly followed or its principle applied without express citation in many subsequent decisions of the said supreme court, to wit, in McCulloch *v.* Stone, 64 Miss., decided in 1886; in Railroad Company *v.* Thomas, 65 Miss., decided in 1888; in Bank *v.* Worrall, 67 Miss., decided in 1889; in Attala County *v.* Kelly, and in Railroad Company *v.* Taylor, 68 Miss., decided in 1890; in Railroad Company *v.* Lambert, 70 Miss., decided in 1893, being the settled and unquestioned law of the State ever since its making.

That ever since such decision its construction of the constitution has been recognized and followed in all the departments of the State government—legislative and executive—and plainly recognized and followed by the constitutional convention of said State in the year 1890 in the formation and adoption of the new constitution of that year.

On the 3rd day of March, 1882, the legislature of said State passed

the act entitled "An act to authorize the Memphis & Vicks-
645 burg Railroad Company and the Mississippi Valley and Ship Island Railroad Company to effect a consolidation," said companies being two companies thereto chartered by said State which had until then failed to construct the railroads contemplated by their respective charters, and section five of said act was in the words and figures as follows:

"SECTION 5. Be it further enacted, That the provisions of the twenty-first section of an act entitled, An act to incorporate the Mobile & North Western railroad, approved July 20, 1870, is hereby made to apply to the said consolidated company, and for that purpose the said section is hereby declared to be part of this act, and this section shall be construed as though the twenty-first section was specially and fully set out herein; but this section shall not — in force for a longer time than twenty-five years from the approval of this act."

That thereafter said act of 1882 was amended by the act approved March 15th, 1884, mentioned in the declaration herein. Accepting the terms and offers of the act of 1882 aforesaid, so amended, a consolidation was effected in the year 1884 between said Memphis & Vicksburg Railroad Company and the three other companies as set forth in the declaration herein, and thereby the Louisville, New Orleans & Texas Railway Company was formed, as a new company, with the said act of 1882, as amended by the said act of 1884, as its charter, and the charters of its consti-uent members as provided in section 1 of said act of 1882.

That, proceeding under said charter and under said section five as a part thereof, the said Louisville, New Orleans & Texas Railway Company proceeded to construct and equip the railroads contemplated in said acts, beginning the construction thereof in the year 1882, and making the connection of track through from Memphis, in the State of Tennessee, to New Orleans, in the State of Louisiana, by way of Vicksburg, in the said State of Mississippi, over the route prescribed in said acts, in the latter part of the year 1884, and adding branches thereto as authorized by said acts and contemplated therein, from time to time, until in the year 1891, at an immense expenditure of money and by the incurring of enormous liabilities, and by borrowing for such purposes large sums of money, all as authorized by and contemplated in said acts, all of the railroads and property mentioned in this declaration and about the taxes upon which this defendant is sued herein being part and parcel of the railroad so built and constructed under and by virtue of such authority, except those parts mentioned in the declaration and described as the "special charter" and the "Helena branch" and the "Bayou Sara branch," which were constructed by other companies under other charters and were purchased by said company.

That in the construction and equipment of said railroad and other necessary costs incident to such enterprise the said railroad company borrowed money and so used the same for such purposes, and incurred liabilities and made payments, using bonds and stock for such payments, all as authorized by its said charters, so that

the stock and bonds issued by it for such payments and for such borrowed money and in discharge of the liabilities so incurred amounted in the year 1884 to more than four million dollars of stock and more than twelve million dollars of first-mortgage bonds and more than nine million dollars of income morgtage bonds, which were subordinated to the said first-mortgage bonds, and for such purposes aforesaid, as authorized by said charter, in subsequent years other stock and bonds were issued from time to time in the extension and development of said railroad and its betterment for its public uses, until in the year 1890 the total issuance of stock had reached the amount of five millions of dollars, and of first-mortgage bonds the sum of over sixteen millions of dollars, and of second-mortgage bonds the sum of over nine millions of dollars, and of income bonds the sum of over ten millions of dollars; all of which bonds and stock had been placed on the money markets of the world, and large amounts thereof were sold and disposed of to various parties, citizens of various States, other than Mississippi, and of Europe, who bought the same in the usual course of trade and for value and without notice.

On the 1st day of November, 1890, the people of the State of Mississippi in convention assembled adopted a new constitution, which became operative on that day, and of which section 181 expressly declared that "the property of all private corporations for
646 pecuniary gain shall be taxed in the same way and to the same extent as the property of individuals," thus by plain enactment recognizing the interpretation placed by the *the* Mississippi Mills case upon the coustitution of 1869, and changing the rule so as actually to require taxation by changing the language of the provision; but in the same section it is also provided that "exemptions from taxation to which corporations are legally entitled at the adoption of this constitution shall remain in full force and effect for the time of such exemptions as expressed in their respective charters or by general law unless sooner repealed by the legislature," thus expressly recognizing and retaining the validity of the exemptions already granted under the constitution of 1869, since as to those contained in charters anterior to 1869 the legislature could not repeal the same and the constitutional convention could not, and such provision would be as to them wholly unnecessary and nugatory.

Afterwards, in January, 1891, was decided by said supreme court of said State the case of the Louisville, New Orleans and Texas Railway Company *v.* Taylor, reported in 68th Mississippi Reports, in which case a sheriff and tax collector of the county of Panola was endeavoring to collect certain taxes from said company; the said court adjudicated expressly that the said company, so formed as aforesaid, was entitled to the privilege called therein an "exemption," contained in the said section twenty-one, which was declared to be conferred upon the consolidated railways by said act of 1882.

That continuously and habitually all of the executive officers of the State government recognized and acted upon the right and title of the said Louisville, New Orleans and Texas Railway Company

to the said privilege of the said section twenty-one (that is, section five of the act of 1882) from the formation of said company until and during the year 1892, during all of such period the several tax collectors whose duty it was to collect taxes habitually and without objection, and as a mere matter of course, delivered to the said company the tax receipts provided for in said section on the presentation of the affidavits therein provided for, and at various sessions of the legislature during said period members thereof introduced bills for the purpose of repealing said privilege of said section, but each successive legislature at which such efforts were made refused to repeal the same.

Afterwards, in or about the month of July, 1892, this defendant, The Illinois Central Railroad Company, a citizen and corporation of the State of Illinois, purchased of the mortgage bonds aforesaid as follows: Of the first-mortgage bonds, the amount of thirteen millions of dollars; of the second-mortgage bonds, the sum of over eight millions of dollars, and of the income bonds, the sum of over eight millions of dollars, paying a large price therefor; and at or about the same time the Mississippi Valley Company, a corporation of the State of Mississippi, but of whose capital stock the defendant The Illinois Central Railroad Company held almost all, purchased nearly four millions dollars of said capital stock of the Louisville, New Orleans and Texas Railway company, and both of said purchasing corporations made their said purchases contemplating and relying on the said privilege of said section five (or twenty-one), in said act of 1882, and upon the said settled rule of law in respect thereto as exp-ended in the said Mississippi Mills case and the subsequent cases aforesaid following the same, and on said section 181 of the constitution of 1890, and on the said Taylor case above cited, and upon the said uniform recognition of said right by all departments and officers of said State, as aforesaid, as a very material element of value in their said purchases and a material inducement thereto.

That afterwards, to wit, on the 24th day of October, 1892, this defendant and the Yazoo & Mississippi Valley Railroad Company and the said Louisville, New Orleans & Texas Railway Company, by virtue of the authority conferred upon them in and by their respective charters, were consolidated with each other by way of merger, so that the existence of the latter company was merged and sunken in that of the former, and the existence of the former, this defendant, continued unbroken and no new company was formed; that in making such consolidation with the said Louisville, New Orleans & Texas Railway Company the latter company brought into the consolidation its property, rights, franchises, privileges, and immunities, including the privilege of said section five of the
647 act of 1882, and the consolidated company, this defendant, assumed its debts and liabilities, and in making such consolidation with said Louisville, New Orleans & Texas Railway Company this defendant, The Yazoo & Mississippi Valley Railroad Company, contemplated and relied on the said privilege of section five (or twenty-one) in said act of 1882 and upon the said settled

rule of law in respect thereto as expounded in said Mississippi Mills case and the subsequent cases aforesaid following the same and in said section 181 of the constitution of 1890 and on the said Taylor case, above cited, and upon said uniform recognition of said right by all of the officers and departments of said State, as aforesaid, such privilege being a very material element of value in the said consolidation and a material inducement to this defendant, The Yazoo & Mississippi Valley Railroad Company, to make the same with the said Louisville, New Orleans & Texas Railway Company. By said consolidation the said Louisville, New Orleans & Texas Railway Company carried into the consolidated company, as part of its assets and property, the line of railroad between Jackson, Mississippi, and the city of Natchez, in said State, which had been the railroad of the Natchez, Jackson & Columbus Railroad Company aforesaid, together with the privilege of said section twenty-one, which had been by the act of 1870 aforesaid extended to that company, as aforesaid, and which the said company had by its deed conveyed to the said Louisville, New Orleans & Texas Railway Company, in the year 1890, under and by virtue of an act of the legislature of the said State of that year specially authorizing such sale and conveyance.

In the month of January, 1893, one Lambert, sheriff of Adams county, in said State, undertook to collect privilege and ad valorem taxes on the property in Adams county that had been property of said Natchez, Jackson and Columbus Railroad Company, as aforesaid, in disregard of said right under said section twenty-one, and this defendant, The Yazoo & Mississippi Valley Railroad Company as consolidated, and the said Natchez, Jackson & Columbus Railroad Company enjoined such collection, setting up the privilege aforesaid; and said cause having been taken by them to the said supreme court on appeal from an adverse decision by the chancellor in the case of Railroad *v.* Lambert, 70 Miss. Reports, decided at the March term, 1893, — adjudged that the said consolidation of 1892 operated by way of merger only and did not form a new company subject to section 180 of the constitution of 1890, and that the so-called exemption (that is to say, the privilege conferred by said section twenty-one) not only passed by the sale of 1890 to the said Louisville, New Orleans & Texas Railway Company, but also, by said consolidation of 1892, passed, as property and privilege of the said last-named company, into the consolidated company and appertained to this defendant, The Yazoo & Mississippi Valley Railroad Company; and in said decision the said Mississippi Mills case was again expressly reaffirmed, and the demand and claim of said sheriff and tax collector were denied.

Further, that on the faith of the decision in the Mississippi Mills case aforesaid and said other cases named following the same and of the said section 181 of the constitution of 1890, of the said Taylor case, and of the said Lambert case, and of the said uniform recognition of said right and privilege by all of the officers and departments of said State, as aforesaid, the said defendant, The Yazoo & Mississippi Valley Railroad Company, executed, on the 24th day of

May, 1893, a certain mortgage, a copy of which is herewith filed as Exhibit A, upon the said railroads and property that were of the former Louisville, New Orleans & Texas Railway Company, including the income therefrom, to secure the amount of twenty-five millions of dollars of mortgage bonds of the Illinois Central Railroad Company then about to be put on the market and sold and which were immediately thereafter placed upon the market and sold to innocent purchasers, any and every where, in the usual course of business, for value and without notice of the claim now advanced in this cause, who took and bought the same relying upon the said decisions and the said recognitions and course of dealing of said officers and departments; and the said defendant, The Illinois Central Railroad Company, after the said sec. 181 of the constitution of Mississippi of 1890 and after the decision of said Taylor case, and after the said Lambert case was decided, and relying upon the same, accepted the security offered by said
648 mortgage; and relying upon said mortgage the scope and value of which was directly affected by that decision, and relying upon the property and income in and by such mortgage pledged as security for said bonds, to which said Illinois Central Company could and did look as a safeguard and protection to it against its own liability on said bonds to the purchasers and holders thereof, did issue and become liable on large amounts of such bonds for the use and benefit of said Yazoo & Mississippi Valley Railroad Company as consolidated, to wit, for the purpose of paying its floating debt and for the purpose of improving, developing, extending, equipping, and otherwise bettering its railroad and outfit, all as stipulated to be done in said deed of mortgage, and a part of the security of said mortgage, as shown on the face thereof, is the income annually derived from the property and railroad that was property and railroad of the Louisville, New Orleans & Texas Railway Company, which income was pledged as security and was the only fund provided for the payment of the coupons of the second-mortgage bonds and of the income mortgage bonds of said last-named company under the said mortgages of 1886 and earlier date, such income being the net income left after paying off operating expenses and the interest on the first-mortgage bonds and taxes, and such net income being never at any time sufficient to pay off the whole of the coupons of said second-mortgage bonds, nor any of the coupons of said income mortgage bonds, and the interest on said income bonds being non-accumulative, but payable only out of the net income, as aforesaid, of the same year in which the coupons mature, and the collection by this suit of the taxes herein demanded would be an immediate and direct deprivation of the holders of said second-mortgage bonds and income bonds of their incomes therefrom, and of said defendant, the said Yazoo & Mississippi Valley Railroad Company, of its ability to pay anything on such interest on such bonds, and would imperil the safety of said bonds and coupons thereof.

And after the decision of said Lambert case this defendant, The Yazoo & Mississippi Valley Railroad Company, relying upon said

decision and the adjudication thereof, continued for five years until the 20th day of June, 1898, to conduct its business upon the principle of said decision that it was not a new company, but the original Yazoo & Mississippi Valley Railroad Company of 1882, and made many contracts and incurred numerous obligations, and paid off and discharged many debts and liabilities, and especially paid to holders of construction debts of said L., N. O. & T. R'y Co. in full the taxes for the years 1893, 1894, and 1895, as provided for in said section five of the act of 1882, and transacted all its business upon that basis, the items of which are too numerous to undertake to set forth in this plea.

And again, especially relying on said sec. 181 of the constitution of 1890 and on said Mississippi Mills case and said Taylor case in 1892 and on the same and said Lambert case in 1893 and 1894 and 1895, this defendant did in such years, having in its hands in each year a balance of $200,000 of net earnings, as aforesaid, for each said year after payment of operating expenses and taxes and interest on first-mortgage bonds, pay the same over as such net balance to holders of coupons on said second-mortgage bonds, in amount of $200,000 per annum, out of which amounts so respectively paid out this defendant, by its contract with such bondholders, had the right to pay off all assessed taxes, and would have paid off these taxes except for such decisions and constitutional section, and such coupons so paid were liabilities only against the said net income of said Y. & M. V. R. R. Co. and were not liabilities against said defendant.

Thereafter thsi plaintiff, proceeding under the authority claimed to be conferred on him by chapyer 126 of the Annotated Code of 1892, which became operative on yhe 2nd day of April, 1892, on the — day of ——, 1893, brought in this court his action at law demanding of defendants taxes alleged to be due to the State and the several counties named and the several municipalities named in his declaration under and by virtue of the revenue laws of said Annotated Code, which became operative on said 2nd day of April, 1892, on the property that had been property of the said Louisville, New Orleans and Texas Railway Company, not including the property that had been property of the said Natchez, Jackson
649 and Columbus Railroad Company, and for the privilege of operating the same, money amounting to about the sum of $109,000.00, all for the year 1892.

Afterwards, proceeding under the authority claimed to be conferred upon him by the act of the year 1894, enlarging and defining his powers as such agent, he brought a second action, under a similar pretense of right, under the same revenue laws, demanding similar taxes on the same property for the years 1893 and 1894.

Afterwards he brought a third action under a similar pretense of right and authority, demanding similar taxes on the same property for the year 1895, said action being brought on the — day of ——, 1896.

Afterwards, by order of this court, said three suits were consolidated into one, being this cause, and were subsequently tried as

one. Said trial resulted in a verdict and judgment for the defendants as to the taxes of 1892, 1893, and 1894, but in a verdict and judgment in favor of the plaintiff as to the taxes of 1895, amounting to about $88,000.00, from which decision the plaintiff appealed to said supreme court, and the defendants prosecuted a cross-appeal. Said appeal and cross-appeal were decided by said supreme court on Monday, the 20th day of June, 1898, and the said court reversed the judgment of this court on both the appeal and the cross-appeal, and it held and adjudged that the said section 13 of article XII of the constitution of 1869 meant that the property of corporations for pecuniary profits should be actually taxed, and not merely subject to taxation at the will of the legislature; that the said twenty-first section of the said Mobile and North Western charter and said section five of the said act of 1882 were void *ab initio*, and the case of The Mississippi Mills *v.* Cook aforesaid was expressly overruled, and all of its subsequent cognate cases aforesaid were overruled by necessary consequence, including the said Taylor case. It was further adjudged that the said consolidation of 1892 operated to extinguish both of the consolidating companies, and not by way of merger, and created a new company subject to section 180 of the constitution of 1890, and the said Lambert case was also expressly overruled. Wherefore the said privilege of section five of the act of 1888 would not have come to the said defendant, The Yazoo & Mississippi Valley Railroad Company, even if the said section had not been void under the constitution of 1869, as aforesaid.

Up to the day of said decision—that is, until said 20th of June, 1898—the said recognition of the right of the defendant, the said Yazoo & Mississippi Valley Railroad Company, to avail itself of and to have the benefit of said section five and said course of dealing in respect thereto had been continued by the tax collectors of said State and counties, and said receipts contemplated by said section had been regularly delivered to said defendant on the presentation of the required affidavits, and at the sessions of the legislature held in the years 1894, 1896, and 1898 renewed efforts had been made to repeal the said privilege of said section, but the legislature again and at each time refused to do so.

And up to said day of such decision the bonds aforesaid of the Louisville, New Orleans and Texas Railway Company and of the Illinois Central railroad, secured as aforesaid, and the stock of the said Louisville, New Orleans and Texas Railway Company remained and continued on the markets, and were being bought and sold for value largely and by innocent purchasers without notice. The holders of the said second mortgage bonds and of the said income bonds of the Louisville, New Orleans & Texas Railway Company have no resource or security for the payment of their coupons of interest except the earned income of said road after payment of the interest on first-mortgage bonds and operating expenses and taxes, and, so far as the said income bonds are concerned, that income must be earned during the current year in order that the coupons shall be payable at all. The earnings of the said road have never been large enough to enable it to pay the interest in full of the

second-mortgage bonds on the basis as stated above, nor to pay any interest on the income bonds, or to pay any dividends to stockholders, and the direct effect of said decision is to place a burden of about one hundred thousand dollars per annum upon an income already insufficient to meet the interest as aforesaid or to pay dividends on the capital stock, in disregard of the said privilege of said section five and under statutes enacted subsequent thereto.

That this suit by the plaintiff and the said decision of June 20th, 1898, are violative of section 10, article 1, of the Constitution of the United States, which forbids any State to pass any law impairing the obligation of a contract, and do impair the obligation of contracts as follows: (1) The contract between the said Louisville, New Orleans & Texas Railway Company and its successor, this defendant, The Yazoo & Mississippi Valley Railroad Company, and the State of Mississippi, embodied in the said act of 1882, as amended by the act of 1884 aforesaid, and especially in said section five of said act of 1882; (2) the contracts between the said Louisville, New Orleans & Texas Railway Company and its stockholders, including said Mississippi Valley Company, as embodied in said acts and section and their subscriptions thereunder to and for stock of said company and purchases thereof; (3) the contracts between said Louisville, New Orleans & Texas Railway Company and the trustees of its first, second, and income mortgages aforesaid and the many and various purchasers of the several bonds secured by said several mortgages, including the defendant The Illinois Central Railroad Company, as embodied in and affected by the said acts and section and the said mortgages and bonds made and issued thereunder; (4) the contract of consolidation of 1884, by which the said Louisville, New Orleans & Texas Railway Company was formed, as set forth in the declaration herein; (5) the contract of consolidation of 1892 aforesaid between said Louisville, New Orleans and Texas Railway Company and the Yazoo & Mississippi Valley Company and the many contracts made and liabilities incurred by the said Yazoo & Mississippi Valley Railroad Company thereunder, as aforesaid.

(6.) The mortgage contract of the 24th of May, 1893, above set forth, and the contract of the trustees thereunder and that of the Illinois Central Railroad Company thereunder and the contracts of the various holders and purchasers of the bonds thereby secured and the security of the said Illinois Central Railroad Company thereunder, as hereinbefore stated.

That this suit by the plaintiff and the said decision of June 20th, 1898, are violative of section 1 of the fourteenth amendment to the Constitution of the United States, which forbids any State to deprive any person of property without due process of law or to deny to any person within its jurisdiction the equal protection of the laws, both of which are done by said suit and decision as follows: (1) By requiring and forcing this defendant, The Yazoo & Mississippi Valley Railroad Company, to pay anew and for the second time in currency for the benefit of the said State and of the counties and municipalities named in said declaration the same identical

taxes, amounting to about $100,000 per annum, for the years 1886 to 1897, inclusive, which it and its predecessor, the said Louisville, New Orleans & Texas Railway Company, from year to year as due have paid to their construction creditors as designated by the said section five in the act of 1882, such payments being made when the said supreme court had declared that it was right and lawful so to make the same and in reliance upon said declaration and the common action and holding of all officers and departments of the State, as aforesaid; (2) by requiring and forcing this defendant, The Yazoo & Mississippi Valley Railroad Company, to pay in taxes for the years 1886 to 1907, inclusive, a sum of not less than $100,000 per annum; which sum the legislature of said State, as an inducement to the said Louisville, New Orleans & Texas Railway Company to construct said railroad, declared should not be paid except in the manner indicated in said section five of the Acts of 1882, such declaration and legislation being made and had and the same being accepted by the said Louisville, New Orleans & Texas Railway Company and afterwards by this defendant, The Yazoo & Mississippi Valley Railroad Company, and acted upon by them, as stated hereinbefore, at a time when said supreme court had declared and settled that such declaration and legislation was valid and binding, and continued to declare for more than twenty years, such requirement not being by the will and order of the legislature in the premises, but only by a total and sudden revolution in the judicial construction of the constitution of the State; (3) by taking
651 away by retroactive judicial legislation of a large part of the security held by the purchasers and holders of the aforesaid bonds of the Louisville, New Orleans & Texas Railway Company (including the defendant The Illinois Central Railroad Company) and also of the purchasers and holders of the Illinois Central bonds aforesaid; (4) by depriving the said Illinois Central Railroad Company of a large part of the security and protection which it held under the said mortgage of 1893, as aforesaid; (5) by taking away from the holders of stock in the former Louisville, New Orleans & Texas Railway Company (including said Mississippi Valley Company) and of stock in the Yazoo & Mississippi Valley Company, consolidated, a large part of the net income of the said railroad, out of which alone they can obtain dividends by judicial change of construction made since they acquired their several shares of stock; (6) by depriving said Yazoo & Mississippi Valley Railroad Company of its contract status by the consolidation of 1892 as the original company of 1882, thus denying to the consolidating company the right to contract in such matter as they may desire in disregard of their charter privileges in that respect.

That, proceeding under the said section five, adopting said section twenty-one, and in conformity thereto as to all of the railroads and property in said declaration mentioned, except said special charter and Helena branch and Bayou Sara branch and all of the taxes payable thereon, as set forth in said declaration, during the year 1892 and in due and proper time, the said Louisville, New Orleans & Texas Railway Company and the said Yazoo & Mississippi Val-

ley Railroad Company and during the years 1893, 1894, and 1895 the said last-named company, also in due and proper time, paid said taxes to the full extent thereof in the payment of debts and liabilities which the said Louisville, New Orleans & Texas Railway Company had incurred in the construction of said road and in the payment of money borrowed by the said last-named company to be used in such construction and so used and in payment of debts incurred by said last-named company in such construction, and also in due and proper time in each of said years respectively the Yazoo & Mississippi Valley Railroad Company delivered to the tax collector of each and every of said counties an affidavit made by the president of said company or by the cashier thereof that the amount of said taxes had actually and in good faith been paid and applied by said company or by said Louisville, New Orleans & Texas Railway Company or, as to the year 1892, by said Louisville, New Orleans & Texas Railway Company during said years 1892, 1893, 1894, and 1895 in payment of the debts incurred by the said Louisville, New Orleans & Texas Railway Company in the construction of its said railroad or money borrowed by said last-named company upon lands or otherwise to be used in constructing said road or paying debts incurred by said last-named company in constructing the same; whereupon the said several tax collectors did each and ever one give to defenda-t a receipt in full for the amount of said taxes respectively except as aforesaid.

That it is not true, as in said declaration is falsely alleged, that on or about July 21st, 1892, or at any other time all the railroads and property of said Louisville, New Orleans & Texas Railway Company *was* purchased by the Illinois Central Railroad Company or any part thereof; nor is it true, as in said declaration is falsely alleged, that on or about the 25th day of October, 1892, or at any other time the said Illinois Central Railroad Company turned over, delivered to, and merged all said property and railroads of said Louisville, New Orleans & Texas Railway Company or any part thereof into the railroad system and property of the said Yazoo & Mississippi Valley Railroad Company; nor is it true, as in said declaration is falsely alleged, that the said Illinois Central Railroad Company then and there owned and controlled the said railroad system and property of said Yazoo & Mississippi Valley Railroad Company to any other extent and degree than that it held and operated under a lease for a term of years; nor is it true, as in said declaration is falsely alleged, that in said October, 1892, or at any other time the said Yazoo & Mississippi Valley Railroad Company began and has since continued operating all said railroads and railroad system of said Louisville, New Orleans & Texas Railway Company or any part thereof under the direction and control of the said Illinois Central Railroad Company; nor is it true, as
652 falsely alleged, that the said Illinois Central Railroad Company did at any time or in any way become liable for or undertake to pay or assume the liabilities, debts, or obligations of the said Louisville, New Orleans & Texas Railway Company or any of them.

All of which defendant is ready to verify. Wherefore it prays judgment, &c.

MAYES & HARRIS,
Att'ys for Def't.

5th Plea.

And for a further plea to said declaration, leave of the court being first obtained, comes the defendant The Illinois Central Railroad Company, and as to all the taxes herein demanded, except those assessed upon and claimed because of the railroads and property described in the declaration as the special charter and the Helena branch and the Bayou Sara branch, says:

1. That the said Louisville, New Orleans & Texas Railway Company was authorized by and organized under an act of the legislature of the State of Mississippi entitled "An act to authorize the Memphis & Vicksburg Railroad Company and the Mississippi Valley and Ship Island Railroad Company to affect a consolidation," approved March 3d, 1882, as amended by said act of March 15th, 1884.

2. That on or about the 24th day of October, 1892, the said Louisville, New Orleans & Texas Railway Company was consolidated with and merged in the said defendant, The Yazoo & Mississippi Valley Railroad Company, by the act and deed of the said two companies, as authorized by their respective charters, such consolidation by express agreement in the said deed of consolidation operating by way of merger of the existence of the Louisville, New Orleans & Texas Railway Company into that of the Yazoo & Mississippi Valley Railroad Company, and continuing the existence of the last-named company unbroken and not forming any new company, all under the rule laid down by the Supreme Court of the United States in the case of Whitworth *v.* Tennessee, 117 United States Reports.

That by said consolidation the said Louisville, New Orleans & Texas Railway Company carried into the consolidated company as part of its property a certain line of railroad extending from the city of Jackson to the city of Natchez, in said State, and which said L., N. O. & T. Company had purchased in the year 1870 by authority of an act of the legislature passed in that year to that end from the Natchez, Jackson & Columbus Railroad Company, whereby said railroad became in October, 1892, property of this defendant, The Yazoo & Mississippi Valley Company, as consolidated. Afterwards, to wit, in January, 1893, one Lambert, sheriff and tax collector of Adams county, in said State, undertook to collect taxes, both privilege and ad valorem, for the years 1891 and 1892 on such railroad property in Adams county, notwithstanding the fact, which was the fact, that the legislature of the State of Mississippi had by the act approved August 8th, 1870, and entitled "An act supplemental to the acts of incorporation of certain railroad companies extended to the said Natchez, Jackson & Columbus Railroad Company the full privilege of the sectoon numbered twenty-one of the act of July 20, 1870, entitled 'An act to incorporate the Mobile

& North Western Railroad Company,'" and said privilege had by said act of 1890 and the said sale thereunder passed with said railroad to said Louisville, New Orleans & Texas Railroad Company, and by said consolidation of 1892 to the said defendant, The Yazoo & Mississippi Valley Railroad Company.

Thereupon the defendant, the said Yazoo & Mississippi Valley Railroad Company, and the said Natchez, Jackson & Columbus Railroad Company filed in the chancery court of Adams county their two bills in chancery, uniting in the same, in one of which they enjoined the said sheriff from collecting the said privilege taxes and in the other they enjoined him from collecting the said ad valorem taxes. Said bills, amongst other things, set up the facts herein stated, and set up and insisted upon the identical articles of consolidation and exhibited the same therewith which are set up in and exhibited with this declaration. The sheriff demurred to said bills, and the chancellor sustained said demurrers and dis-
653 missed said bills, from which judgments this said defendant, The Yazoo & Mississippi — Railroad Company, and the said Natchez, Jackson & Columbus Railroad Company prosecuted their appeal to the supreme court of said State. On said appeal the State of Mississippi appeared formally, and was represented by the Hon. Frank Johnston, the attorney general of the State, who took charge of the case and argued the same, both orally and by written brief. In said litigation and on said appeal the same identical questions and points raised by the plaintiff in his pleadings herein and by the decision of the supreme court herein on the 20th of June, 1898, were involved and were presented and were decided, as to the effect of the same consolidation of October 24, 1892, between the said Louisville, New Orleans and Texas Railway Company and the Yazoo & Mississippi Valley Railroad Company. It was contended that, as to the said taxes of both 1891 and 1892, the privilege of said section twenty-one had been lost by said sale of 1890; and that even if not so, so far as the taxes claimed for 1892 were concerned, the said privilege was lost by said consolidation of 1892; that such consolidation created a new corporation, which, being created under the constitution of 1890, became subject to its provisions about taxation of corporate property and could not take the said privilege, and in such cases the said supreme court adjudged and finally decided that the said consolidation of 1892 did operate only by way of merger, and that the existence of the original Yazoo & Mississippi Valley Railroad Company of 1882 was not extinguished thereby, and that no new company was formed thereby, and that the same was not in any way affected by the constitution of 1890, and that the said privilege was not lost thereby. To said litigation and adjudication the said State of Mississippi was a party, being represented in the first instance by its duly authorized officer, the sheriff and tax collector, who was by law authorized to recover taxes by suit, and in the said supreme court by the attorney general, who appeared for the State avowedly, and this defendant, The Yazoo & Mississippi Valley Railroad Company, being one of the two litigants adverse to the State, the said other railroad company being in fact

only a formal party to cover a doubt entertained as to which company was the proper one to tender the statutory affidavits under said section twenty-one; said decision and judgment was and is *res adjudicata* as against said State and all its municipal subdivisions in questions of taxation, as to the constitutionality of said section five of the act of 1882 (section 21 aforesaid), as to the effect of said consolidation of 1892 under the said constitution of 1890, and it is hereby pleaded as such.

And the decision of the said supreme court in this cause rendered on the said 20th day of June, 1898, whereby it was declared that said consolidation of 1892 did form a new company and did cause the loss of said privilege, and the attempted overruling of said Lambert case, and this suit, so far as it embraces that question, are violative of the rights of the said defendant, The Yazoo & Mississippi Valley Railroad Company, secured by the fourteenth amendment to the Constitution of the United States, in that they are an effort to deprive said company of its property without due process of law, and to deprive said company of the equal protection of the laws; also they are an effort to impair the obligation of the said contract of consolidation and of all of the contracts made since said consolidation by said consolidated company, by which it was bound or by which other- were and are bound to it, and into which contracts the nature of said consolidated company enters as an element of their obligation.

3. That except as to the taxes assessed upon and due because of the railroad and property described in the declaration as the special charter and the Helena branch and the Bayou Sara branch, during the said years 1892, 1893, 1894, and 1895, and in due and proper time, the Yazoo & Mississippi Valley Railroad Company delivered to the tax collector of each and every of said counties an affidavit made by the president of said company or by the cashier thereof that the amount of said taxes had actually and in good faith been paid and applied by said company (or, as to the year 1892, by said Louisville, New Orleans & Texas Railway Company) during said years 1892, 1893, 1894, and 1895 in payment of the debts incurred by the said Louisville, New Orleans & Texas Railway Company in the construction of its said railroad or money borrowed by
654 said last-named company upon lands or otherwise to be used in constructing said road or paying debts incurred by said last-named company in constructing the same, whereupon the said several tax collectors did each and every one give to defendant a receipt in full for the amount of said taxes respectively.

4. That it is not true, as in said declaration is falsely alleged, that on or about July 21st, 1892, or at any other time, all the railroads and property of said Louisville, New Orleans & Texas Railway Company *was* purchased by the Illinois Central Railroad Company, or any part thereof; nor is it true, as in said declaration is falsely alleged, that on or about the 25th day of October, 1892, or at any other time, the said *said* Illinois Central Railroad Company turned over, delivered to, and merged all said property and railroads of said Louisville, New Orleans & Texas Railway Com-

pany or any part thereof into the railroad system and property of the said Yazoo & Mississippi Valley Railroad Company; nor is it true, in said declaration is falsely alleged, that the said Illinois Central as Railroad Company then and there owned and controlled the said railroad system and property of said Yazoo & Mississippi Valley Railroad Company to any other extent and degree than that it held and operated under a lease for a term of years a portion of railroad running from Jackson, Miss., to Parsons, in Grenada county, which was constructed by said Y. & M. V. R. R. Co. several years before said consolidation, and forms no part of the railroad property described in said declaration; nor is it true, as in said declaration is falsely alleged, that in said October, 1892, or at any other time, the said Yazoo & Mississippi Valley Railroad Company began and has since continued operating all said railroads and railroad system of said Louisville, New Orleans & Texas Railway Company, or any part thereof, under the direction and control of the said Illinois Central Railroad Company; nor is it true, as falsely alleged, that the said Illinois Central Railroad Company did at any time or in any way become liable for or undertake to pay or assume the liabilities, debts, or obligations of the said Louisville, New Orleans & Texas Railway Company or any of them.

All of which the defendant is ready to verify. Wherefore, &c.

MAYES & HARRIS,
Att'ys for Def't.

6th Plea.

And for a further plea to the said declaration, leave of the court having been first obtained, comes the defendant The Illinois Central Railroad Company, and as to all of the taxes herein demanded, except those assessed upon and claimed because of the railroads and property described in the declaration as the special charter and the Helena branch and the Bayou Sara branch, *and* says:

That on the first day of December, 1869, the people of the State of Mississippi adopted a constitution commonly known since that time as the constitution of 1869, by which the then existing constitution was displaced and abrogated. One provision of said constitution was section 13, article XII, which provided that "the property of all corporations for pecuniary profits shall be subject to taxation the same as that of individuals." Another provision was section 20, article XII, which is as follows:

"SEC. 20. Taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value to be ascertained by law."

Shortly thereafter the legislature of the State of Mississippi, on the 20th day of July, 1870, incorporated the Mobile & North Western Railroad Company, and of that charter of incorporation the twenty-first section was in words and figures as follows, to wit:

"SECTION 21. Be it enacted, That in consideration of the construction of the railroads provided for herein, and of the great benefit which the State will receive in the development of its agricultural resources by means of said railroads as works of internal improve-

ment, and also of the increased value which will thereby be added to the property of the State, thus enabling the State to greatly increase its revenue without additional and burdensome taxation upon the people, the State hereby agrees with said company
655 (and which agreement is irrepealable) that all taxes to which said company shall be subject for the period of thirty years, are hereby appropriated and set apart, and shall be applied to the payment of the debts and liabilities which the said company may have incurred in the construction of said road, or for money borrowed by said company upon lands or otherwise, to be used in constructing the same; and it shall be the duty of the tax collector in every county in each and every year, to give to said company a receipt in full for the amount of said taxes upon receiving from said company an affidavit made by the president or cashier of said company, that the amount of said taxes have actually and in good faith been paid and applied by said company during the year, in payment of the debts incurred, or money borrowed as aforesaid, and which receipt so given shall be in full of all taxes, county, State and municipal to which said company shall be subject; provided, however, that whenever the profits of said company shall enable it to declare and pay to the stockholders an annual dividend of eight per cent. upon its capital stock over and above the payment of its debts and liabilities, then the appropriation of the taxes aforesaid shall cease, and said taxes shall be paid by said company to the tax collector to be by him paid over as required by law."

At the April term, 1878, of the supreme court of the State of Mississippi that court decided a certain cause, since widely known amongst the members of the bar of said State as the Mississippi Mills case, in which was litigated and determined the meaning of the foregoing provisions in the said constitution of 1869, and by that decision the said supreme court announced and declared the true meaning of said provisions to be: (1) Not a mere declaration that corporate property should be liable to be taxed the same as that of individuals; and (2) not a declaration that it should be actually subjected to such taxation so that the legislature was denied the power to grant exemptions as heretofore; but (3) that the legislature should not thereafter have the power to make grants or exemptions which should be contracts irrepealable by subsequent legislatures, and that the matter of corporate taxes should always be controlled by the legislatures successively.

This decision, rendered twenty years ago, has remained unchallenged and unmodified until now; and not only so, but it has been expressly followed or its principle applied without express citation in many subsequent decisions of the said supreme court, to wit: In McCulloch *v.* Stone, 64 Mississippi, decided at the October term, 1886; in Railroad Company *v.* Thomas, 65 Mississippi, decided at the October term, 1888; in Bank *v.* Worrall, 67 Mississippi, decided at the October term, 1887; in Attalla County *v.* Kelly, and in Railway Company *v.* Taylor, 68 Mississippi, decided at the October term, 1890, and in Railroad Company *v.* Lambert, 70 Mississippi, decided at the March term, 1893. And ever since the said decision of said

Mississippi Mills case the practical construction, contemporaneous in character, by the various departments of the State, legislative and executive, has been in accordance therewith until now. On the third day of March, 1882, was passed by the legislature of said State an act which constituted the charter of a railroad company known as the Louisville, New Orleans & Texas Railway Company, together with an amendment, not here material, adopted in March, 1884.

The said act of 1882 contained in it as section 5 thereof a provision granting to the company to be organized under the act, as a new and independent grant by reference to it, the said section 21 of the Mobile and North Western charter and the benefits thereof, as fully as if the same were set forth in said act of 1882 as section 5 thereof. Said act is entitled "An act to authorize the Memphis & Vicksburg Railroad Company and the Mississippi Valley and the Ship Island Railroad Company to effect a consolidation," and was approved March 3rd, 1882, and the act amendatory thereof of March 15th, 1884, is the act cited by plaintiff in his declaration herein.

Said act authorizes, as amended, the company chartered thereby to be formed out of the Vicksburg & Memphis Company aforesaid and any other railroad companies of this State or any other State or States of the Union.

Accepting the terms and offers of said act of 1882, so amended, the said Vicksburg & Memphis Company and three other companies undertook the construction of a railroad from Memphis,
656 in the State of Tennessee, to New Orleans, in the State of Louisiana, by way of Vicksburg, in this State, and got the same through in the year 1884, expending thereon many millions of dollars, and forming by their consolidation, in accordance with the terms of said act as amended in the year 1884, the said Louisville, New Orleans & Texas Railway Company.

The said case of Taylor *v.* Railway Company, 68 Mississippi, decided at the October term, 1890, above, was a case in which the said Louisville, New Orleans & Texas Railway Company, formed as aforesaid, was one of the parties litigant, the other party being the sheriff and tax collector of Panola county, who had undertaken to collect taxes because of the railway property owned and in possession of said railway company, and the supreme court in said case decided and adjudged, as theretofore it had been practically adjudged, that said section 5 of the act aforesaid, being chapter 555 of the Laws of 1882, was constitutional and effectual and did pertain to and belong to the said railway company under and by virtue of the provisions of its charter, and said claim and demand of the said sheriff in respect to the collection of said taxes was by said judgment refused, adjudicated against, and defeated.

Thereafter, in the month of October, 1892, the said Louisville, New Orleans & Texas Railway Company was consolidated with and merged into this defendant, The Yazoo & Mississippi Valley Railroad Company, in and by the articles of consolidation and agreement referred to and relied upon in the said plaintiff's declaration, such consolidation operating by way of merger, so that the exist-

ence of the said Louisville, New Orleans & Texas Railway Company was merged in that of this defendant, The Yazoo & Mississippi Valley Railroad Company, and the existence of the Yazoo & Mississippi Valley Railroad Company was continued unbroken, and no new company was thereby formed.

In the subsequent cases of Railroad Company *v.* Lambert, 70 Mississippi, decided at the March term, 1893, this defendant, The Yazoo & Mississippi Valley Railroad Company, as consolidated, was one of the litigants thereto, resisting therein an effort of the sheriff of Adams county, in the State of Mississippi, proceeding in the name of and by the authority of the State of Mississippi to collect State taxes, amongst others being its adversary, and the supreme court of this State in and by such decision adjudged and determined that the legal effect of the consolidation aforesaid was as aforesaid, and that this defendant, The Yazoo & Mississippi Valley Railroad Company, was entitled to the benefit of the said section 5 of the said act of 1882 and had not lost the same by virtue of such consolidation.

At various times and at various sessions of the legislature of the State of Mississippi effor*t* were made by members thereof to repeal the said privilege enjoyed by the said Louisville, New Orleans & Texas Railway Company, the constituent of this defendant, The Yazoo & Mississippi Valley Railroad Company, and also to repeal such privilege since such consolidation, then owned and enjoyed by the Yazoo & Mississippi Valley Railroad Company as consolidated, but the said legislatures of said State met each such effort by a continuous and persistent refusal to repeal the same and allowed the same to stand unrepealed, and the same does stand unrepealed by the legislature to this day, such efforts and refusals being before and by the legislatures following, to wit:

In the legislature of 1886, senate bill numbered 93; defeated by vote in the senate Feb'y 22, 1886.

In the legislature of 1888, senate bills numbered 84 and 253; amended by vote in senate Feb'y 10th and 27th respectively, 1888, so as to continue existing exemptions.

In the legislature of 1890, senate bill numbered 40; failed in house by adverse report of the committee on ways and means Feb'y 21st, 1890.

In the legislature of 1894, house bill 162; lost in the senate Feb'y 10th, 1894.

In the legislature of 1896, house bill 358; lost by adverse report from committee Feb'y 22, 1896.

In the legislature of 1898, bill —; lost by —.

Section 18*in* of the constitution of 1890, adopted by the people of the State of Mississippi, in convention, on the first day of November, 1890, recognizes and continues the existence of such privilege and of similar privileges then lawfully existing in the State of
657 Mississippi until thereafter repealed by the legislature thereof.

Relying upon the aforesaid legislation of the State of Mississippi in said section five of the said statute of 1892, as amended by the

act of 1884, and upon the adjudication aforesaid and upon the action of such various legislatures, as aforesaid, and upon the action — such constitutional convention of 1890, as aforesaid, as the same was severally passed, adjudicated, and acted upon by said legislatures and provided by said constitution in their several dates and orders of event, the said railroad was constructed by said Louisville, New Orleans & Texas Railway Company, as set forth, and equipped and operated until the time of such consolidation, and by such consolidation was turned into and became the property of this defendant, The Yazoo & Mississippi Valley Railroad Company, as consolidated, and accepted by the same as such in such consolidation, and has since been by the same maintained and operated until this date and numerous and enormous obligations incurred and disbursements of money made on the faith thereof.

That in and during the said year 1892 the said Louisville, New Orleans & Texas Railway Company and the said Yazoo & Mississippi Valley Railroad Company after such consolidation and in and during the years 1893, 1894, and 1895 respectively the said Yazoo & Mississippi Valley Railroad Company did in each and every of said years, relying, as aforesaid, upon said legislation and adjudications and refusal to repeal said privilege of said legislature and said constitutional enactment, as aforesaid, pay the taxes aforesaid (except, as aforesaid, those demanded because of the said special charter and the said Helena branch and the said Bayou Sare branch) to the full extent thereof in the payments of debts and liabilities which the said Louisville, New Orleans & Texas Railway Company had incurred in the construction of said road and in the payment of money borrowed by said Louisville, New Orleans & Texas Railway Company to be used in such construction and so used and in the payment of debts incurred by said Louisville, New Orleans & Texas Railway Company in such construction and (excepting as to said special charter and Helena branch and Bayou Sara branch, as foresaid) during the said years 1892, 1893, 1894, and 1895 and in due and proper time and relying, as aforesaid, the Yazoo & Mississippi Valley Railroad Company delivered to the tax collector of each and every of said counties an affidavit by the president of such company or by the cashier thereof that the amount of said taxes had actually and in good faith been paid and applied by said company (or, as to the year 1892, by the said Louisville, New Orleans & Texas Railway Company) during the said years 1892, 1893, 1894, and 1895 respectively in payment of the debts incurred by said Louisville, New Orleans & Texas Railway Company in the construction of its said railroad or money borrowed by said last-named company upon lands or otherwise to be used in constructing said road or paying debts incurred by said last-named company in constructing the same. Whereupon said tax collectors did each and every one give to the defendant a receipt in full for the amount of said taxes respectively, which receipts the said defendant now holds, the same having never been called in or in anywise cancelled by any judicial procedure of said State.

Wherefore the defendants herein aver that the State of Mississippi

and the various counties and municipalities mentioned in the plaintiff's declaration herein, the said plaintiff as revenue agent herein, each and all are estopped to claim and assert the said taxes severally and collectively as herein demanded.

That it is not true, as in said declaration is falsely alleged, that on or about July 21st, 1892, or at any other time all the railroads and property of said Louisville, New Orleans & Texas Railway Company *was* purchased by the Illinois Central Railroad Company or any part thereof; nor is it true, as in said declaration is falsely alleged, that on or about the 25th day of October, 1892, or at any other time the said Illinois Central Railroad Company turned over, delivered to, and merged all said property and railroads of said Louisville, New Orleans & Texas Railway Company or any part thereof into the railroad system and property of the said Yazoo & Mississippi Valley Railroad Company; nor is it true, as in said declaration is falsely alleged, that the said Illinois Central Railroad Company then and there owned and controlled the said rail-
658 road system and property of said Yazoo & Mississippi Valley Railroad Company to any other extent than that it held and operated under a lease for a term of years a portion of railroad running from Jackson, Miss., to Parsons, in Grenada county, which was constructed by the Yazoo & Miss. Valley R. R. Co. several years before said consolidation and forms no part of the property mention in said declaration; nor is it true, as in said declaration is falsely alleged, that in said October, 1892, or at any other time the said Yazoo & Mississippi Valley Railroad Company began and has since continued operating all said *ria*lroads and railroad system of said Louisville, New Orleans & Texas Railway Company, or any part thereof, under the direction and control of the said Illinois Central Railroad Company; nor is it true, as falsely alleged, that the said Illinois Central Railroad Company did at any time or in any way become liable for or undertake to pay or assume the liabilities, debts, or obligations of the said Louisville, New Orleans & Texas Railway Company or any of them.

All of which the said defendant is ready to verify. Wherefore *he* prays judgment, &c.

MAYES & HARRIS,
Att'ys for Def't.

7th Plea.

Comes the defendant herein The Illinois Central Railroad Company and denies the wrong and injury when, etc.; and for a further plea to the said declaration as to the taxes therein demanded as assessed upon and due because of these portions of said railroad and property named and described in said declaration as the special charter and the Helena branch and the Bayou Sara branch *and* says that all of such taxes were duly and regularly paid in currency by the defendant The Yazoo & Mississippi Valley Railroad Company in the years 1892, 1893, 1894, and 1895 respectively and before the bringing of the respective suits therefor which have been consoli-

dated into this case; and this the said defendant is ready to verify. Wherefore it prays judgment, etc.

MAYES & HARRIS,
Att'ys for Def'ts.

Endorsed: Filed July 6, 1898. F. B. Neal, clerk, by W. J. Brown, Jr., D. C.

Motion for Rehearing on Demurrer.

WIRT ADAMS, State Revenue Agent,
vs.
YAZOO & MISS. VALLEY R. R. CO. ET AL. } # 2788. Consol.

Now comes the plaintiff and moves the court to grant a rehearing on the demurrers to his 5th, 6th, 7th, and 8th replications to the plea of the defendant- setting up a claim of exemption from taxation.

CRITZ & BECKETT,
Att'ys for Plaintiff.

MAYES & HARRIS, *Contra.*

Endorsed: Filed and entered July 6, 1898. F. B. Neal, clerk, by W. J. Brown, Jr., D. C.

Motion to Strike Out Pleas.

WIRT ADAMS, State Revenue Agent,
vs.
YAZOO & MISSISSIPPI VALLEY R. R. CO. ET AL. } 2788.

The plaintiff, by his attorneys, comes and moves the court
659 to strike from the files the 3rd, 4th, 5th, 6th, and 7th pleas of each of the defendants, The Yazoo & Mississippi Valley and The Illinois Central Railroad Companies respectively, for the following reasons, to wit:

1st. Because said pleas are improperly filed.

2nd. Because said pleas are no defense to the cause of action as it now stands before the court, and no one of them is any defense.

3rd. Because all the defenses set up in said pleas can be set up under their pleas filed prior to the filing of these pleas, and because each of said pleas seek to have this court review the decision of the supreme court.

4th. Because all matters set up in said pleas have been adjudged against said defendants in this case by the supreme court.

And the following additional reasons as to said 3rd, 4th, 5th, and 6th pleas of each of said defendants respectively, to wit:

1st. Because one of said pleas is so framed as to prejudice, embarrass, and delay a fair trial of this case.

2nd. No one of said pleas is *is* necessary in order to bring the true merits of the controversy in this suit fairly to trial.

3rd. Each one of said pleas is so framed as to make *as to make*

the precise nature of the defense intended to be set up so indefinite, uncertain, complicated, and multifarious that it is not apparent what precise defense is intended thereby.

And for the following additional reasons as to said 3rd plea of said defendants respectively, to wit:

1st. Because said plea sets up matters of defense that can be set up under the former pleas filed by said defendants, and nothing more.

And for the following additional reasons as to said 4th plea of each of said defendants respectively, to wit:

1st. Because said plea seeks to have this court review the decision of the supreme court in this case.

2nd. Because said plea denies the validity of the supreme court decision in this case, and calls upon this court to reverse that decision.

3rd. Because all matters involved in this plea can be set up under the pleas of said defendants filed prior to the filing of said plea.

4th. Because all matters contained in said plea have been decided by the supreme court in this case under said former pleas.

And for the following additional reasons as to said 5th plea of each of said defendants respectively, to wit:

1st. Because said plea attacks the validity and legal effect of the decision of the supreme court in this cause and seeks to have this court to overrule that decision.

2nd. Because said plea sets up the decision in the case of Natchez, Jackson & Columbus Railroad Company *vs.* James W. Lambert, tax collector, as a conclusive adjudication against plaintiff's cause of action in this case, when said plea shows upon the face that said decision was overruled by said supreme court before said pleas were filed.

3rd. Because said plea is offered too late.

And for the following additional reasons as to said 6th plea of each of said defendants respectively, to wit:

1st. Because said plea attacks the validity of the decision of the supreme court in this case and seeks to have the same reviewed by this court.

2nd. Because said plea is no defense in this case as it now stands.

3rd. Because said plea sets up as an estoppel only such matters as the supreme court has overruled in this case before said plea was filed.

4th. Because the State cannot be estopped by the acts of its ministerial officers, and cannot be estopped by the decisions of its court as to any matters not actually adjudicated in said decisions.

5th. Because said plea is presented too late.

And for the following additional reasons as to said 7th plea of each of said defendants, to wit:

1st. Because plea is a defense to matter not involved in this suit.

2nd. Because the record shows that plaintiff's claim as to the matters covered by said plea had been dismissed.

CRITZ & BECKETT,
Attorneys for Plaintiff.

660 Endorsed: Filed and entered July 6, 1898. F. B. Neal, clerk, by W. J. Brown, Jr., D. C.

Motion to Strike out Pleas Sustained.

June Term, 1898.

JULY 7, 1898.

WIRT ADAMS, State Revenue Agent,
vs.
YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY ET AL. } 2788.

This cause came on for hearing upon plaintiff's motion to strike out the 3rd, 4th, 5th, 6th, and 7th pleas of the defendant The Yazoo & Mississippi Valley Railroad Company and the 3rd, 4th, 5th, 6th, and 7th pleas of the defendant The Illinois Central Railroad Company, and thereupon said defendants withdrew said two 7th pleas; and the court, upon full consideration of the matter, doth order that said motion be, and the same is hereby, sustained, and each and all of said pleas (except said 7th pleas) are stricken from the files; to which the defendants then and there excepted and there exception was allowed.

Third Special Bill of Exceptions.

WIRT ADAMS, State Revenue Agent,
vs.
YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY. } 2788.

Be it remembered that on Tuesday, the 5th day of July, 1898, being a day of this the June term, 1898, of this court, came on to be heard the above-entitled cause, and the defendants made their motion for a continuance of this cause until the next term of this court for reasons assigned in the affidavit presented to that end, and the said motion was overruled, all of which appears in a certain special bill of exceptions herein filed; and on the overruling of said motion for continuance the defendants requested of the court to grant them time until the morning of Wednesday, the 6th day of July, 1898, in which to prepare pleas to meet the new aspect put upon the case, in their opinion, by the decision of the supreme court certified with the mandate herein, and this request the court granted.

On Wednesday morning the court convened at 9 o'clock, July 6, 1898, and, this cause being called, all counsel were present, and the court inquired of counsel for defense if their pleas were ready; whereupon counsel for defense replied that they were, and produced the same and handed them to the clerk of the court in the presence of counsel for plaintiff and without any objection by them. The clerk thereupon marked the same filed before they were submitted to the court or the counsel for the plaintiff and without any leave of the court to file same other than as stated above. The counsel for the plaintiff then obtained said pleas from the clerk, after the

same had been marked filed by him, and asked time until three o'clock in the afternoon to consider the same, which was granted by the court.

Thereupon, in the afternoon of said day, the counsel for the plaintiff filed their motion, which is herein of record, to strike from the files the 2nd, 3rd, 4th, 5th, 6th, and 7th pleas of each of the defendants, which were all of the pleas aforesaid.

On this day, being Thursday, the 7th day of July, 1898, a day of said week and term, this cause being called, the plaintiff amended his motion by striking therefrom the figures and letters 2nd, which occurs in the written third line thereof between the words "files the" and the expressions 3rd, 4th, &c., announcing that they withdrew their motion as to the second pleas of each defendant and would reply to the same. The defendants then confessed the motion as to the two 7th pleas, stating that they had forgotten what the records herein do show; that at the former term of this court the plaintiff had dismissed this cause as to the taxes defended against by said 7th pleas. The court thereupon sustained the said motion as to said 3rd, 4th, 5th, & 6th pleas of the said two defendants respectively and struck the same from the files.

Whereupon the defendants excepted and tendered this their special bill of exceptions, which is hereby signed and made a part of the record in this cause this the 7th day of July, 1898.

Allowed.

ROB'T POWELL, *Judge.*

Endorsed: Filed July 7, 1898. F. B. Neal, clerk, by W. J. Brown, Jr., D. C.

661 *Replication to Pleas of Yazoo & Miss. Valley R. R. Co.*

WIRT ADAMS, State Rev. Agent,
vs.
YAZOO & MISS. VALLEY RAILROAD CO. ET AL. } 2788.

Now comes the plaintiff, by his attorneys, and denies all the allegations of the plea of the Yazoo & Mississippi Valley Railroad Company filed at the present term of this court on July 6th, 1898, called the 2nd plea, and takes issue on the same by consent.

CRITZ & BECKETT,
Att'ys for Plaintiff.

Endorsed: Filed July 7, 1898. F. B. Neal, clerk, by W. J. Brown, Jr., D. C.

Replication to Plea of Illinois Central Railroad Company.

WIRT ADAMS, State Revenue Agent,
vs.
YAZOO & MISS. VALLEY RAILROAD COMPANY ET AL. } 2788.

Now comes the plaintiff, by his attorneys, and denies all the allegations of the plea of the Illinois Central Railroad Company filed at

the present term of this court on July 6th, 1898, called the 2nd plea, and takes issue on the same by consent.

CRITZ & BECKETT,
Att'ys for Plaintiff.

Endorsed: Filed July 7, 1898. F. B. Neal, clerk, by W. J. Brown, Jr., D. C.

Withdrawal of Pleas.

WIRT ADAMS, State Revenue Agent,
vs.
YAZOO & MISSISSIPPI VALLEY R. R. CO. ET AL. } 2788.

In this cause, the court having stricken from the files the pleas of the two defendants respectively numbered 3, 4, 5, & 6, filed by them in order to meet the new aspect put upon the case by the decision of the supreme court herein rendered on the 20th of June, 1898, the said defendants hereby withdraw the joint plea heretofore filed by them prior to such decision and all other pleas filed before that decision, and also withdraw the two pleas filed by them respectively at this term numbered 2, and decline to plead further herein.

THE YAZOO & MISSISSIPPI VALLEY R. R. CO. AND
ILLINOIS CENTRAL R. R. COMPANY,
By MAYES & HARRIS, *Attorneys.*

Endorsed: Filed July 7, 1898. F. B. Neal, clerk, by W. J. Brown, Jr., D. C.

662 *Order Consolidating Causes.*

June Term, 1898.

JULY 8, 1898.

WIRT ADAMS, State Revenue Agent,
vs.
THE YAZOO & MISSISSIPPI VALLEY R. R. CO. ET AL. } 2788, 2916, 3018, 3059, and 3142.

On the 21st day of July, 1896, causes numbered 2788, 2916, and 3018, the suits of plaintiff against defendants for the taxes of the years 1892, 1893, 1894, and 1895 respectively, were consolidated, and after that proceeded with as one case under said number 2788, and now, by consent of all parties, said consolidated case embracing said three cases is further consolidated with cases numbered 3059 and 3142, the suits of plaintiff against defendants for the taxes of the years 1896 and 1897 respectively, and hereafter all of said suits shall proceed as one suit under the said number 2788, and it is ordered that all the orders, proceedings, and pleadings in one shall be appropriated to each and all of said cases with the proper changes in dates and amounts for each of said years 1892, 1893, 1894, 1895, 1896, and 1897. This order is made to save the expenses and inconvenience of separate pleadings and trials in each case, and is not to be con-

strued to the prejudice of either party, and all objections and exceptions are reserved which could be reserved if said orders, proceedings, and pleadings were all separate.

This order, at the request of all parties, is entered *os af* the 4th day of July, 1898, and shall take effect as of that date, at which date the same was made.

663 *Declaration in No.* 3142.

THE STATE OF MISSISSIPPI,
Hinds County, First District.

Circuit Court, Jan'y Term, 1898.

WIRT ADAMS, State Revenue Agent, for the Use of THE STATE OF Mississippi, &c., Plaintiff,
v.
THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY ET AL., Defendants.

Now comes the plaintiff, Wirt Adams, State revenue agent, who sues for the use of The State of Mississippi and of the counties therein of De Soto, Tunica, Coahoma, Bolivar, Washington, Sharkey, Issaquena, Warren, Claiborne, Jefferson, Franklin, Amite, Wilkinson, Tallahatchie, and Leflore, and of the towns of Tunica, in said Tunica county; Lula, Clarksdale, Jonestown, Coahoma, and Friars Point, in said Coahoma county; Shelby, Cleveland, Shaw, Rosedale, and Gunnison, in said Bolivar county; Leland and Hollandale, in said Washington county; Rolling Fork, in said Sharkey county; Vicksburg, in said Warren county; Port Gibson and Russum, in said Claiborne county; Harriston, in said Jefferson county; Hamburg, Roxie, and Knoxville, in said Franklin county; Gloster, in said Amite county; Centerville, in said Wilkinson county—

Under and by virtue of the statutes in such cases made and provided, and complains of the defendants, the said Yazoo & Mississippi Valley Railroad Company, a corporation duly chartered and organized under the laws of the State of Mississippi, and The Illinois Central Railroad Company, a foreign corporation chartered and organized under the laws of the State of Illinois, and both having a part of their lines of railway, depots, and agents in said first district of Hinds county, in an action of debt on the statutes in such cases made and provided, for that whereas the said defendants are and have been since the year A. D. 1892 the owners of the railways, stock, franchises, and property before that time the property of the former Louisville, New Orleans & Texas Railway Company, in the State of Mississippi, which railways, stock, franchises, and property *was* duly assessed for the taxation in said State in and for the years A. D. 1897 in said State of Mississippi, under and in accordance with its laws, by its Mississippi railroad — as State railroad assessors, after objections heard and considered, and *was* also then and there by said railroad commission duly classified for privilege

taxation under said laws for said year, the main line being so classified as first class, the Riverside division as second class, and the Tallahatchie branch as third class, and the said assessment-rolls were duly sent to the clerks of the boards of supervisors of said several counties and were by them filed and copies made and delivered as required by law, and the said assessments were as follows:

For the main line in the counties of—

	De Soto	$164,427
664	Tunica	376,643
	Coahoma	391,941
Bolivar		563,523
Washington		416,866
Sharkey		420,471
Issaquena		82,214
Warren		574,808
Claiborne		257,978
Jefferson		250,978
Franklin		276,927
Amite		208,331
Wilkinson		145,514

For the Riverside division.

Counties of—

Coahoma	262,270
Bolivar	450,994
Washington	8,715
Sharkey	23,825
Issaquena	50,587

For the Tallahatchie branch.

In the counties of—

Coahoma	87,229
Tallahatchie	131,853
Leflore	64,775

For said towns:

Tunica	8,240
Lula	14,460
Clarksdale	15,680
Jonestown	
Friars Point	10,175
Shelby	14,345
Cleveland	20,965
Shaw	7,420
Rosedale	8,143
Gunnison	10,282
Leland	29,515
Hollandale	8,830
Rolling Fork	

Vicksburg	150,735
Port Gibson	18,519
Russum	9,138
Harriston	10,826
Hamburg	14,327
Roxie	15,247
Knoxville	
Gloster	15,469
Centerville	10,011
Coahoma	14,830

And whereas the levy of State taxes for the year A. D. 1897 was and is 6½ mills on the dollar's worth of taxable property;

And whereas the said privilege taxes on railroads for said year A. D. 1897 was and is for first-class railroads $20.00, and for second-class railroads $15.00, and for third-class railroads $10.00 per mile;

And whereas the boards of supervisors of said several counties did for said year 1897 duly levy county taxes on said railroad and all other taxable property within their respective counties as follows:

In the counties of—

De Soto	5	mills.
Tunica	9.1	mills.
Coahoma	11½	mills.
Bolivar	11.70	mills.
Washington	7	mills.
Sharkey	6	mills.
Issaquena	6	mills.
665 Warren	6	mills.
Warren	11½	mills.
Claiborne	8½	mills.
Jefferson	10.45	mills.
Franklin	11½	mills.
Amite	5	mills.
Wilkinson	6	mills.
Tallahatchie	7½	mills.
Leflore	5½	mills.

And whereas the town taxes duly levied for said year, A. D. 1897, was as follows:

Tunica	—	mills.
Lula	—	"
Clarksdale	—	"
Jonestown	—	"
Friars Point	—	"
Shelby	—	"
Cleveland	—	"
Shaw	5	"
Rosedale	—	"
Gunnison	—	"

Leland	— "
Hollandale	6 "
Rolling Fork	— "
Vicksburg	20 "
Port Gibson	8¾ "
Russum	— "
Harriston	— "
Hamburg	4 mills.
Roxie	— "
Knoxville	— "
Gloster	9½ "
Centerville	2½ "
Coahoma	— "

And whereas the mileage of said railroads in said respective counties was as follows:

For the main line, main track, in—

De Soto	12.868 miles.
Tunica	30.023 "
Coahoma	30.234 "
Bolivar	44.324 "
Washington	32.173 "
Sharkey	33.427 "
Issaquena	6.645 "
Warren	35.768 "
Claiborne	20.373 "
Jefferson	19.837 "
Franklin	21.773 "
Amite	16.577 "
Wilkinson	10.827 "

For the Riverside division, main track, in—

Coahoma	27.713 miles.
Bolivar	47.891 "
Washington	2.175 "
Sharkey	2.165 "
Issaquena	5.460 "

For the Tallahatchie branch, main track, in—

Coahoma	14.109 miles.
Tallahatchie	20.585 "
Leflore	10.205 "

666 And whereas the amounts of said State, county, and privilege taxes expressed *is* as follows:

In De Soto county:

Privilege	$257.36
State	1,068.77
County	822.13
	2,148.26

In Tunica county:

Privilege	600.46
State	2,448.17
County	3,427.43
	6,476.06

In Coahoma county:

Privilege	600.46
State	2,545.51
County	4,507.32
	7,653.29

In Bolivar:

Privilege	886.44
State	3,662.89
County	6,593.00
	11,142.33

In Washington:

Privilege	643.46
State	2,709.62
County	2,918.06
	6,371.14

In Sharkey:

Privilege	670.54
State	2,733.06
County	2,522.82
	5,926.42

In Issaquena:

Privilege	132.90
State	534.39
County	575.49
	1,242.78

In Warren:

Privilege	715.36
State	3,736.25
County	6,610.29
	11,061.90

In Claiborne:

Privilege	407.46
State	1,676.85
County	1,792.81
	3,877.12

In Jefferson:

Privilege	396.74
State	1,627.16
County	2,115.30
	4,139.20

In Franklin:

Privilege	434.84
State	1,761.02
County	3,115.66

In Amite:

Privilege	331.54
State	1,354.15
County	1,041.65
	2,727.34

In Wilkinson:

Privilege	216.52
State	945.84
County	873.08
	2,035.44

667 For the Riverside division.

In Coahoma:

Privilege tax	465.69
State	1,714.75
County	3,016.10
	5,196.54

In Bolivar:

Privilege	718.36
State	2,931.45
County	4,476.61
	8,126.42

In Washington:

Privilege	32.62
State	56.64
County	60.80
	160.06

In Sharkey:

Privilege	39.22
State	154.91
County	142.95
	337.08

In Issaquena:

Privilege	81.90
State	328.87
County	354.01
	764.72

For the Tallahatchie branch.

In Coahoma:

Privilege	141.09
State	566.98
County	1,003.13
	1,711.20

In Tallahatchie:

Privilege	200.58
State	857.09
County	922.06
	1,980.63

In Leflore:

Privilege	100.20
State	421.03
County	356.26
	877.49

And the town taxes are as follows:

Tunica	
Lula	
Clarksdale	
Jonestown	
Friars Point	
Shelby	
Cleveland	
Shaw	$36.10
Rosedale	
Gunnison	
Leland	
Hollandale	52.98
Rolling Fork	
Vicksburg	3,014.50
Port Gibson	162.04
Russum	
Harriston	
Hamburg	
Rozie	
Knoxville	
Gloster	146.95
Centerville	25.02
Coahoma	

668 A copy of which assessment-rolls is herewith filed as Exhibit "A" to this declaration, and is asked to be taken as a part thereof.

And the plaintiff in fact avers that said defendants are indebted to the State of Mississippi and to said several counties and to said towns in the amount of said sums of money for said State, county, and privilege and town taxes, aggregating a large sum of money, to wit, the sum of $—.

And although said several amounts are past due and delinquent and have been duly demanded, yet said defendants, each and both, have hitherto failed and refused and still fail and refuse to pay the same or any part thereof, to plaintiff's damage the sum of $250,000.00, and hence he sues for the uses aforesaid, and, as required by the statutes in such cases made and provided, he makes parties to this suit and asks for summons for the members of said railroad commission and the sheriffs of said counties as follows:

Members of said railroad commission:

J. J. Evans, of Monroe county.
M. M. Evans, of Jackson county.
J. H. McGinnis, of Lauderdale county.

Sheriffs of said counties:

W. S. Wissinger, of De Soto.
F. L. Hope, of Tunica.
F. B. Fitzgerald, of Coahoma.
R. M. Edwards, of Bolivar.
J. B. Hebron, of Washington.
C. H. Walton, of Sharkey.
R. W. Smith, of Issaquena.
Dan N. Hebron, of Warren.
R. C. McCay, of Claiborne.
C. C. Coffey, of Jefferson.
J. P. Jones, of Franklin.
J. B. Turnipseed, of Amite.
J. M. Sessions, of Wilkinson.
J. H. Sullivan, of Tallahatchie.
J. B. Humphreys, of Leflore.

CRITZ & BECKETT,
Attorneys for Plaintiff.

Endorsed: Filed and summons issued Dec. 24, '97, to Hinds, Jackson, Lauderdale, De Soto, Tunica, Coahoma, Bolivar, Washington, Sharkey, Issaquena, Warren, Claiborne, Jefferson, Franklin, Amite, Wilkinson, Tallahatchie, and Leflore. F. B. Neal, clerk, by W. J. Brown, Jr., D. C.

669 EXHIBITS TO DECLARATION IN No. 3142.

Assessment of the Main Line, Yazoo & Mississippi Valley Railroad Company for the Year 1897.

Original schedule filed with the Mississippi railroad commission on the 9th day of April, 1897.

F. C. KOMBROUGH, *Secretary.*

I hereby certify that the following assessment-roll of the property of the railroad company was made up by the Mississippi railroad commission, with the values as specified in columns headed valuation by commission, at a meeting of said commission in the capitol, at Jackson, Mississippi, on the 6 day of ——, 1897.

Witness my official signature this — day of ——, 1897.

—— ——.

I hereby certify that the following final assessment of the property of the —— Railroad Company was made by the Mississippi railroad commission, with the values as specified in the column headed "valuation by commission after objections heard," at a meeting of said commission in the capitol, at the city of Jackson, Mississippi, on the — day of ——, 1897.

Witness my official signature this — day of ——, 1897.

—— ——.

STATE OF ILLINOIS, } ss:
County of Cook, }

—, J. C. Welling, vice president of the Yazoo & Mississippi Valley Railroad Company, do hereby solemnly swear that the schedules hereto attached are full, true, and correct to the best of my knowl edge and belief.

J. C. WELLING,
Vice-President of the Yazoo & Mississippi Valley Railroad Company.

Subscribed and sworn to before me this 7th day of April, 1897.

JULIUS RENNEY,
Notary Public.

Valuation per Mile of Main Track, Franchise, and Rolling Stock.

Valuation by company, $5500–2089. Rolling stock, 7589.

Valuation by commission	$12,000
Valuation by commission after objection- heard	12,000

Valuation per Mile of Side Track.

Valuation by company, $2,500.

Valuation by commission	$3,000
Valuation by commission after objections heard	3,000
Total capital stock on 807.267 miles railroad	5,000,000.00
Par value of stock	5,000,000.00

Actual value of stock—no market value.

Gross receipts last year on 456.154 miles R. R., main line	3,370,565.21
Gross receipts from freight last year	2,340,351.47
Gross receipts from passengers last year	596,058.94
Gross receipts earned in Mississippi on 314.92 miles railroad, main line	2,035,059.21

State separately what property is claimed to be exempt from taxation, and cite law authorizing exemptions.

The Yazoo & Mississippi Valley Railroad Company, as the successor of the Louisville, New Orleans & Texas Railway Company, claims exemption from taxation of the property above described under the provisions of section 5 of an act of the legislature of the State of Mississippi entitled "An act to authorize the Memphis
670 and Vicksburg R. R. Co. and the Mississippi Valley and Ship Island R. R. Co. to effect a consolidation," approved March 3, 1882, and under the provisions of sec. 21 of an act of said legislature entitled "An act to incorporate the Mobile and North Western R. R. Co.," approved July 20, 1870.

Recapitulation for the Year 1897.

Main line.

County.	Mileage.	Valuation by company.	Valuation by commission.	Valuation by commission after objections heard.
De Soto	12.863	79,718		
Tunica	30.023	179,719		
Coahoma	30.234	192,319		
Bolivar	44.322	271,323		
Washington	32.173	205,631		
Sharkey	33.527	199,701		
Issaquena	6.645	38,763		
Warren	35.768	343,879		
Claiborne	20.373	123,981		
Jefferson	19.837	121,157		
Franklin	21.752	128,279		
Amite	16.577	99,392		
Wilkinson	10.826	73,166		
	314.920	2,056,028		
Proportion of rolling stock		657,876		
Total		2,713,904		

WIRT ADAMS, STATE REVENUE AGENT.

Description of Rolling Stock.

	No.	Value.	Total value.
Engines:			
Passenger	21	3,100.00	65,100.00
Freight	41	3,100.00	127,100.00
"	24	3,300.00	79,200.00
Switching	14	2,800.00	39,200.00
Cars:			
Passenger	34	1,800.00	61,200.00
"	10	1,200.00	12,000.00
Combination baggage & smoker	9	1,000.00	9,000.00
" " mail & express	7	1,000.00	7,000.00
Baggage & express	6	800.00	4,800.00
Business	2	2,250.00	4,500.00
Pay	1	1,800.00	1,800.00
Freight:			
Box	2,062	200.00	412,400.00
Stock	51	200.00	10,200.00
Fruit	173	250.00	43,250.00
Flat	541	125.00	67,625.00
Construction	2	150.00	300.00
Coal	395	150.00	59,250.00
Caboose	56	200.00	11,200.00
Pile-driver	3	400.00	1,200.00
Wrecking	2	400.00	800.00
Steam shovel	1	1,000.00	1,000.00
Total on 807.267 miles			1,018,125.00

The above rolling stock is prorated (on basis of mileage in Miss. and earnings in Miss. for 1894) on next page.

671 *Description of Rolling Stock.*

Proportion in Mississippi, $\frac{657}{807}\frac{876}{267}$ of 1,018,125, $786,934.

		Total rolling stock.		
Main line	0.836	786,934	657	657,876
Helena branch	0.005	do.	.....	3,935
Riverside div., L., N. O. & T.	0.051	do.	.....	40,134
Riverside div., special charter	0.034	do.	.....	26,755
Tallahatchie branch	0.012	do.	.....	9,443
N., J. & C.	0.060	do.	.....	47,217
Bayou Sara branch	0.002	do.	.....	1,574
	1.000			$786,934

Telegraph line used in operation of railroad exclusively.
No commercial business done over these wires.

		Main line.
De Soto	county.....	12.863 miles.
Tunica	"	30.023 "
Coahoma	"	30.234 "
Bolivar	"	44.322 "
Washington	"	32.173 "
Sharkey	"	33.527 "
Issaquena	"	6.645 "
Warren	"	35.768 "
Claiborne	"	20.373 "
Jefferson	"	19.837 "
Franklin	"	21.752 "
Wilkinson	"	10.826 "
Amite	"	16.577 "

All exempted from taxation, as stated on 3rd sheet of this return.

672 *Declaration in No.* 3059.

THE STATE OF MISSISSIPPI, }
Hinds County. }

Circuit Court, First District.

WIRT ADAMS, State Revenue Agent, Use, &c., Plaintiff, }
vs. }
YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY ET AL., Defendants. }

Declaration.

Now comes the plaintiff, Wirt Adams, State revenue agent, who sues for the use of the State of Mississippi and of the counties therein of De Soto, Tunica, Coahoma, Bolivar, Washington, Sharkey, Issaquena, Warren, Claiborne, Jefferson, Franklin, Amite, Wilkinson, Tallahatchie, and Leflore and of the towns of Tunica, in said Tunica county; Lula, Coahoma, Jonestown, Friars Point, and Clarksdale, in said Coahoma county; Shelby, Cleveland, Shaw, Gunnison, and Rosedale, in said Bolivar county; Leland and Hollandale, in said Washington county; Rolling Fork, in said Sharkey county; Vicksburg, in said Warren county; Port Gibson and Russom, in said Claiborne county; Harrison, in said Jefferson county; Hamburg, Roxie, and Knoxville, in said Franklin county; Gloster, in said Amite county, and Centerville, in said Wilkinson county, under and by virtue of the statutes in such cases made and provided, and complains of the defendants, The Yazoo & Mississippi Valley Railroad Company, a domestic corporation formed and organized under the laws of Mississippi, and The Illinois Central Railroad Company, a foreign corporation, formed and organized under the laws of the State of Illinois, and each having a part of their lines of railway, depots, and agents in said first district of

Hinds county, in an action of debt on the statutes in such cases made and provided.

For that whereas on or about October 24th, 1892, the railroad and property of the former Louisville, New Orleans & Texas Railway Company, formed and organized under the laws of the State of Mississippi, became and has ever since continued to be the property of said defendants, and was duly assessed for taxation in the year of 1896, in said State of Mississippi, under and in accordance with its laws, by its Mississippi railroad commission as State railroad assessors, after objection heard from and considered, and was also by said railroad commission duly classified for privilege taxation under and in accordance with said laws, the main line being classified as first class and the Riverside division as 2nd class and Tallahatchie branch as third class, and said assessment-rolls were duly sent to the clerks of the boards of supervisors of said several counties and by them filed and copies made and disposed of, as required by the laws in such cases made and provided, and the said assessment was as follows:

On the main line in—

De Soto county	$164,427
Tunica county	376,639
Coahoma county	392,291
Bolivar county	563,523
Washington county	416,866
Sharkey county	420,471
Issaquena county	82,214
Warren county	572,589
Claiborne county	256,986
Jefferson county	250,408
Franklin county	270,927
Amite county	208,850
Wilkinson county	144,394

For the Riverside division in—

Coahoma county	262,270
Bolivar county	451,494
Washington county	19,590
Issaquena county	50,587
Sharkey county	23,825

673 For the Tallahatchie branch in—

Coahoma county	88.124
Tallahatchie county	130,953
Leflore county	64,775

In and for said towns as follows:

Tunica	8,240
Lula	14,460
Coahoma	14,830

Friars Point	10,175
Jonestown	
Clarksdale	15,680
Shelby	14,345
Cleveland	20,965
Shaw	7,420
Gunnison	10,282
Rosedale	7,642
Leland	29,515
Hollandale	8,830
Rolling Fork	
Vicksburg	150,755
Port Gibson	17,928
Russum	9,144
Harriston	11,657
Hamburg	14,527
Roxie	15,241
Knoxville	
Gloster	15,469
Centerville	10,524

And whereas the levy of State taxes for said year 1896 was six mills on the dollar's worth of taxable property;

And whereas the privilege taxes for the said year 1896 was $20.00 per mile on first-class railroads, $15.00 per mile on second-class, and $10.00 per mile on third-class railroads under the act entitled "An act creating privilege taxes on certain industries in Mississippi and repealing all laws in conflict with the same," approved March 17, 1896;

And whereas the board of supervisors of said several counties did for said year 1896 duly levy their county taxes on said railroad and all taxable property within their respective limits on the dollar's worth as follows, in—

De Soto county	5	mills.
Tunica county	7	"
Coahoma county	12	"
Bolivar county	16.20	"
Washington county	7	"
Sharkey county	6	"
Issaquena county	6½	"
Warren county	12	"
Claiborne county	8	"
Jefferson county	7½	"
Franklin county	10	"
Amite county	5	"
Wilkinson county	6¾	"
Tallahatchie county	8	"
Leflore county	5⅔	"

And whereas the town taxes duly levied for each of said years were as follows:

Tunica	—	mills.
Lula	—	"
Coahoma	—	"
Jonestown	—	"
Friars Point	—	"
Clarksdale	—	"
Shelby	—	"
Cleveland	—	"
Shaw	5	"
674 Gunnison	—	"
Rosedale	—	"
Rolling Fork	—	"
Vicksburg	20	"
Port Gibson	6½	"
Russum	—	"
Harriston	—	"
Hamburg	2½	"
Roxie	—	"
Knoxville	—	"
Gloster	9	"
Centerville	2½	"
Leland	—	"
Hollandale	6	"

And whereas the privilege-tax mileage of said railroads in each of said counties was as follows:

For the main line in—

De Soto county	12.863
Tunica county	30.023
Coahoma county	30.234
Bolivar county	44.322
Washington county	32.173
Sharkey county	33.527
Issaquena county	6.645
Warren county	35.768
Claiborne county	20.373
Jefferson county	19.837
Franklin county	21.752
Amite county	16.577
Wilkinson county	10.826

For the Riverside division in—

Coahoma county	27.713
Bolivar county	41.891
Washington county	2.175
Issaquena county	5.460
Sharkey county	2.615

For the Tallahatchie branch in—

Coahoma county	27.713
Bolivar county	41.891
Washington county	2.175
Issaquena county	5.460
Sharkey county	2.615

For the Tallahatchie branch in—

Coahoma county	14.109
Tallahatchie county	20.585
Leflore county	10.205

And whereas the said defendants, being the owners of said property, are liable for the taxes thereon, and said Illinois Central Railroad Company did in fact, in writing, assume and promise to pay all taxes which might be lawfully levied on said property, whereby and by force of the statute in such cases made and provided the said defendants have become and are now indebted to said State of Mississippi and to said several counties and towns for current privilege, State, county, and municipal taxes for said fiscal year 1896 as follows:

For the main line.

In De Soto county:

State tax	986.56
Privilege tax	257.26
County tax	822.13

Tunica county:

State tax	2,259.83
Privilege tax	600.46
County tax	2,636.47

675 Coahoma county:

State tax	2,353.74
Privilege tax	604.68
County tax	4,707.49

Bolivar county:

State tax	886.44
Privilege tax	
County tax	9,129.07

Washington county:

State tax	2,511.19
Privilege tax	643.46
County tax	2,918.06

Sharkey county:

State tax	2,522.82
Privilege tax	670.54
County tax	2,522.82

Issaquena county:

State tax	496.88
Privilege tax	132.90
County tax	534.39

Warren county:

State tax	3,425.53
Privilege tax	715.36
County tax	6,871.06

Claiborne county:

State tax	1,541.91
Privilege tax	407.46
County tax	2,055.88

Jefferson county:

State tax	1,502.44
Privilege tax	396.74
County tax	1,878.06

Franklin county:

State tax	1,625.56
Privilege tax	435.04
County tax	2,709.27

Amite county:

State tax	1,252.10
Privilege tax	331.54
County tax	1,044.25

Wilkinson county:

State tax	866.36
Privilege tax	216.52
County tax	974.65

For the Riverside division.

In Coahoma county:

State tax	1,573.62
Privilege tax	415.69
County tax	3,147.24

Bolivar county:

State tax	2,708.96
Privilege tax	628.36
County tax	7,314.20

676 Washington county:

State tax	117.54
Privilege tax	32.62
County tax	137.13

Issaquena county :

State tax	303.50
Privilege tax	81.90
County tax	328.71

Sharkey county :

State tax	142.95
Privilege tax	39.22
County tax	142.95

For the Tallahatchie branch.

In Coahoma county :

State tax	528.74
Privilege tax	141.09
County tax	1,057.48

Tallahatchie county :

State tax	785.71
Privilege tax	205.85
County tax	1,047.62

Leflore county :

State tax	388.65
Privilege tax	102.05
County tax	367.05

For the town taxes as follows in—

Tunica	
Lula	
Coahoma	
Jonestown	
Friars Point	
Clarksdale	
Shelby	
Cleveland	$36.10
Gunnison	
Rosedale	
Leland	
Hollandale	52.98
Rolling Fork	
Vicksburg	3,014.70
Port Gibson	107.56
Russum	
Harriston	
Hamburg	36.31
Roxie	
Knoxville	
Gloster	139.22
Centerville	26.31

Plaintiff herewith files copies of said assessment-rolls and ask that they be taken as part of this declaration as Exhibits A, B, & C thereto.

And the plaintiff in fact avers that although said defendants were and are still indebted to said State of Mississippi and to said several counties and towns in said several amounts, aggregating a large sum of money, to wit, the sum of $—:

And although said several amounts have long since been due and are now delinquent and have been duly demanded, yet the said defendants have both and each hitherto failed and refused and still fail and refuse to pay the same or any part thereof, to plaintiff's damage $125,000.00, and hence he sues for the uses aforesaid, and, as by the statute in such cases made and required, he makes parties to this suit the Honorable J. J. Evans, of Monroe county, J. D. McGinnis, of Lauderdale county; M. M. Evans, of Jackson county, constituting said Mississippi railroad commission, as State railroad assessors, and the sheriffs and tax collectors of said counties
677 as follows: W. S. Wissinger, of De Soto; F. L. Hope, of Tunica; F. P. Fitzgerald, of Coahoma; R. M. Edwards, of Bolivar; J. B. Hebron, of Washington; C. H. Walton, of Sharkey; R. W. Smith, of Issaquena; Dan N. Hebron, of Warren; R. C. McCay, of Claiborne; C. C. Coppey, of Jefferson; J. L. Calcote, of Franklin; Chas. E. Davis, of Amite; J. M. Sessions, of Wilkinson; J. H. Sullivan, of Tallahatchie, and J. B. Humphries, of Leflore, and asks that they and each of them and said defendants, The Yazoo & Mississippi Valley Railroad Company and Illinois Central Railroad Company, be summoned as required by law, &c.

CRITZ, BECKETT & JONES,
Attorneys for Plaintiff.

Endorsed: Filed with Exhibits A B & C this December 18, 1896. F. B. Neal, clerk, by W. J. Brown, Jr., D. C.

The exhibits to this declaration are omitted from the record by the instructions and agreement of attorneys for both parties *of* this suit.

678 *Judgment.*

June Term, 1898.

JULY 8, 1898.

WIRT ADAMS, State Revenue Agent, Use, &c.,
vs.
YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY *et al.* } 2788, Consol.

This day came on to be heard this cause, the same embracing cases No. 2788, 2916, 3018, 3059, and 3142, heretofore consolidated, and the plaintiff and defendants appeared by their respective counsel; and thereupon the defendants, The Yazoo & Mississippi Valley and The Illinois Central Railroad Companies, withdrew each and

all of their joint and several pleas on file, not including, however, the pleas which have been stricken out by the court, and said nothing further in bar of this action; it is therefore considered and so ordered and adjudged the plaintiff have judgment, *nil dicet*, against the defendants for the amounts sued for in said consolidated cause. Thereupon defendants' counsel admitted in open court that a writ of inquiry was not necessary in this case; that the clerk of this court might lawfully calculate the amounts due according to this judgment.

And thereupon said clerk made such calculations and found the several amounts due from defendants to plaintiff for which judgment is hereinbelow entered for taxes for the years 1892, 1893, 1894, 1895, 1896, and 1897 and for the State, counties, and towns as hereinbelow given respectively, which amounts are found correct and approved by the court.

Wherefore it is considered and so ordered and adjudged by the court that the plaintiff, Wirt Adams, State revenue agent, do have and recover of said defendants, The Yazoo & Mississippi Valley Railroad Company and The Illinois Central Railroad Company, the said several sums of money below enumerated for the use of said State and said several counties and towns respectively as stated below, to wit:

For De Soto county:

Privilege taxes	$1,543.80
State taxes	5,548.27
County taxes	5,227.47

For Tunica county:

Privilege taxes	$3,615.04
State taxes	12,685.97
County taxes	20,014.57

For Coahoma county:

Privilege taxes	$6,745.46
State taxes	25,021.73
County taxes	41,702.50

For Bolivar county:

Privilege taxes	$9,048.24
State taxes	34,010.06
County taxes	98,607.80

For Washington county:

Privilege taxes	$4,014.19
State taxes	14,563.29
County taxes	17,164.17

For Sharkey county:

Privilege taxes	$4,226.86
State taxes	14,943.60
County taxes	17,849.12

For Issaquena county:

Privilege taxes	$1,153.10
State taxes	4,472.58
County taxes	4,794.81

679 For Warren county:

Privilege taxes	$4,292.16
State taxes	19,588.98
County taxes	40,550.20

For Claiborne county:

Privilege taxes	$2,444.12
State taxes	8,706.32
County taxes	12,118.92

For Jefferson county:

Privilege taxes	$2,361.44
State taxes	8,488.32
County taxes	11,754.94

For Franklin county:

Privilege taxes	$2,628.82
State taxes	9,092.61
County taxes	17,015.78

For Amite county:

Privilege taxes	$1,988.94
State taxes	7,044.93
County taxes	8,138.68

For Wilkinson county:

Privilege taxes	$1,299.34
State taxes	4,863.14
County taxes	5,512.36

For Tallahatchie county:

Privilege taxes	$1,224.23
State taxes	4,367.58
County taxes	6,097.54

For Leflore county:

Privilege taxes	$403.86
State taxes	1,516.00
County taxes	1,665.08

All items of privilege and State taxes above being for the use of the State, and each item of county taxes above being for the use of the county for which it appears in the above statement, being the State, county, and privilege taxes in each of said counties for all of

the years inclusive, and for the following towns and cities respectively, the following amounts, to wit:

Tunica	$102.15	Hollandale	$286.17
Vicksburg	15,307.32	Port Gibson.....	697.79
Friars Point..... ...	350.96	Shaw	183.75
Hamburg	202.68	Gloster.....	743.76
Centerville.....	180.95	Leland..... ...	413.00

being the total amount of taxes due each of said counties and towns respectively for the respective years, as given in the several declarations as to said cities and towns, aggregating herein in all the total sum of five hundred and forty-eight thousand six hundred and seventy-six $\frac{99}{100}$ dollars ($548,676.99); which total sum said plaintiff shall have and recover of said defendants, together with six per cent. interest per annum thereon from this date until paid, and all costs of this suit and of each suit consolidated therewith or therein, and for each of and all said items execution may issue.

And this consolidated case is dismissed without prejudice as to all the towns not named in this judgment and all towns named herein except as to the taxes due the town of Tunica for the years 1893, 1894, and 1895; Vicksburg for the years 1893, 1894, 1895, 1896, and 1897; Friars Point for the years 1893 and 1894; Clarksdale for the years 1893 and 1895.

Hamburg for the years 1893, 1894, 1895, 1896, and 1897.

Hollandale for the years 1893, 1894, 1895, 1896, and 1897.

Port Gibson for the years 1893, 1894, 1895, 1896, and 1897.

Roxie for the year 1895.

Shaw for the years 1893, 1894, 1895, 1896, and 1897.

680 Centerville for the years 1893, 1894, 1895, 1896, and 1897.

Gloster for the years 1893, 1894, 1895, 1896, and 1897.

Leland for the years 1893 and 1894.

Judgment for which taxes is herein given.

Stenographer's Notes.

WIRT ADAMS, State Revenue Agent,
vs.
THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY ET AL. } 2788.

The defendant in this cause objected to any other action in the cause at this term of the court for the reason that the mandate, with the document accompanying the same, shows on the face of it that the said document accompanying the same was not the opinion of the supreme court in the case, and that the opinion therein was to be hereafter prepared in that court. The said objection being made under section 4381 of the Code of 1892, the same was overruled by the court and exception taken.

The court overruled the said objection upon the ground that the counsel for the defense had made a motion before the supreme court in the case before the mandate was sent to the court asking that court to withhold the mandate until the opinion was filed, but that

opinion was overruled by the supreme court, the chief justice announcing from the bench in overruling it that the abstract filed by a majority of the court would stand for the opinion for the present.

The defense objected to any steps being taken in this case because this cause was not docketed until today; two weeks of the term has gone by, and they claim that this court has no jurisdiction of the case and no power to proceed in the same to trial unless the court acquires such jurisdiction on the first day of the term; that the mandate cannot be certified down from the supreme court in the middle of a term of court and the case placed on the trial docket and stand for trial on the third Monday of this term of the court.

The above motion was overruled, and the defense excepted.

Endorsed: Filed July 19, 1898. F. B. Neal, clerk, by W. J. Brown, Jr., D. C.

681 *Appeal Bond, Yazoo & Mississippi Valley Railroad Company.*

Know all men by these presents that we, the Yazoo & Mississippi Valley Railroad Company, as principal, and the Illinois Central Railroad Company and the Chicago, St. Louis and New Orleans Railroad Company and the Canton, Aberdeen & Nashville Railroad Company and Stuyvesant Fish and J. T. Harahan, as sureties, are held and firmly bound unto Wirt Adams, State revenue agent, in the sum of one million ninety-seven thousand three hundred and fifty-four dollars, jointly and severally; for the full and true payment of which we and each of us do hereby bind ourselves, our successors, heirs, executors, administrators, and assigns, firmly by these presents.

Witness our signatures and our respective corporate seals this the 20th day of July, 1898.

Upon condition, nevertheless, that whereas the said Wirt Adams, State revenue agent, did on the 8th day of July, 1898, recover in the circuit court in the first district of Hinds county, Mississippi, a certain judgment against the Yazoo & Mississippi Valley Railroad Company and against the said Illinois Central Railroad Company for the sum of five hundred and forty-eight thousand six hundred and seventy-six dollars and ninety-nine cents; and whereas the said The Yazoo & Mississippi Valley Railroad Company hath prayed an appeal therefrom to the supreme court of the State of Mississippi:

Now, therefore, if the said The Yazoo & Mississippi Valley Railroad Company shall satisfy the said judgment and also such final judgment as may be made in said cause if the same be affirmed, together with all costs, then this obligation shall be null and void; otherwise to remain in full force and virtue.

In witness whereof the said The Yazoo & Mississippi Valley Railroad Company, the Illinois Central Railroad Company, the Chicago, St. Louis & New Orleans Railroad Company, and the Canton, Aberdeen & Nashville Railroad Company have, by order of their respective boards of directors, caused these presents to be signed by their respective presidents and their respective corporate seals to be hereto affixed and attested by their secretaries and the said Stuyvesant

Fish and J. T. Harahan have hereto set their hands and seals on the date first above mentioned.

[CORPORATE SEAL.] THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY,
By J. C. WELLING, *Vice-President.*

Attest: W. G. BRUEN, *Ass't Secretary.*

[CORPORATE SEAL.] ILLINOIS CENTRAL RAILROAD COMPANY,
By STUYVESANT FISH, *President.*

Attest: A. G. HACKSTAFF, *Secretary.*

[CORPORATE SEAL.] CHICAGO, ST. LOUIS & NEW ORLEANS RAILROAD COMPANY,
By STUYVESANT FISH, *President.*

Attest: A. G. HACKSTAFF, *Secretary.*

[CORPORATE SEAL.] CANTON, ABERDEEN & NASHVILLE RAILROAD COMPANY,
By J. C. WELLING, *Vice-President.*

Attest: A. G. HACKSTAFF, *Secretary.*

STUYVESANT FISH.
J. T. HARAHAN.

Witness as to Stuyvesant Fish:
W. E. RUHAN.
W. H. FISK.

Endorsed: Approved August 3, 1898. Filed August 3, 1898. F. B. Neal, clerk, by W. J. Brown, Jr., D. C.

682 *Appeal Bond of Illinois Central Railroad Company.*

Know all men by these presents that we, the Illinois Central Railroad Company, as principal, and the Yazoo & Mississippi Valley Railroad Company and the Chicago, St. Louis & New Orleans Railroad Company and the Canton, Aberdeen & Nashville Railroad Company and Stuyvesant Fish and J. T. Harahan, as sureties, are held and firmly bound unto Wirt Adams, State revenue agent, in the sum of one million ninety-seven thousand three hundred and fifty-four dollars, jointly and severally; for the full and true payment of which we and each of us do hereby bind ourselves, our successors, heirs, executors, administrators, and assigns, firmly by these presents.

Witness our signatures and corporate seals this the 20th day of July, 1898.

Upon condition, nevertheless, that whereas the said Wirt Adams, State revenue agent, did on the 8th day of July, 1898, recover in the circuit court of the first district of Hinds county, Mississippi, a

certain judgment against the said Illinois Central Railroad Company and against the Yazoo & Mississippi Valley Railroad Company for the sum of five hundred and forty-eight thousand six hundred and seventy-six dollars and ninety-nine cents; and whereas the said Illinois Central Railroad Company hath prayed an appeal therefrom to the supreme court of the State of Mississippi: Now, therefore, if the said Illinois Central Railroad Company shall satisfy the said judgment and also such final judgment as may be made in said cause and all costs if the same be affirmed, then this obligation shall be null and void; otherwise to remain in full force and virtue.

In witness whereof the said Illinois Central Railroad Company, the Yazoo & Mississippi Valley Railroad Company, the Chicago, St. Louis & New Orleans Railroad Company, and the Canton, Aberdeen & Nashville Railroad Company have, by order of their respective boards of directors, caused these presents to be signed by their respective presidents and their respective corporate seals to be hereto affixed and attested by their secretaries and the said Stuyvesant Fish and J. T. Harahan have hereto set their hands and seals on the date first above mentioned.

[CORPORATE SEAL.] ILLINOIS CENTRAL RAILROAD COMPANY,
By STUYVESANT FISH, *President.*

Attest: A. G. HACKSTAFF, *Secretary.*

[CORPORATE SEAL.] THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY,
By J. C. WELLING, *Vice-President.*

Attest: W. G. BRUER, *Ass't Secretary.*

[CORPORATE SEAL.] CHICAGO, ST. LOUIS & NEW ORLEANS RAILROAD COMPANY,
By STUYVESANT FISH, *President.*

Attest: A. G. HACKSTAFF, *Secretary.*

[CORPORATE SEAL.] CANTON, ABERDEEN & NASHVILLE RAILROAD COMPANY,
By J. C. WELLING, *Vice-President.*

Attest: A. G. HACKSTAFF, *Secretary.*

STUYVESANT FISH. [SEAL.]
J. T. HARAHAN. [SEAL.]

Witnesses as to J. T. Harahan:
W. E. RUHAN.
W. H. FISK.

Endorsed: Bond. Approved August 3, 1898. Filed Aug. 3, 1898 F. B. Neal, clerk, by W. J. Brown, Jr., D. C.

683 *Certificate to Transcript, 2nd Appeal.*

STATE OF MISSISSIPPI, }
Hinds County. }

I, F. B. Neal, clerk of the circuit court in and for said county and State, hereby certify the foregoing and annexed one hundred and forty-eight pages to contain a full, true, and correct transcript of the record of the cause stated in the caption as the same remains on file and of record in my office.

Given under my hand and the seal of said court this 4th day of December, 1898.

[SEAL.]

F. B. NEAL, *Clerk*,
By W. J. BROWN, JR., *D. C.*

Record endorsed: Filed Dec. 6, 1898. E. W. Brown, clerk, by C. C. Campbell, D. C.

684 The State of Mississippi to the sheriff of Hinds county, in said State:

You are hereby commanded to summon Wirt Adams, State rev. agent, or Mess. Critz & Beckett, his attorneys in fact or of record, if to be found in your county, to appear before the supreme court of the State of Mississippi, at the capitol, in the city of Jackson, in the county of Hinds and State aforesaid, on the 7th day — December, A. D. 1898, then and there to answer the appeal of the Yazoo & Miss. Valley Railroad Company *et al.* from a judgment of the circuit court of Hinds, in said State, rendered against said appellant on the 8th day of July, A. D. 1898, at the June term, A. D. 1898, of said circuit court, in favor of said appellee, for $548,676.99; and have there then this writ.

Given under my hand and the seal of said circuit court, at my office, in Jackson, Miss., and issued this the 25th day of November, A. D. 1898.

F. B. NEAL, *Circuit Clerk*,
By W. J. BROWN, JR., *D. C.*

Sheriff's Return.

Executed personally this the 25th day of November, 1898, on Wirt Adams, State rev. agent, by handing him a true copy hereof.

W. D. RATLIFF, *Sh'ff*,
By P. D. RATLIFF, *D. S.*

Endorsed: Filed Dec. 6, 1898. E. W. Brown, clerk, by C. C. Campbell, D. C.

685 STATE OF MISSISSIPPI, } ss:
County of Hinds, First District, }

YAZOO & MISS. VALLEY R. R. CO. ET AL., Appellants, }
v.
WIRT ADAMS, State Revenue Agent, Appellee. }

Come the appellants herein, The Yazoo & Mississippi Valley Railroad Company and The Illinois Central Railroad Company, and respectfully show unto the court that heretofore, to wit, on the 8th day of July, 1898, the said appellee herein, Wirt Adams, State revenue agent, recovered a judgment against appellants in the circuit court of Hinds county, Mississippi, district number one, in the sum of about $548,000.00, and that on the — day of August, 1898, appellants perfected their appeal bond from said judgment to this court, filing their appeal therefor, which was duly approved by the clerk. Appellants are notified by the clerk of this court that the clerk of said circuit court has failed to file in this court the certified copy of the record in said cause as to his duty under the law, and appellants do therefore hereby move this court for a rule on said clerk, requiring him to show cause why he has not so filed said copy of said record.

MAYES & HARRIS,
Att'ys for Appellants.

Endorsed: 9241. Filed Nov. 21st, 1898. E. W. Brown, clerk, by C. C. Campbell, D. C.

686 And on the 26th day of November, 1898, the following order was entered sustaining the above motion:

YAZOO & MISSISSIPPI VALLEY RAILROAD CO. ET AL. }
v. } 9251.
WIRT ADAMS, State Revenue Agent. }

Came on to be heard the motion of appellants for a rule on the clerk of the circuit court of Hinds county to certify the record herein to this court, and it appearing to the court that the appellants took an appeal to the present term of this court from a judgment of said circuit court rendered herein at the June term thereof, A. D. 1898, on the 8th day of July, 1898, and it further appearing that the clerk of said circuit court has failed to certify the record of said cause as required by law, it is ordered by this court that the precept of this court issue to said clerk, commanding him to forthwith certify said record or show cause why he has not certified the same, or should not as herein commanded; this writ returnable instanter.

But the record having been certified to the court before the writ ordered above could issue, none was in fact issued.

And on the 22nd day of November, 1898, an opinion in words and figures as followas was filed:

687 *Opinion. Filed November* 22, 1898.

WIRT ADAMS, State Revenue Agent,
v. & ats.
Y. & — V. R. R. Co. ET AL. } 8629.

WHITFIELD, *J.:*

The question which lies at the foundation of this case, is this: Conceding for argument's sake, that the L., N. O. & T. R. R. Co., had an exemption from taxation, did the consolidation of that railroad with the Yazoo & Mississippi Valley R. R. Co., on October 24, 1892, create a new corporation, as of that date, and thus result in the cutting off of said exemption, by sec. 180 of the constitution of 1890? If this question be answered in the affirmative then, obviously, the contention of the State must prevail throughout, without regard to any other questions in the case. The power to consolidate must be granted by the State, and permission to consolidate so granted, is not a contract, but a mere license.

Amer. *v.* Eng. Ency. Law (2nd edition), vol. 6, p. 802.
Pearsall *v.* G. V. R'y Co., 161 U. S., 667.
L. & N. R. R Co. *v.* Ky., 161 U. S., 695.
Keokuk *v.* Mo., 152 U. S., 312.

These railroad companies were perfectly free to consolidate or not. The L., N. O. & T. R. R. Co., if it had a legal exemption, could have retained it, by simply retaining the precise corporate existence it then had. Sec. 181 of Con. of 1890. Consolidation was voluntary on their part, and effected subject to the law and constitution then in force. What the effect of consolidation is, depends upon the will and purpose—not of the corporations, but of the State speaking through the legislature.

Great stress has been laid upon the provisions of sec. 5, Acts of 1882, p. 843, to the effect that the Y. & M. V. R. R. Co. might consolidate with other railroad companies "upon such terms as they may agree upon." But this simply meant "such terms as they the companies might agree upon," consistent with the law as announced in their charters, and otherwise. The charter of the Memphis & Vicksburg R. R. Co.—one of the constituents of the L., N. O. & T. R. R. Co.—expressly stipulates any consolidation shall be "on such terms as may be consistent with the powers conferred on said company." Substantially identical language with the language of sec. 5, *supra*, occurred in the charters under consideration in Keokuk *v.* Mo., 152 U. S., at p. 309, top of the page, and R. R. Co. *v.* Ga., 98 U. S., at p. 361, and in many other cases. These words, "upon such terms as they may agree upon," are not new. They perhaps appear substantially in all grants of power to consolidate railroad or other corporations. As for example, in The Atlanta & Richmond Air Line Railroad Co. *v.* State, 63 Ga., at p. 486. They have no magic in them. They are plain every-day phrases and relate alone to the mere administrative details attending the consolidation of corpora-

tions, which must of course be left to the officers of such corporations, and with which the legislature cannot be burdened; and they convey no substantive powers or rights. These must be found, if anywhere, expressly set forth by the legislature in the charters in the first instance, and not delegated to the corporations, to be worked out under the gloss of these mere administrative phrases. Whether, therefore, the union of these two corporations resulted in consolidation and the creation of a new corporation, or in mere merger
688 of the L., N. O. & T. R. R. Co. with the Y. & M. V. R. R. is to be found not in this phrase so much relied on, but in the clear purpose of the legislature. The articles of consolidation are to be carefully looked to, of course, but they must conform in what they do, if valid, to the purpose of the legislature as to what the effect of the consolidation shall be.

Keokuk *v.* Mo., 152 U. S., 305; Central R. R. Co. *v.* La., 92 U. S., 660.

Let us inquire then what the effect of this consolidation was. And first, what railroads entered into this consolidation? The L., N. O. & — R. R. Co. and the Y. & M. V. R. R. Co. What was the L., N. O. & T. R. R. Co.? It is described in the "articles of consolidation" as "the Louisville, New Orleans & Texas Railway Company, a corporation of the States of Tennessee, Mississippi and Louisiana of the first part," and it is further expressly declared in said articles that the consolidation is effected "under and by virtue of the charters of the respective States of Tennessee, Mississippi and Louisiana, in such case made and provided," etc. The two ends of this railroad are in Louisiana and Tennessee. Now what were the laws touching consolidation in these States, "in such case made and provided?" Of course we deal here exclusively with the Mississippi corporation under our laws; but the laws of Louisiana and Tennessee are expressly referred to as having been held in mind in effecting this consolidation, and they will materially aid us in solving this question. The road with all its property was a unit in the three States. If the effect of the consolidation in Tennessee and Louisiana was known necessarily to be the creation of a new corporation, it hardly comports with reason to suppose that any different consolidation would have been sought at the hands of the Mississippi legislature or granted by it, if sought. And so we shall find it to be. The act No. 157 of 1874 of Louisiana, set forth in 40 La. Ann., p. 385—a general law expressly provides that: "Any two business—companies—may consolidate said corporations, and form *one consolidated* company, holding, etc., all property, etc., belonging to each, and under such corporate name as they may agree upon; and a certificate of the fact of such consolidation with the name of the consolidated company shall be filed and recorded in the office of the secretary of state." This is like the Ohio and Missouri statutes referred to in Keokuk *v.* Mo., 152 U. S., 308–310, and they were all held to provide for a consolidation resulting in a new corporation. Board *v.* Gaslight Co., 40 La. Ann., 384. The provisions of the Tennessee Code (Milliken & Vertress), 1884, secs. 1263–1270,

are stronger and more explicit still in necessitating the creation of a new corporation, sec. 1270 expressly declaring that no exemption from taxation of any constituent company should pass to the consolidated company. The Tennessee and Louisiana ends of the L., N. O. & T. R. R. are integral parts now of the present Y. & M. V. R. R. As to these ends—under Louisiana and Tennessee law the present Y. & M. V. R. R. is undoubtedly a new corporation. How, then, can this corporation—the present Y. & M. V.—an entire corporation—be one new corporation, with stock of but one corporation, the new one, in Louisiana and Tennessee, and in Mississippi, not one new corporation, and having double stock of both constituent roads? As counsel very pertinently asks, "Which is Tennessee stock, which is Louisiana stock, and which is Mississippi stock?"

What now, are the provisions of Mississippi law, as to this consolidation? The L., N. O. & T. had itself no power to consolidate, and it is conceded that this consolidation of the L., N. O. & T. with the Y. & M. V. did not take place under sec. 1 of the act of 1882—the charter of the L., N. O. & T.—but that the power of con-
689 solidation authorized by that section was exhausted in the consolidation of the Baton Rouge railroad with the M. & V. R. R., forming the L., N. O. & T. R. R. The provisions of law we look to then as authorizing the consolidation under consideration are sec. 16 of the Acts of 1870, p. 326; the charter of the Memphis & Vicksburg Railroad Co.; sec. 25 of the Acts of 1882, p. 932; the charter of the N. O., B. R., V. & M. R. R. Co.; the Baton Rouge charter; and sec. 5 of the Acts of 1882, p. 842–'3; the Yazoo & Miss. Valley Railroad charter. The language of said section 16 is as follows: "That said company shall have the right and power to *consolidate* the stock, property and franchises of the road with any other road or roads, in or out of this State, at any time that the president and directors of the road may deem proper, and upon such terms as may be consistent with the powers conferred upon said company." We understand the well-settled rule of law as declared by the Supreme Court of the United States to be that a consolidation of *stock* results uniformly and necessarily in the creation of a new corporation.

> Clearwater *v.* Meredith, 1 Wall., 25; R. R. Co. *v.* Ga., 98 U. S., 361, 363–'4; Keokuk *v.* Mo., 152 U. S., 308; St. Louis *v.* Berry, 113 U. S., 466–473; Green's Brice's Ultra Vires note at p. 538.

In 98 U. S., *supra*, at p. 363–'4, the court say: "That, generally, the effect of consolidation as distinguished from a union by merger of one company into another is to work a dissolution of the companies consolidating, and to create a new corporation out of the elements of the former, is asserted in many cases, and it seems to be a necessary result. In McMahan *v.* Morrison, 16 Ind., 172, the effect of a consolidation was said to be a dissolution of the corporations previously existing and at the same instant, the creation of a new corporation, with property, liabilities and stockholders derived from

those passing out of existence. So in Lanman *v.* The Lebanon V. R. R. Co., 30 Pa. St., 42, the court said: "Consolidation is a surrender of the old charter by the companies, the acceptance thereof by the legislature, and the formation of a new company out of such portions of the old, as enter into the new. This court, in Clearwater *v.* Meredith, 1 Wall., 40, expressed its approval of what was said in the former of these cases. It is true these expressions have not all the weight of authority, for they were not necessary to the decisions made, but they are worthy of consideration, and they are in accordance with *what seems to be sound reason.*" Justice Strong who delivered this opinion also delivered the opinion in 92 U. S., where at p. 671, he referred, in the spirit of criticism, to these cases. It is, therefore, noteworthy that three years later, after fuller consideration, he says, speaking for a unanimous court, "they are in accordance with sound reason." The authority in 98 U. S., p. 361, was to "consolidate their *stocks*, upon such terms as might be agreed upon by the directors, and ratified by a majority of the stockholders; and it was unanimously held that it was not merger, as in 92 U. S., 665, nor alliance or confederation, but consolidation resulting in the formation of a new company. Said the court, at p. 364: "When, as in this case, the stock of two companies is consolidated, the stockholders become partners, or quasi partners, in a new concern. Each set of stockholders is shorn of the power which as a separate body it had before. Its action is controlled by a power outside of itself. To illustrate: the stockholders of the Savannah & Albany Railroad Co. could not after consolidation have exercised any of the powers or franchises they had prior to their consolidation with the stock-
holders of the Atlantic & Gulf R. R. Co. They could not
690 have built their road or controlled its management. They
could not therefore have performed the duties which, by their original charter, were imposed upon them; those duties could only have been performed by another organization composed partly of themselves and partly of others. Their powers, their franchises, and their privileges were therefore gone, no longer capable of exercise or enjoyment. Gone where? Into the new organization, the consolidated company, which exists alone by virtue of the legislative grant, and which has all its powers, facilities, and privileges by virtue of the consolidation act. What then, was left of the old companies? Apparently nothing. They must have passed out of existence and the new company must have succeeded to their rights and their duties; but the new company comes into existence under a *fresh grant.*

Not only its being, but its powers, franchises, and immunities, are grants of the legislature which gave it its existence. Since, then, a consolidation of the stock of two corporations means the creation of a new corporation, it necessarily follows that the power to consolidate given by this sec. 16 *supra* did not authorize a merger, or any consolidation except such as resulted in the formation of a new company. The next source of power to consolidate is sec. 25, Acts 1882, p. 932 *supra.* That provides: "That the company shall have power and authority to * * * consolidate the company with

any other company, under the name" (not under the name *and charter* as in 92 U. S., p. 667) "of one or both; but when such * * * consolidation is effected, the said company shall be entitled to all the benefits, rights, franchises, lands and property of every description belonging to said road or roads so consolidated." The language here sharply distinguishes between the old companies and the new in a way that makes it perfectly clear the legislature meant the consolidation to result in the creation of a new corporation. Said company, that is the new consolidated company, may be under the name of one, but not the charter of one; on the contrary it, said company, shall be entitled to all the benefits, etc., etc., belonging to said *roads—all* of them *so* consolidated. Manifestly the legislative purpose here was the consolidation of two or more companies into one new company. No power can be found here for merger. The next source of power to consolidate is sec. 5 of the Acts of 1882, p. 843, which provides: "Said company may consolidate with any other railroad company in or out of the State of Mississippi upon such terms as the consolidated company may agree upon; and upon any such consolidation the consolidated company shall have and enjoy all the property, rights, privileges, powers, liberties and immunities and franchises herein granted; but such consolidation shall not have the effect of exempting from taxation the railroad or property owned by such other consolidated company prior to its consolidation with the company hereby chartered; nor of exempting from taxation any property which the consolidated company may, after such consolidation acquire under the provisions of the charter of such other consolidating company." Clearly here also, it is consolidation and not merger which is provided for, and such consolidation as should result in a new company, a "consolidated company which should" enjoy all the property, etc., etc., of its previously existing constituent companies. It will not fail to be noted that in none of these acts is the word merger ever used. Always, and everywhere, it is "consolidation" alone that is authorized. If merger merely was intended, what was easier than to have used the words appropriate to manifest that intention? Why this careful and exclusive use of the word "consolidation"? And not of this
694 word only, but of other terms indicating a clear intention to create a new consolidated company? We conclude, therefore, on a review of the statutes authorizing the consolidation under review that so far as the purpose of the legislature was concerned, it was its clear purpose that consolidation and not merger should occur, and such consolidation as should result in the creation of a new corporation.

Counsel for the railroad company relies on three authorities especially to show that what the legislature here intended was merger.

Tomlinson *v.* Brouch, 15 Wallace, 460;
The Central R. R. Co. *v.* Ga., 92 U. S., 666; and
Meyer *v.* Johnson, 53 Ala., 313.

But in Tomlinson *v.* Brouch Mr. Justice Bradley properly characterized what was done as "amalgamation" which is merger and

not consolidation, p. 463, 15 Wall., and the act of the legislature expressly provided for merger. It provided p. 463 that "the said South Carolina Canal & R. R. Co., shall be *merged* in the said South Carolina R. R. Co." and provided expressly that the South Carolina R. R. Co. should retain its autonomy and previous existence. There was no room for construction in this case and it was conceded on all hands that what occurred was merger. So in Central R. R. Co. *v.* Ga. it was expressly provided—92 U. S., p. 671—that the union should take place under "the name and *charter* of the Central R. & Banking Co." merger was clearly provided for; p. 671–'3. And in Meyer *v.* Johnson, 53 Ala., the court lay stress upon the word "unite" p. 318, "were *united* with those of the Alabama company and vested in it so as to enable it, (*called* in the contract the consolidated company, because their franchises were consolidated *with* its)" etc., etc.—a case again of merger. The authorities are wholly inapplicable to a case like this, where the statutes all sedulously avoid the word merger, exclusively use the word consolidate, and accompany that word—definite enough in itself—with other provisions which leave no doubt that consolidation resulting in the creation of a new corporation was intended. Turning now from the legislative purpose, let us see what was actually done in pursuance of this power to consolidate.

First, the stock of the two companies was consolidated. Learned counsel for the railroad insists that the testimony of Welling shows that the stock was never exchanged. He is mistaken in this. Welling does so state, but on cross-examination expressly declares on this very point, "I do not know as to that question, I do not recall the fact just what was done"—and he is a witness for the railroads. This falls far short of showing that the stock was not exchanged, the other testimony shows it was.

Second. The deed of consolidation on its face provides for and creates a new organization and new officers, see articles 4, 5, 6, 7; and article 8.

Third. The fifth article of consolidation conveys all the "rights—property, etc., etc., etc., of every kind belonging to *either* of the parties—to the consolidated company, without any further act deed or conveyance" distinguishing clearly between the two previous companies—"either of the parties"—and the new company, the grantee, the "consolidated company."

Fourth. The articles of incorporation themselves, on their face declare that doubt exists as to the effect of what has been done and conclude most significantly. "But whatever may be the legal consequence of the consolidation herein provided for, this agreement is to stand and be effective." This is pregnant with meaning. The R. R. companies knew that the only power the legislature had given was to so consolidate as to create a new corporation, and that
692 under sec. 180 of the constitution of 1890 the exemption if any existed would be cut off. They knew the only word used was "consolidate" in all the legislative acts, aad that merger and consolidation are very distinct and different things. And yet—not conforming to the power, but seeking to carry the exemption in

spite of it—they used the words "unite, merge, and consolidate," and say that "such consolidation shall be effected by uniting or merging the stock, property and franchises of the L., N. O. & T. R. R. Co. with and into the stock, property and franchises of the said Yazoo & Miss. Valley Railroad Company without disturbing the corporate existence of the last-named company, or the formation of any new distinct corporation, unless such result shall be necessary to give legal effect to this agreement; but whatever may be the legal consequence of the consolidation herein provided for, this agreement is to stand and be effective." Doubtless they desired to merge; but the legislature had only authorized consolidation and such consolidation as necessarily resulted in the creation of a new corporation, and they could only lawfully do, what the legislature, in fact, authorized; not what they might wish to do. And the words "consolidate upon such terms as they might agree upon," means that the thing done must be consolidation but the mere administrative details of uniting the two into one new corporation were left to the companies; names count for nothing. It is substance courts look to. Consolidation resulting in the creation of a new corporation is what the legislature authorized: is what the articles of consolidation actually effected, and it is utterly beyond the power of the railroad companies to change the essential nature of what was done by calling it "merger."

We have not adverted to all the considerations sustaining this view. The closer the analysis of the articles of consolidation and of the action of the authorities of the two companies the more indisputable it appears that such consolidation as resulted in the creation of a new corporation was precisely what was effected. The notice for a meeting of the stockholders called for August 1, 1893, is a meeting of the stockholders of the Y. & M. V. R. R. Company. The minutes recite that it was a meeting of the stockholders of the Y. & M. V. Railroad Company and gives the number of shares and names of the holders, and all this is true also of the meeting of stockholders of October 4, 1893. Again, on August 1, 1893, a resolution was passed "that the stock, property and franchises of said two corporations had been merged or united in *one single corporation* under the corporate name of the Y. & M. V. Railroad Company. Another resolution was passed reciting that the Y. & M. V. Railroad Company was the "successor" or assignee of the L., N. O. & T. Railroad Company. Of course the mere *name*—Y. & M. V. Railroad Company—is utterly immaterial in determining whether it is attached to the same old company known as the Y. & M. V. Railroad Company or to the consolidated company, the new company, and this action of the stockholders as well as the articles of consolidation pointed clearly to the same result—consolidation and not merger. The new company was the successor or assignee of the two old companies and the language of Mr. Justice Brown of *of* the Supreme Court of the United States in Keokuk *v.* Mo., 152 U. S., 309, fits in here as if uttered for this case: "It is impossible to conceive of a corporation existing without stock or certificates representing the interests of the corporators in the organization. Now if the act provides

(the deed in the case at bar) that these certificates shall be surrendered and certificates in another company issued in their place, what becomes of the prior companies? Who are their stockhold-
693 ers? Who their officers? (The deed in this case appoints an entirely new set of officers. See Charter Book, pp. 731–732.) If the stock in the new company is sold what interest in the prior companies passes by the sale? There can be but one answer to these questions. The property and franchises of the prior companies are gone, as much as if they had surrendered their charters. The new company doubtless received by transmission from its constituent companies their property, rights, privileges and franchises including any immunity from taxation; but it receives them as an heir receives the estate of his ancestor, or as a grantee receives the estate of a grantor, by inheritance, succession or purchase. The result is not a mere union or partnership of two companies nor the merger of franchises of one in another, but the extinguishment of one and the creation of another in its place. It follows from this that when the new corporation came into existence it came precisely as if it had been organized under a charter granted at the date of the consolidation, and subject to the constitutional provisions then existing." To the same effect also is St. Louis *v.* Berry, 113 U. S., 469–475. Article 2 of the articles of consolidation is as follows: "The corporate name of the said consolidated company shall be the Yazoo & Mississippi Valley Company. Articles 3 to 8 inclusive are as follows:

"Article 4. Every holder of the stock of either of the said companies now outstanding, shall be entitled to cast *one vote* for *each* share of stock, held by him in the stockholders' meetings of the consolidated company, which vote may be cast either in person or by proxy, and shall have all the rights of a stockholder of the consolidated company, as fully as if new shares of the consolidated company had been issued and exchanged therefor; and in case the *consolidated company* shall determine to issue new shares such shares shall be exchangeable at par for the now outstanding shares of *each* of the *constituent* companies; and the remainder of the capital stock of the consolidated company shall be issued from time to time and upon such terms and conditions as may be prescribed by the board of directors of said company.

"Article 5. All and singular the rights, powers, privileges, immunities and franchises, and all the railroads, real and personal estate, easements, fixtures, equipments, choses in action, and property and assets of every kind, nature or description belonging to either of the parties hereto, shall be vested in and become the property of the said *consolidated company*, without any *further act, deed*, conveyance or assurance being required in the premises.

"Article 6. The affairs of the consolidated company shall be managed by a board of directors which shall consist of such a number of members not less than five, as the company may determine from time to time, each of whom shall be a stockholder, and one of them a resident of the State of Mississippi, one of Tennessee, and one of Louisiana. The members shall be divided

into three equal classes as nearly as practicable. Successors, for the term of three years shall be chosen for those belonging to the first class at the first annual meeting of the stockholders held after this consolidation shall have been effected; for those who belong to the second class at the next annual meeting; and for those belonging to the third class at the next succeeding annual meeting of the stockholders. Each director successively chosen shall continue in office until his successor is elected. Vacancies in the board caused otherwise than by expiration of term for which the retiring director was chosen, may be filled by a vote of a majority of the directors remaining, such appointee to continue in office until the next
694 regular election of directors by the stockholders.

The first board of directors shall be composed of the following members divided into three classes as follows:

First class. Stuyvesant Fish, Adolph Schreiber, W. C. Craig, Chas. A. Peabody, Jr.

Second class. John W. Auchinloss, Walther Luttgen, Edward H. Harriman, J. T. Harahan.

Third class. S. V. R. Cruger, R. P. Neeley, R. C. Shepherd, John C. Welling.

Article 7. The board of directors of said consolidated company shall choose one of their number president whose term of office shall be one year, or until his successor shall be chosen or qualified. They may also appoint such other officers and agents as they may deem necessary from time to time and prescribe their duties and compensation; and may provide, by the by-laws to be adopted, such rules and regulations relating to the affairs and business of said company as may be necessary or proper. The said board shall also have power to appoint an executive committee, of whom the president shall be one *ex officio*, who shall possess and exercise all the powers and duties of the board of directors, when the board is not in session. Until otherwise ordered the corporate seal of the said consolidated company shall be that of the Yazoo & Mississippi Valley Railroad Company.

Article 8. The said *consolidated company* shall be and the same is hereby authorized and empowered in such a manner and upon such conditions as are permitted by law, to issue its bonds and secure the same, as well as all bonds heretofore issued by *either* of the *constituent* companies, or that have been heretofore or may be hereafter issued by any other railroad company, by mortgage or deed of trust, upon all or any of its railroads, rights, franchises and property, real and personal, wherever the same may be situated, and whether the same may be owned by said company at the time this consolidation is effected or may be hereafter acquired; and may also exercise any and every other corporate right, or power now vested in, or which might have been heretofore lawfully exercised by *either* of said *constituent* companies."

It will be seen that said article 5 itself conveys all the property, rights and franchises, etc., belonging to either constituent to the *consolidated* company without any further act, "deed, conveyance or assurance being required in the premises," and in this regard is

substantially identical with the provisions in St. Louis *v.* Berry, 113 U. S., 475, and Keokuk *v.* Mo., 152 U. S., 308, both of which cases hold that a new corporation was created. It will be noticed also that article 6 creates a new organization and actually names a new set of directors for the consolidated company who are under article 7 to elect officers for the consolidated company. It will be noticed that article 8 authorizes the new consolidated company to "issue its bonds and secure the same as well as all bonds heretofore issued by *either* of the *constituent* companies," and further provides "that the consolidated company shall exercise any and every other corporate right or power now vested in or which might have been heretofore lawfully exercised by *either* of said *constituent* companies," clearly drawing the distinction between the *two* previous *constituent* companies and the *new consolidated* company; and it will further be specially noticed and to this we direct the closest attention; that article 4 provides "that every holder of the stock of *either* of the said companies now outstanding shall be entitled to cast *one* vote for *each* share of stock held by him, in stockholders' meetings of the consolidated company and shall have all the rights of a stockholder of the consolidated
695 company as fully as if new shares of the consolidated company had been issued and exchanged therefor." Now it is clearly admitted by both sides that the L., N. O. & T. Railroad Company was dissolved and became extinct. The L., N. O. & T. Railroad Company had 50,000 shares of stock; the Y. & M. V. had 6,000 shares of stock, and if anything is certain, it is, undoubted, that it is a metaphysical and legal impossibility that a corporation with 6,000 shares of stock could absorb one with 50,000 shares and allow *one* vote to *each* share. It is well said by counsel for the revenue agent: "The voting power of the latter is more than eight times that of the former, and it could absorb the former and seven more like it, and no legislative declaration or judicial dictum could alter this fact, for it is founded in the nature of things. The deed of consolidation provides for the contingency, and says, whatever the effect, that consolidation shall stand and be effective. What is, then, effected? If the L., N. O. & T. Railroad Company is extinguished and the voting power of each share of stock is equal and extends equally over all the property, rights, operations and franchises of the consolidated company, you may put in what name or call it what you may, but the actual result is a complete and perfect consolidation with the combined voting power of both. One cannot absorb 8½, but one and 8½ can make 9½ a NEW number."

We have thus far been discussing two things: the purpose of the legislature in authorizing the consolidation, and what was actually done in pursuance of that authority, and it is perfectly clear that what the legislature authorized and what was actually created in fact in pursuance of that authorization was consolidation of such character as resulted in the creation of a new company under the name of the Y. & M. V. Railroad Company; that the Y. & M. V. Railroad Company with which we now deal is not the old Y. & M. V. Railroad Company—one of the constituent members—but is the NEW Y. & M. V.

Railroad Company, a new consolidated company taking its grant of corporate rights from date of said consolidation October 24, 1892, some two years after the constitution of 1890 went into effect. This leaves for solution on this branch of the case a single inquiry: Did section 180 of the constitution of 1890 cut off the exemption claimed by the L., N. O. & T. Railroad Company, conceding now, for the purpose of argument, that it ever had any such exemption? That section is in the words following:

"SECTION 180. All existing charters or grants of corporate franchise under which organizations have not in good faith taken place at the adoption of this constitution shall be subject to the provisions of this article; and all such charters under which organizations shall not take place in good faith and business be commenced within one year from the adoption of this constitution, shall thereafter have no validity; and every charter or grant of corporate franchise hereafter made shall have no validity, unless an organization shall take place thereunder and business be commenced within two years from the date of such charter or grant."

It is too clear for argument that the "power to consolidate is the grant of a corporate franchise." 2nd Morawetz Priv. Cor., sec. 954, p. 903; Ashley *v.* Ryan, 153 U. S., 436–463. It is not a right, but a mere license, as heretofore shown. It takes effect not as of the date of the charter but as of the date of the deed of consolidation. Keokuk *v.* Mo., 152 U. S., 308. A corporation can have no status or existence until organized. 1 Morawetz Priv. Corp., 288. Unless, therefore, the present Y. & M. V. R. R. Co. had been organized at the date of the adoption of the constitution, it is settled that
696 it could not possibly have been legally entitled to an exemption at that time. Planters' Fair, etc., *v.* State, 161 U. S., 192. A corporate franchise is the right to exist as a corporation. It is the franchise invested in the individual stockholders before a corporation is authorized authorizing them to form such corporation by organization. This is the precise corporate franchise meant by sec. 180 of the constitution. There is an exact analogy between this corporate franchise authorizing individuals to organize themselves into a corporation, and the franchise authorizing constituent corporations and artificial persons to organize themselves into a consolidated company, and in the one case as in the other, the result of the organization must be a new company. There are various other franchises which may belong to corporations, such as the right to be and operate a railroad after the corporation is organized, receive tolls, etc., but this belongs to the corporation as an artificial person. It is clear, therefore, that the corporate franchise referred to in sec. 180 is the right to exist as a corporation. It is thoroughly settled by the United States Supreme Court that the effect of sec. 180 of the constitution of 1890 was to cut off any exemption claimed, if it ever existed. St. Louis *v.* Berry, 113 U. S., 475; Keokuk *v.* Mo., 152 U. S., 308.

Learned counsel for the railroad companies insist that under sec. 181 of the constitution and sec. 279 in the schedule of the constitu-

this exemption was continued. These sections are in these ds:

SEC. 181. The property of all private corporations for pecuniary shall be taxed in the same way and to the same extent as the perty of individuals, but the legislature may provide for the tax- n of banks and banking capital by taxing the shares according he value thereof (augmented by the accumulations, surplus, and aid dividends), exclusive of real estate, which shall be taxed as er real estate. Exemptions from taxation to which corporations legally entitled at the adoption of this constitution shall remain ull force and effect for the time of such exemptions as expressed their respective charters or by general laws, unless sooner re- led by the legislature."

ection 279 is as follows:

SECTION 279. All writs, actions, causes of actions, proceedings, secutions, and rights of individuals and bodies corporate, and of State, and charters of incorporation shall continue; and all in- tments which shall have been found or which shall hereafter be nd, and all prosecutions begun or that may be begun for any me or offense committed before the adoption of this constitution, y be proceeded with and upon as if no change had taken place."

This is a wholly mistaken view of these provisions of the consti- ion. Sec. 181 preserves only such exemptions as corporations ly organized prior to the constitution were LEGALLY entitled to he adoption of the constitution. Its meaning plainly was that orporations organized and existing at the date of the adoption of constitution should retain the precise corporate existence they n had, such exemptions as they *legally* had should continue ilst their corporate organizations remained as they were. It has hing to do with the preservation of exemption to any corpora- n existing at the date of the adoption of the constitution which sed to retain its said precise corporate existence, and became con- idated with another corporation, thereby ceasing to exist. Sec- n 279 meant the same thing, to wit, that charters of incorporation longing to corporations at the date of the adoption of the consti- ion were not in any way to be infringed by the constitution so long as such corporations retained their precise previous cor- porate organization. This, and this only, is the whole scope of the two sections. Their plain meaning is in harmony th the whole spirit of the chapter on corporations in the consti- ion, and cannot be frittered or pared away by ingenuity or refine- ent.

It was well said by Mr. Justice Brown in Keokuk *v.* Mo., 152 S., at p. 312, "But the decisive answer to this objection is that e legislature had no power, in 1869, to extend to a new corpora- n created by the consolidation an exemption contained in an act ssed in 1857, before the constitution was adopted, and hence, der the terms of this act, we cannot hold that immunity from xation passed as a franchise or privilege to the consolidated cor- ration. The construction claimed by the defendant would be rectly in the teeth of the constitutional provision that no property

shall be exempted from taxation. While, as heretofore observed, an exemption from taxation contained in a charter previously granted could not be taken away by this constitutional provision without the impairment of the obligation of a contract, it doubtless applies to all corporations thereafter formed either by original charter or by the consolidation of prior corporations under the act of 1869."

It is further clear that if the different charters relied upon had expressly provided by the use of the word "immunity" or by direct declaration to that effect, that the alleged exemption of the L., N.O. & T. should pass into the consolidated company, section 180 of the constitution of 1890 still cut off the exemption, since the constitution is the paramount law of the land, the consolidation having taken place some two years after its adoption. It is so expressly held in the L. & N. Railroad Company *v.* Ky., 161 U. S., 695, and Pearsall *v.* G. N. Railroad Company, 161 U. S., 167. And, in this view, it of course becomes immaterial whether the position of learned counsel for the railroad that the exemption passes by *general law* into the consolidated company without *express declaration* is correct or incorrect, though we understand the Supreme Court of the United States to have distinctly held that the sovereign right of taxation does not so pass unless there be either express declaration to that effect or the use in statutes authorizing the consolidation of the word "immunity." And that court has distinctly held as "the later and best-considered view, sustained by the weight of authority," that the use of the word franchise or privilege or any other word than the word immunity is not sufficient to embrace an exemption from taxation.

Phœnix Ins. Co. *v.* The State, 161 U. S., 176.
Keokuk *v.* Mo., 152 U. S., 304.
Covington *v.* Sanford, 164 U. S., 586.
Norfolk *v.* Pendleton, 156 U. S., 172.
Pickard *v.* Railroad, 130 U. S., 640.
Railroad Co. *v.* Palmes, 192 U. S., 451.
Home Ins. Co. *v.* The State, 161 U. S., 198.

On this very point Mr. Justice Peckham in Phœnix Ins. Co. *v.* Tennessee, 161 U. S., p. 178, says: "The inference is sought to be drawn in favor of exemption if the legislature did not *affirmatively* grant the right to tax. We cannot assent to any such view and we could come to no such conclusion from an examination of the general statutes cited by counsel. It is a complete *overturning* of the *universal rule* in *regard to taxation.* The power and the right to tax are always presumed, and the exemption is to be clearly granted. Mere silence is the same as a denial of exemption." Nothing certainly can be clearer than this. Indeed the opinion of Mr. Justice Peckham in this case is so clear and forcible that we quote from it to adopt the following passages on this particular proposition:

"In Wilson *v.* Gaines, 9 Bax., 546, it was held by the supreme court of Tennessee that as the State in its constitution (article
698 11, sec. 7, constitution 1834) used in the same connection all the words "rights," "privileges," "immunities" and "exemptions," each of these words was to be given, in interpretation, a

meaning so limited as not to include anything expressed by the others and that when any one of them is found in a statute the legislature must be conclusively presumed to have used it in its restricted sense. This decision of the Tennessee court tends very strongly to the idea that the words "immunity" or "exemption" would have been required to secure the exemption to a company in a case like this. It is true that this view was not assented to by this court as being the correct one in Tennessee *v.* Whitworth, 117 U. S., 139, 146, and it is simply cited for the purpose of showing what the Tennessee court did decide in regard to the meaning of its own constitution in reference to this subject.

That the legislature was, about the time, freely incorporating various companies and granting them exemption from taxation with considerable liberality, is not a sufficient reason to induce this court to depart from the universal and well-established rule making a claim for exemption a matter to be *proved beyond all doubt*. The circumstance which we regard as very significant and which has already been alluded to, consists in the omission of the word "immunities" in the grant to plaintiff in error. That omission we attach great weight to, and the least that can be said of it is that it involves the question in doubt.

It cannot be denied that the decisions of this court are somewhat involved in relation to this question of exemption. It is difficult in some cases to distinguish the language used in each so far that the different results arrived at by the court can be seen to be founded upon a real difference in the real meaning of such language. The question has sometimes arisen upon the consolidation of different companies, and sometimes upon a sale under a mortgage foreclosure. Among the former is the case of Keokuk & Western Railroad *v.* Mo., 152 U. S., 301, where under the laws of Missouri (sec. 4 of the act of March 2, 1869) there was a provision that the consolidated company should be "subject to all the liabilities and bound by all the obligations of the companies within this State" and "be entitled to the same franchises and privileges under the laws of this State, as if the consolidation had not taken place." The question was said to admit of doubt, whether under the name "franchises and privileges" an immunity from taxation passed to the new company. Various cases are cited in the opinion which was delivered by Mr. Justice Brown showing the grounds taken by this court in such cases. In Chesapeake & Ohio Railway *v.* Miller, 14 U. S., 176 (a foreclosure case), it decided that an immunity from taxation enjoyed by one railroad company did not pass to the purchaser under the foreclosure of a mortgage, although the act provided that the purchaser should forthwith become a corporation, "and should succeed to all such franchises, rights and privileges as would have been had by the original company but for such sale and conveyance." The case followed that of Morgan *v.* La., 93 U. S., 217 (also a foreclosure case), where it was held that the words "franchises, rights and privileges" did not necessarily include a grant of exemption or immunity from taxation. See also, to same effect, Memphis & Little Rock R. R. *v.* Railroad Commissioners, 112 U. S., 609. The case of Pickard *v.*

Tennessee, etc., Railroad, 130 U. S., 637, 642, may also be referred to, upon the point that exemption, although it might be granted must be considered as a personal privilege not extending beyond the immediate grantee unless otherwise so declared in express terms; and it was therein declared that such immunity would not pass merely by a conveyance of the property and franchises of a railroad company, although such company might itself hold property exempt from taxation. In that case Mr. Justice Field, speaking for the court, said: "It is true there are some cases where the terms 'privileges' has been held to include immunity from taxation, but that has generally been where other provisions of the act have given such meaning to it. The later, and we think the better opinion, is that unless other provisions remove all doubt of the intention of the legislature to include an immunity in the term franchise, it will not be so construed. It can have its full force by confining it to other grants to the corporation." This language is referred to by Mr. Chief Justice Fuller in the case of Wilmington & Weldon R. R. *v.* Alsbrook, 146 U. S., 279, where, at page 297, he says: "We do not deny that an exemption from taxation may be construed as included in the word 'privileges,' if there are other provisions removing all doubt of the intention of the legislature in that respect," citing the Pickard case.

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Looking at the other side, we find the case of Humphrey *v.* Pegues, 16 Wall., 244, where there was a grant to a railroad company of "all the rights, powers and privileges" granted by the charter of another company which exempted the property of such other company from taxation, and it was held that the property of the first company was thereby also exempted. Mr. Justice Hunt, in delivering the opinion of the court, said that: "A more important or more comprehensive privilege than a perpetual immunity from taxation can scarcely be imagined. It contains the essential idea of a peculiar benefit or advantage or special exemption from a burden falling upon others." Again, in Tennessee *v.* Whitworth, 117 U. S., 139, it was held that a right to have shares in its capital stock exempt from taxation within the State was conferred upon a railroad corporation by a State statute granting to it "all the rights, powers and privileges," or granting it "all the powers and privileges" conferred upon another corporation named if the latter corporation possessed by law such right of exemption. The question in that case arose as to the meaning of certain statutes passed by the legislature of Tennessee resulting in the consolidation of certain railroads therein mentioned. In the course of his opinion Mr. Chief Justice Waite cites the case of Philadelphia, Wilmington & Baltimore Railroad *v.* Maryland, 10 How., 376, 393, where Mr. Chief Justice Taney, speaking of a statute which authorized the union company to have "the property, rights and privileges which that law or other laws conferred on them" (the separate companies or either of them), said that such language extended to the union company the exemption from taxation contained in the charter of one of the united companies. Mr. Chief Justice Waite, continuing

in his opinion, said: "As has already been seen the word 'privilege' in its ordinary meaning when used in this connection includes an exemption from taxation." The decision of this last case should be *confined* to the *peculiar language* used in the various statutes therein cited, wherein, aside from the word "privilege," it may be argued that, considering all the language used in those statutes, the intention of the legislature to exempt the company named from taxation may fairly well be made out.

The later cases of Pickard *v.* Tennessee, etc., Railroad Co., 130 U. S., 637, and Wilmington, etc., Railroad *v.* Alsbrook, 146 U. S., *supra*, show that there must be other language than the mere word "privilege" or other provisions in the statute removing all doubt as to the intention of the legislature before the exemption will be admitted. The case of Mobile & Ohio Railroad *v.* Tennessee,
700 153 U. S., 486, adds nothing to the discussion on either side.

The particular point was not in that case, but it seems to be cited by counsel for plaintiffs in error for the purpose of showing what was the general condition of the State at the time of the adoption of the constitution in 1834, and what was the policy of the State in regard to internal improvements which the constitution declared ought to be encouraged. The incorporation of an insurance company would hardly come within the most liberal meaning of the term "internal improvements." If this were an original question, we should have no hesitation in holding that the plaintiff in error did not acquire the exemption from taxation claimed by it, and we think at the *present time the weight of authority* as well as the *better opinion*, is in favor of the same conclusion which we should otherwise reach."

It is impossible for us to add to the elegance, clearness or force of this reasoning. It will be noted too that the court says that the case of Tennessee *v.* Whitworth, 117 U. S. 139, "must be confined to the language used in the various statutes therein cited, wherein, aside from the word privilege, it might be argued that considering all the language used in those statutes the intention of the legislature to exempt the company named from taxation may fairly well be made out." Tennessee *v.* Whitworth seems fairly to be shaken as authority by the later decisions of the Supreme Court of the United States, and whether it is sound or unsound cuts no figure in this case, since in that case no new constitution intervened. The material fact, that in this case a new constitution does intervene, constitutes the decisive difference between this case and Tennessee *v.* Whitworth, and makes this case fall within the principle of Keokuk *v.* Mo., and St. Louis *v.* Berry, *supra*. See also Morgan *v.* La., 93 U. S., 223; M. & O. Railway Company *v.* Miller, 114 U. S., 186. We therefore reach the conclusion that the consolidation of the L., N. O. & T. with the Y. & M. V. Railway Co. resulted in the creation of a new corporation, the present Y. & M. V. R. R. Co., and *that* consolidation having been effected October 24, 1892, some two years after the constitution of 1890 went into effect, section 180 of that constitution effectually cut off the exemption claimed. We entertain no doubt whatever of the entire correctness of *of* this view, but

if the doubt existed the same result must follow in accordance with the well-settled principle that all doubt must be resolved in favor of the taxing power. This principle has never been more emphatically declared than in Yazoo & Mississippi Valley Railroad *v.* Thomas, 132 U. S., 174, in the following clear-cut language: "Exemptions from taxation are regarded as in derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact and express requirement of the language used, construed *strictissimi juris*." It necessarily follows from these views that on this ground alone, standing by itself, apart from all other considerations in this case we must, and do hold the railroad company not entitled to the exemption claimed except in the particular hereinafter to be mentioned, and this independent ground of decision disposes of the case regardless of all other grounds. It will be observed that we have in reaching this conclusion treated consolidation not, as in itself, meaning necessarily that a new corporation must be created, but have allowed it the latitude of definition sometimes given it, very loosely and improperly, as we think, according to which consolidation may mean merger, the absorption of one corporation by another. Taking the word even in that sense as we have done thus far throughout this discussion, we have nevertheless found that the purpose of the legislature was such con-
701 solidation as meant not merger but the creation of a new corporation and that the articles of consolidation together with the action of the stockholders and directors of the two companies show that what was actually effected was the creation of a new corporation. It is not necessary therefore to say that the term consolidated, *ex vi termini*, imports a creation of a new corporation, though in our judgment such is its true meaning as shown by the best considered cases. The loose phrase—"consolidation by merger"—is too vague and confusing to signify anything clearly; one might as well say merger by consolidation and that equivalency of phrase would give us the equation consolidation = merger, which manifestly is nonsense. The term consolidation where such phrase as consolidation by merger occurs, has as it seems to us, been carelessly confounded with the term amalgamation as used in England. Amalgamation in the English sense probably means about what merger does with us, but it is not consolidation in any proper sense of the term; it is in the interest of clearness of definition that consolidation should be limited to signify such union of two or more corporations as necessarily results in the creation of a third new corporation, and as we understand the decisions, this is what is known as the American doctrine and the better view. Thus in Green's Brice's *Ultra Vires*, p. 538, Mr. Green says, summing up in a most learned note: The term "amalgamation" is seldom applied to corporations in this country. That which takes its place as much as any is "consolidation." But, though it is difficult accurately to define amalgamation as commonly used in English law, it certainly has a wider meaning than consolidation has with us. Consolidation would, *e. g.*, be inapplicable to a union of two or more companies, in such way that one of the original corporations only was continued in existence,

while the other were merged or absorbed in it. The absorption of one corporation by another would, according to some of the decisions, be an amalgamation in England; but it *would not be a consolidation here.* In McMahan *v.* Morrison, 16 Ind., 172, a case frequently cited with approval in the later decisions, it was said, that the effect of the consolidation "was a dissolution of the three corporations named, and at the same instant, the creation of a new corporation, with property, liabilities and stockholders derived from those then passing out of existence." Similarly, in Lanman *v.* Lebanon, etc., Railroad Company, 30 Pa. St., 42, consolidation is said to amount to "a surrender of the old charters by the companies, the acceptance thereof by the legislature, and the formation of a new corporation out of such portions of the old as enter into the new." Where by the terms of the statute and deed, the first corporation was extinguished, the second only continued in existence, this was held not to be "an amalgamation or consolidation of the two corporations into one." Powell *v.* Northern Missouri R. R. Co., 42 Mo., 63. In the American view, therefore, it would seem that the *dissolution of all* the old corporations and the creation of *one new one* are *essential* to *consolidation.*"

Mr. Chief Justice Fuller in Railroad Company *v.* Alsbrook, 146 U. S., 279, clearly has this view of consolidation. He says: "And although the transaction is called by the legislature, in the act of 1875, a consolidation, it amounted rather to a merger or an amalgamation, and need not be held to have resulted in a new corporation." Clearly distinguishing between consolidation on the one hand and merger or amalgamation on the other hand as two things in their essential nature wholly different from each other, as undoubtedly they are. So the supreme court of Arkansas distinctly hold in St. Louis *v.* Berry, 41 Ark., at p. 518, afterwards affirmed by the
702 U. S. Supreme Court, saying: "And in the absence of a contrary intention clearly expressed in the law authorizing it the legal effect of a consolidation is to extinguish the constituent companies and to create a new corporation with property, liabilities and stockholders derived from those then passing out of existence," citing:

McMahan *v.* Morrison, 16 Ind., 172.
Lawman *v.* Lebanon R. R. Co., 30 Pa. St., 42.
Clearwater *v.* Merridith, 1 Wall., 25.
Shields *v.* State, 26 *id.*, 86.
Same case on error, 95 U. S., 319.
Central R. R. Co. *v.* Ga., 92 *id.*, 665.
R. R. Co. *v.* Maine, 96 *id.*, 499.
Railroad Co. *v.* Ga., 98 *id.*, 359.

Mr. Justice Strong says in Central R. R. Co. *v.* Ga., 98 U. S., 360, that this view of consolidation accords with sound reason. And to the same effect is The Arkansas Milling *v.* Berry, 44 Ark., 22; Atlanta, etc., *v.* Ga., 637, 486. As before remarked, however, it is not necessary for us to hold that the true definition of the word consolidation is such union of two or more corporations as necessarily re-

sults in the creation of a new corporation; we merely remark upon what we think the true definition of the word should be held to be, in the interest of clearness and definiteness in legal phraseology, adding the authorities which restrict its signification as indicated above. But it is most earnestly insisted by learned counsel for the railroad company that the case of Railroad Company *v.* Lambert, 70 Miss., 781, is *res adjudicata* of this entire controversy. Except in the single particular to be hereinafter mentioned, this position is wholly untenable. The rule laid down by Mr. Justice Field of the United States Supreme Court in Cromwell *v.* Sac County, reaffirmed in Keokuk *v.* Mo., *supra*, and in New Orleans *v.* Citizens' Bank, 167 U. S., 397, and in So. P. R. R. Co. *v.* U. S., 168 U. S., at p. 48, is this, "That where the parties are the same and the subject-matter and cause of action are the same, the estoppel extends not only to what was decided, but to all that might have been decided in that case; but where the parties are substantially the same but the cause of action different it only extends to what was necessarily involved and was actually decided in the first suit;" which is the doctrine laid down in the Duchess of Kington's case. The parties in the Lambert case were the Natchez, Jackson & Columbus Railroad Company and the sheriff of Adams county, and the subject-matter or cause of action was the tax, State and county, on the part of the Natchez, Jackson & Columbus railroad within Adams county; the exemption asserted was under the charter of the Natchez, Jackson & Columbus Railroad Company. In this case the parties are the Illinois Central Railroad Company and the Yazoo & Mississippi Valley Railroad Company on the one hand and the State revenue agent on the other, and the subject-matter is State and county taxes of an entirely different railroad, the L., N. O. & T. railroad, and an exemption is claimed under the charter of the L., N. O. & T. Railroad Company, an entirely different charter. It is perfectly manifest therefore that neither the parties nor the subject-matter are the same, except in the particular to be hereafter mentioned. The thing adjudged in the Lambert case was that State and county taxes were not due on that part of the Natchez, Jackson & Columbus Railroad Company lying within Adams county. It is true the principle of the decision would extend to the exemption of the whole property of the Natchez, Jackson & Columbus R. R. Co., but that was not the thing adjudged, and that feature of the decision is persuasive under the doctrine of *stare decisis*, and not binding as an estoppel, under the doctrine of *res adjudicata*. It is also true that to claim the benefit of *res adjudicata* as estoppel, in the strict and technical sense, it must be
703 pleaded or offered in evidence. It is further to be remarked that it is not the reason which a court gives for its decision which constitutes estoppel, but the thing it adjudges; this is well settled in Buckner *v.* Calote, 28 Miss., 432. The property adjudged by a court to a litigant is his thenceforward under the doctrine of *res adjudicata* as a rule of property as against the parties in that same litigation; but the reasons which the court may give for the decision are thereafter simply persuasive under the doctrine of *stare decisis* and not in themselves to be invoked as the estoppel. It is a

mere confusion of thought to blend these two wholly different principles, underlying these legal doctrines, and thus practically treating them as the same. Nor are the taxes of any one year, the same cause of action as the taxes of any other year, in the only proper technical signification to be given to the term *res adjudicata*. It is so held by the United States Supreme Court in Keokuk *v.* Mo., *supra*, and in Phœnix Ins. Co. *v.* Tennessee, 161 U. S., at p. 186. A decision for the taxes of any one year may be invoked under the doctrine of *stare decisis*, where the taxes of any other year are involved under the same claim. But certainly never, on any clear thinking or correct reasoning, under the doctrine of *res adjudicata*.

On this very subject the supreme court of Iowa said, in The City of Davenport *v.* The C., R. T. & P. R. R. Co., 38 Iowa, p. 639–640: "Each year's taxes constitute a distinct and separate cause of action, and the determination of the matters, involved in the injunction, reached no further than the taxes for the years then in question. The cases are unlike those where two causes of action, (as two promissory notes) forming the subject-matter of successive actions between the same parties both growing out of the same transaction, in which a defense set up in the first suit and held good will conclude the parties in the second.

But the taxes of separate years do not in any just sense grow out of the same transaction. They are like distinct claims on two different promissory notes, made from two distinct and separate though similar transactions between the same parties. A judgment on one of such notes, it is quite clear, would not be of any force as an estoppel in an action on the other note between the same parties. In support of these views see the following cases;" citing twelve cases, Mr. Justice White says in New Orleans *v.* Bank, 167 U. S., p. —, that this was practically overruled in Goodenow *v.* Litchfield, 59 Iowa. But Seevers, chief justice in that case says, at p. 236, that the cases are not in conflict. And Rothbroch, judge, in delivering the opinion of the court in the Goodenow case says at p. 234: "That (the case in 38 Iowa) was a direct proceeding by the *taxing power to collect its revenue*, and it may well be questioned whether *any decree* could operate *upon future assessments and levies*"—the very principle announced in Keokuk *v.* Missouri, 152 U. S.

It will, however, be distinctly observed, and we direct emphatic attention to this statement, that whether the decision for taxes of one year is *res adjudicata* as to taxes for another year preferred under the same claims as held in New Orleans *v.* Citizens' Bank, 167, 397, is wholly immaterial here, since the parties to this litigation are not the same with the parties to the litigation in the Lambert case, except perhaps as hereafter indicated. There is therefore no *res adjudicata* arising out of the Lambert case, except as will be indicated; and that exception is this: Perhaps the State revenue agent as to the taxes, State and county, on the property of the Natchez, Jackson & Columbus Railroad Co. in Adams county, for the year 1892, may be regarded properly and substantially as the same party
704 with the sheriff of Adams county, and the Natchez, Jackson & Columbus Railroad Co., as to the same taxes on the same

part of its property may properly be regarded as substantially t
same party with the Yazoo & Miss. Valley Railroad Co., into whi
the property of the Natchez, Jackson & Columbus Railroad Co. h
been integrated. Substantially, in this small particular, as to t
State and county taxes for the year 1892 on that part of the prope
of the Natchez, Jackson & Columbus Railroad Co. lying in Ada
county, the parties may be said to be the same and the cause
action the same; and we hold accordingly that as to that the ra
road company is entitled to claim the exemption under the Lamb
case as *res adjudicata*. Except as to this alone there is clearly, as
think, no right to invoke the Lambert case as *res adjudicata* for t
reason that the parties are not the same without reference to oth
considerations. And let it be further specially noted that the La
bert case went off on demurrer and the evidence in this case was n
before the court. It is well said by the Supreme Court of the Unit
States in Keokuk *v.* Mo., 152 U. S., 313, in an opinion of unusu
clearness and power that "It is not to be tolerated that the St
should be forever debarred of its taxes by an erroneous decision,"
316. But it is said if the Lambert case is not *res adjudicata* it shou
control this case under the doctrine of *stare decisis*. There is a
view of the Lambert case which authorizes the appeal to the d
trine of *stare decisis;* it did distinctly decide that what occurred
tween these companies was merger and not consolidation, and th
no new corporation was created thereby, applying the principles
The Railroad Company *v.* Maine, 96 U. S., 499, to the facts of th
case which are, in our judgment, wholly different from the facts
the Maine case. It did not decide of course—holding that the c
was one of merger—whether section 180 of the constitution of 18
would have cut off the exemption had there been a consolidati
creating a new corporation. Holding, that it was a case of me
merger, the court very naturally held that section 181 of the cons
tution of 1890 had no effect on the exemption claimed, *in that ri*
The court most emphatically did *not* decide that, had there beer
consolidation resulting in the creation of a new corporation af
the constitution of 1890 went into effect, such new corporation cou
claim that an exemption belonging to one of its constituents pr
to that constitution, as the property of the absorbed company alo
was continued by virtue of section 181. There is no process of
terpretation by which the decision in the Lambert case can be so d
torted as to mean any such thing. The court proceeded throughc
upon the proposition that it being a mere case of merger, the Yaz
& Miss. Valley Railroad Co. absorbing the L., N. O. & T. railro
section 181 had no effect upon the exemption, and that such exem
tion passed to the Y. & M. V. Co. so far as the property of t
Natchez, Jackson & Columbus Railroad Co. was concerned. If it h
been a mere case of merger, as held by the court, we think it cle
as hereinbefore pointed out, that *that* exemption did not pass, a
that the court was in error in so holding, because of the well-setti
proposition hereinbefore stated and supported by the authorities th
under the *general law* alone, without reference to the constitutio
an exemption will not pass in a case of merger to the absorbi

company which attached to the property of the company merged alone, unless the legislation authorizing in such case merger either *expressly* declared that the exemption shall pass, or used the word "immunity," or an equivalent word; it was correct in fact to say
705 that the exemption of the property of the Natchez, Jackson & Columbus Railroad Co. passed to the L., N. O. & T. Co. by virtue of the word "immunities" used in the act of 1890, authorizing a sale or consolidation of the Natchez, Jackson & Columbus Railroad Company with the L., N. O. & T. railroad (Laws of 1890, p. 675) provided always that exemption was *legal* in its origin, the validity of which exemption was not contested but conceded in the Lambert case, but which was clearly invalid as we shall show later in this opinion. The power of the word "immunities" in said act to pass such exemption to the L., N. O. & T. railroad under said act of 1890 was exhausted by that consolidation, and had no virtue to carry that exemption into the new company, the present Y. & M. V. Railroad Company, resulting from the consolidation, even had section 180 of the constitution of 1890 not been adopted. We have most carefully considered the Lambert case, giving all due weight to the doctrine of *stare decisis*, and as to the two propositions that what occurred here was merger and not consolidation creating a new corporation, and that the exemption consequently of the Natchez, Jackson & Columbus railroad properly passed to the Y. & M. V. Railroad Company, even in the view of merger under the *legislation alone*, we hereby expressly overrule the Lambert case. Exemptions, where proper, should be expressly granted—not stealthily referenced in.

Second. We turn now to a second ground of decision, wholly independent of, and disconnected from, all that we have said in the first ground, from which we think the same result must follow. The exemption asserted here is that contained in the 21st section of the Mobile & Northwestern Railroad Company's charter, which is as follows:

"SEC. 21. Be it further enacted, That in consideration of the construction of the railroads provided for herein, and of the great benefit which the State will receive in the development of its agricultural resources by means of said railroads as works of internal improvement, and also of the increased value which will thereby be added to the property of the State, thus enabling the State to greatly increase its revenue without additional and burdensome taxation upon the people, the State hereby agrees with said company (*and which agreement is irrepealable*), that all taxes to which said company shall be subject for the period of thirty years are hereby appropriated and set apart, and shall be applied to the payment and debts and liabilities which the said company may have incurred in the construction of said road, or for money borrowed by said company upon lands or otherwise, to be used in constructing the same; and it shall be the duty of the tax collector in every county, in each and every year, to give to said company a receipt in full for the amount of said taxes upon receiving from said company an affidavit, made by the president or cashier of said company,

that the amount of said taxes *have* actually and in good faith bee paid and applied by said company during the year in payment the debts incurred, or money borrowed as aforesaid, and which r ceipt so given shall be in full of all taxes, county, State and muni ipal, to which said company shall be subject; provided, howeve that whenever the profits of said company shall enable it to decla and pay to the stockholders an annual dividend of eight per cen upon its capital stock over and above the payment of its debts an liabilities, then the appropriation of the taxes aforesaid shall ceas and said taxes shall be paid by said company to the tax collector, be by him paid over as required by law."

That act was passed in 1870, after the constitution of 186
706 sec. 13, art. 12, and sec. 20, art. 12, had been adopted, and is expressly decided in Lambert's case, 70 Miss., p. 786 an 789, that this was "a thin disguise to evade constitutional restrai apprehended to be contained in said section 13, article 12, of sa constitution," and the Lambert case further declares—what is ma ifest—that the pretended exemption was irrepealable on the face said section. Unquestionably said 21st section did provide for a *irrepealable exemption on its face*, and we hold it, *therefore*, to hav been in violation of section 13, article 12, and section 20, article 1 of the constitution of 1869.

The case of Mississippi Mills *v.* Cook, 56 Miss., p. 40, expressl held that the legislature had no power to grant an irrepealable e emption and under that decision the exemption claimed under th section is manifestly unconstitutional. Section 13, article 12 of th constitution of 1869, is in these words: "The property of all corp rations for pecuniary profit shall be subject to taxation the same a that of individuals." Section 20 is in these words: "Taxation sha be equal and uniform throughout the State; all property shall b taxed in proportion to its value to be ascertained as directed b law." Mississippi Mills *v.* Cook decided that the property of pr vate corporations for pecuniary profit was and should remain subje to taxation; it expressly held that while an exemption might b granted, yet it might at any time be repealed by the legislatur and further that no exemption could be granted to any privat corporation for pecuniary profit by a special act extending a specia exemption to that special corporation alone; but that in order t make any such exemption valid it must be extended to all corpora tions for pecuniary profit of the same class and in the same situa tion. And the precise exemption asserted in that case was asserte distinctly under the acts of April, 1872, and 17th of April 187 amendatory thereof set out at pages 42–43 of 56 Miss. The Mi sissippi Mills did not claim that it had a valid exemption by virtu of a special act granting such special exemption to the Mississipp Mills alone, but that it had such exemption in common wit all other factories similarly situated by virtue of said general law The exemption set up here under the 21st section of the Mobil and Northwestern charter is wholly different. The claim here i that this particular railroad is entitled to this special exemptio which it is conceded is not now, and never was, extended to al

other railroads similarly situated in this State. And further this exemption is irrepealable on its face, and the Mississippi Mills case decided no irrepealable exemption was constitutional; it is certainly obvious from these considerations alone that The Mississippi Mills *v.* Cook is no authority to sustain the exemption set up here. It is further clear that the constitutionality, under the constitution of 1869, of a legislative grant of exemption to private corporations for pecuniary profit if it embraced all of the same class—the property of individuals being at the same time taxed—was not argued, considered or decided in Mississippi Mills *v.* Cook, but was conceded by the attorney general and the judges who wrote the majority opinions. One of the vices of the decision in Mississippi Mills *v.* Cook is that it did not hold that all the property of private corporations for pecuniary profit was required to be taxed by the terms of the constitution, sections 13 and 20, article 12, just as, and when, the property of individuals was. Instead of doing this the court decided that all such property was free from taxation unless the legislature expressly subjected it to taxation, even though the property of private individuals was taxed, inverting the rule of the constitution. It was certainly an idle performance
to declare, as the court did declare, that the whole effect
707 of the constitutional provision was to render the property
of private corporations for pecuniary profit liable to taxation; that everybody knew, and to so limit the constitutional declaration was to emasculate it. More than 35 years had intervened between the previous constitution of the State and the constitution of 1869; when that previous constitution was adopted—in 1832—the State was young, and had had little experience with the grasping demands of corporations for grants of exclusive privileges; but the experience of more than 35 years had taught it wisdom in this regard, wisdom learned long prior by other Commonwealths like California and Iowa, from the constitution of which latter State the provisions of the constitution of 1869 in question were doubtless borrowed; and so section 13 of article 12 was put in the organic law of the land, beyond the reach of legislative control, for the express purpose of formulating a fundamentally great line of public policy prohibiting any difference in the exercise of the taxing power between the property of individuals and the property of private corporations for pecuniary profit. The court in Mississippi Mills *v.* Cook, at pp. 51–52, looked too narrowly at the mere word "subject," it should have taken broadly the whole section into view and deduced from all its terms the meaning of the provision. Judge Campbell in Beck *v.* Allen, 58 Miss., 177, most wisely said: "Subtlety and refinement and astuteness are not admissible to explain away the expression of the sovereign will. The framers of the constitution and the people who adopted it must be understood to have intended the words employed in that sense most likely to arise from them, *on first reading them.*" This is the doctrine announced by Cooley & Story and our construction of the meaning of section 13, to wit, that it required the property of private corporations for pecuniary profit to be taxed just as when—"the same as"—the

property of individuals, so that one would not be exempt and the other taxed, is the identical construction placed upon the same words by the Supreme Court of the United States, of Alabama, Arkansas, California, Florida and Iowa. We prefer now to distinctly align ourselves with the Supreme Court of the United States on this important question, and overrule Mississippi Mills *v.* Cook in so far as it held that the property of private corporations for pecuniary profit was not, by the constitution of 1869, sections 13 and 20, of article 12, expressly directed to be taxed just as the property of individuals. The decisions of the United States Supreme Court to which we refer are as follows: Louisville *v.* Palmes, 109 U. S., 248; St. Louis *v.* Berry, 113 U. S., 475; Schurz *v.* Cook, 148 U. S., 408; Keokuk *v.* Mo., 152 U. S., 303 and 310-312.

The decisions of the State supreme courts to which we have referred are as follows: 38 Iowa, 635; 34 Cal., 432; 25 Ark., 289; 19 Fla., 231, which collates the constitutions of Wisconsin, Missouri, Illinois, Kansas, Mississippi, Alabama, Arkansas and Louisiana. In 53 Ala., 570, Mobile *v.* Stonewall, Judge Brickell in a most masterly opinion says: "The constitutional provision supposed to have been offended by the enactments under which the appellee claims immunity from the taxation the appellant seeks to recover, has a history which must be consulted, in determining its just interpretation. Its purpose was not an adaptation only of the organic law to the changed political condition of the people, and to conform it to the new relations springing from the amendments of the Federal Constitution, and the conditions imposed by congressional enactment. It was intended also to cure defects time had developed in former constitutions—to narrow and restrain legislative power in the instances experience had
708 shown it most liable to abuse. Under former constitutions the taxing power was not defined, qualified or restrained by any other provision than the simple declaration: 'All lands liable to taxation in this State shall be taxed in proportion to their value.' There cannot be a just interpretation—an interpretation which will consummate the intent of the people in the adoption of these and other constitutional provisions—which is not deduced, not only from their *language*, but from their *history*—from the causes to which they owe *origin*—the *mischief* they were intended to *remedy*. In respect to the Constitution of the United States, it is said 'the safest rule of interpretation is to look to the nature and objects of the particular powers, duties and rights, with all the lights and aid of cotemporary history, and to give to the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed.' In the creation of the greater part, if not all, of the private moneyed or commercial corporations which were created prior to 1861, a commutation of taxation was a prominent feature of the charter. Entire or partial exemption from taxation temporarily has been frequently granted corporations formed to pursue branches of industry, the encouragement of which it was believed a wise public policy required. All exemptions from taxation necessarily increase the burdens imposed on the

property not exempt, and are directly injurious to the tax-payer. The incidental benefits which it is supposed may result to him, in common with the community at large are speculative, and not often a compensation for the immediate injury sustained. Invidious exemptions or discriminations, by which the property of an individual, or of a corporation, is relieved from bearing a just proportion of the common burden taxation is intended to discharge, are violative of the equality of right of the citizen, which is a fundamental principle of our institutions. To prevent any exemption or discrimination in favor of corporations, to subject their property to the same rate of taxation to which the property of individuals of the same kind is subject, is the purpose of the constitutional provision clearly expressed: 'The property of corporations now existing, or hereafter created, shall forever be subject to taxation, the same as property of individuals,' etc. The argument of appellee, that it was intended only to reserve to the legislature the *power of subjecting* corporate property to the taxation imposed on individuals, and to avoid the introduction into charters of irrepealable exemptions, or discriminations, *cannot be supported.* Reading these constitutional provisions in the light of their history, and with a due regard to the words in which they are expressed, it is impossible for us to doubt that it was not competent for the General Assembly, in the imposition of taxes, to distinguish or discriminate in favor of corporate property subject to taxation. If property of a particular kind is subjected to taxation, and owned by a corporation it must bear the rate of taxation imposed on individuals. While the constitution inhibits the exemption or discrimination in favor of corporations, it equally inhibits a discrimination against them. Equality in bearing a common burden, which is natural right and equity, is secured alike to the corporation and to the citizen.

The constitution of Iowa contains a provision identical in meaning if not in words, with the provision of the constitution of 1868, under consideration. It reads: 'The property of all corporations for pecuniary profit shall be subject to taxation, the same as that of individuals.' In The City of Davenport *v.* C. R. J. & P. R. R. Co., 38 Iowa, 633, it was the subject of construction, and was declared mandatory, requiring the legislature to pro-
709 vide for taxation of the property of corporations for pecuniary profit the same as that of individuals. A statute releasing railroad companies from certain taxation to which individuals were subject was declared violative of it. The court says: "What are we to understand to be intended by the language 'the same as that of individuals?' We need not determine whether this language requires that corporate property shall be taxed in the same manner as that of natural persons. It seems, however, quite clear that it was intended by this language to require the legislature to impose the burdens of taxation upon the property of corporations for pecuniary profit, the same as, or equally with, that of individuals; that each shall be taxed for the same objects, and in the same degree, so that individuals shall not be required to pay any taxes on their property which have not also been assessed and laid upon

the property of corporations of the class named, or in any greater proportion. When the legislature provides for taxing the property of individuals, this clause of the constitution requires it to tax the property of corporations for pecuniary profit to the same extent and for the same purposes. If the property of individuals be taxed for State, county, school, and municipal purposes, the property of this class of corporations must be subjected to the same taxes, and at the same rates. *The one cannot be exempt, and the other liable.*"

It will thus be seen that on the particular holding of Mississippi Mills *v.* Cook, which we now overrule, this court stood absolutely alone; its decision in direct conflict with all the decisions we have just above cited. So much for the mere inaccuracy of that holding.

We turn now to the proposition that the overruling of Mississippi Mills *v.* Cook as to the holding which we have particularized overturns a rule of property and destroys a vested right on which the railroad company has a right to rely. The alleged vested right is this: That the 21st section of the Mobile & North Western charter containing this alleged exemption has been declared repeatedly in this State by The Miss. Mills *v.* Cook and other cases down to and including the Lambert case, not to have been violative of the constitution of 1869. This statement is wholly inaccurate and is the result alone of a careless study of the decisions of this court. There are some primary rules on the subject of *stare decisis* to which we shall first call attention. They are formulated by the Supreme Court of the United States as follows:

1. The court is not bound by expressions in former decisions on points which were not contested. Cross *v.* Burk, 146 U. S., 86.

2. The doctrine of *stare decisis* cannot be invoked in favor of decisions on former statutes which were merely similar to but not identical with the one under review. Wood *v.* Brady, 150 U. S., p. 20. This rule was relied upon by the Supreme Court of the United States in the celebrated income tax case. Pollock *v.* Farmers' Loan & Trust Co., 157, 574, the court pointing out that whilst the language of former decisions was sometimes very broad, yet the exact points involved in all former decisions were different.

3. It is expressly held that a decision that a statute constitutes a contract and that an act repealing it is void is not an estoppel to a subsequent decision holding that the former *statute itself* is *unconstitutional*, and this is the exact case now before us. Boyd *v.* Ala., 94 U. S., 645.

Keeping these principles steadily in mind a review of the decisions of this court will show that no charter identical with that of the Natchez, Jackson & Columbus R. R. was ever passed on in this State until January, 1891, a period subsequent to the purchase of that road by the L., N. O. & T. Railroad Company; from
710 which it necessarily follows that THAT purchase could not have been made on the faith of that decision rendered in 1891. It will further be seen that the question whether the 21st section of the charter of the Mobile & North Western Railroad Company violated the constitution of 1869, as we hold it did, has never been passed on in this State up to this time. The cases in this State

relied on to show the opposite of these views are as follows: Mississippi Mills *v.* Cook, 56 Miss., p. 40, decided at the April term, 1878, where the sole question was, *according to the opinion*, whether exemption under general law was repealable or irrepealable; the constitutionality of the exemption was not argued or decided. But much more than this is to be said about Mississippi Mills *v.* Cook. An examination of the original record in Mississippi Mills *v.* Cook shows that it was a bill for injunction by The Mississippi Mills *v.* Cook, tax collector, averring the establishment of its factory after and on the faith of the acts of 1872–1873 granting an exemption in consideration of the construction of factories, etc., and that Cook was willing to accept the affidavit for the taxes of the mill proper, but refused to accept the affidavit for taxes on outlying land, and the bill prayed an injunction *v.* Cook prohibiting the sale of its property for these taxes assessed on outlying lands on the ground that they were essentially part of the mill property for wood, etc. The bill averred that under the act of 1877 Cook, tax collector, insisted on collecting these taxes on these lands; there was a general demurrer to the bill sustained by the court below and the bill was dismissed, and an appeal taken to the supreme court. The sole question involved, therefore, as thus clearly shown *by the record itself*, arose under the general exemption law applicable to all the factories of the class described, and not to a special grant of a special exemption to a particular corporation. All, therefore, that appears in the opinion beyond what would relate to the right to collect these taxes on outlying land, *is mere dictum;* for in determining what has been *adjudged* courts look to the decree and the record, and are not controlled by the mere opinion. Herman on *res adjudicata*, p. 470. Another striking difference between the exemption claimed in that case and in this, is that the act of 1872, under which that exemption was asserted, did not attempt to *perserve* exemptions granted to corporations or individuals establishing factories under its provision from legislative repeal; whereas, in the act of 1870 this 21st section is declared in the Lambert case a miserable attempt to evade the constitution of 1869 and secure an irrepealable grant of exemption, and that, too, to a particular corporation. The next case is McCulloch *v.* Stone, 64 Miss., 378, decided in 1886, in which the only question involved was whether outlying lands of a railroad company were embraced in an exemption contained in that charter, the court holding that they were not. The next case is the Yazoo & Miss. Valley Railroad Company *v.* Thomas, 65 Miss., 553, decided in 1887, in which the only question involved was whether the property was exempt before completion of the railroad to the Mississippi river. The charter provided for a 20 years' exemption after such completion, the court holding that it was not exempt. The next case is The Vicksburg Bank *v.* Worrell, 67 Miss., p. 47, decided at October term, 1889, where the legislature had provided for what the court calls a privilege tax on all banks in the State, and the question was whether this violated article 12, section 20, of the constitution of 1869, providing that taxation shall be equal and uniform and in proportion to value, and the

court held that it did not. The next case is Attala County v. Kelly, 68 Miss., 44, decided at October term, 1890, a case in
711 which the bank had paid in advance a commutation tax of $1,000 called by the court a privilege tax, and the legislature in the same year repealed that law and provided for an ad valorem tax. The court held it was liable to the ad valorem tax notwithstanding it had paid the commutation tax, and that was the only point involved. The next case is The Louisville, New Orleans & Texas *v.* Taylor, 68 Miss., 361, decided at October term, 1890, not actually decided, however, till January 26, 1891, as the records of this court show. No question was raised in that case by counsel or the court as to the constitutionality of the exemption contained in such section 21 of the M. & Northwestern charter, the sole question involved was the right to exemption of a gravel pit claimed by the L., N. O. & T. Railroad Company under the charter of the Vicksburg, Pensacola & Ship Island Railroad Company,—afterwards the M. & Sh. I. R. R. Co.—which never was a part of the L., N. O. & T. Railroad Company, and the court decided that the exemption should be allowed under that charter. This was a most extraordinary mistake, for it is now conceded by counsel for the railroad and everybody else that the charter of the Vicksburg, Pensacola & Ship Island Railroad Company, afterwards the M. & Sh. I. R. R. Co., had nothing on earth to do with the charters of the L., N. O. & T. Railroad Company, nor was that railroad any constituent of the L., N. O. & T. Railroad Company. It appears that the court was led into this mistake by an assumption of counsel to that effect in the case. Certain it is that it was a tremendous mistake of fact and one against the sovereign right of taxation. It is perfectly obvious that this case is wholly fictitious and is of no authority for any purpose. It is further to be observed, however, that inasmuch as the L., N. O. & T. Railroad Company purchased the Natchez, Jackson & Columbus Railroad Company in March, 1890, and the decision in the Taylor case was not rendered until January 26, 1891, the L., N. O. & T. Railroad Company could not possibly have made said purchase on the faith of the Taylor case, nor on the faith of section 181 of the constitution of 1890, because that was not adopted until November 1st, 1890, and then continued only legal exemptions to corporations retaining the precise identity they had before the constitution was adopted. The next case is State *v.* Simmons, 68 Miss., 361, decided at October term, 1890, which involved the mere question as to whether the capital stock was exempt under the charter and the court held that it was not. The next case, and the last, is The Natchez, Jackson & Columbus Railroad Co. *v.* Lambert, 70 Miss., 779, decided at the March term, 1893, and the question contested in that case was whether the exemption of the Natchez, Jackson & Columbus Railroad Co. *v.* Lambert, which had been purchased by the L., N. O. & T. Railroad Company, passed to the Y. & M. V. Railroad Co., the court deciding that it did. The question whether that exemption violated the constitution of 1869 was not argued by counsel or considered or decided by the court. These are the cases on which so much reliance has been placed to show a vested right—

a rule of property—and it is perfectly manifest that in *none* of them was it proper to have decided upon the constitutionality of this section 21, unless in the Taylor case and the Lambert case, because in none of the other cases was that question *involved*, and they could all have been decided without reference to that question, and consequently, under the authority of Pollock *v.* Trust Co., 157 U. S, and Boyd *v.* Ala., 194 U. S., *supra*, they are not binding, under the doctrine of *stare decisis* even, on this court in this case. And whilst the question of the constitutionality of said section 21 was
712 involved in the Taylor case and the Lambert case, the constitutionality of the exemption was *conceded* on all hands, and *not contested*, and not having been contested, these cases as held in Cross *v.* Burk, 146 U. S., *supra*, are of no force on us in this case under the doctrine of *stare decisis*. It will thus be clearly seen (1) that the exemption claimed in the Miss. Mills *v.* Cook was one claimed under a general law applicable to all the factories in the State of the same class; whereas, the exemption claimed here, to wit, the 21st section of the charter of the Mobile & Northwestern Railroad Co., is an exemption attempted to be granted to this special corporation, and not to all the other railroads in the State, a special privilege under a special charter to a special corporation. (2.) That the Miss. mills had established their factory after the passage of the act of 1872–1873, on the faith of those acts as a rule of property; whereas, the L., N. O. & T. Railway Company never came into existence, as admitted by counsel for the railroad until the 12th day of August, 1884, by the consolidation of the Baton Rouge railroad and the Vicksburg and Memphis railroad, after the construction of the road had been practically finished in July, 1884. (3.) That the exemption claimed in Miss. Mills *v.* Cook had no irrepealable feature whereas the exemption set up under the said 21st section is on its face irrepealable, and was so judicially declared to be, in the *Lambert case itself*. (4.) That the L., N. O. & T. Railroad Co. claims under charters granted in 1882 and 1884, asserting as its exemption this 21st section, the unconstitutionality of which, as violative of section 13 of article 12 of the constitution of 1869, was not only *not* considered, argued, or decided, in Miss. Mills *v.* Cook, but which, by virtue of its irrepealable feature and its special grant of an exclusive privilege to a special corporation, would have been *condemned by the reasoning of that very case*. (5.) And not only is it true that the particular exemption claimed here, under this 21st section, was not argued, or decided, in Miss. Mills *v.* Cook, but no other decision was ever rendered in this State in which the constitutionality of this 21st section was *even involved*, until McCulloch *v.* Stone, decided in 1886, four years *after* the grant of the charter of the L., N. O. & T. Railroad Co. (6.) From which it necessarily follows, that *that* road was not built on the faith of any decision ever rendered in this State up to the time of the grant of its charter, which *even involved* the constitutionality of said 21st section, and that the claim that it was organized or built on the faith of such decision operating as a rule of property *is utterly unfounded and absurd*. (7.) That the Taylor case was neither more nor less than a fictitious case which misled

the court by the misstatement of fact that the Vicksburg, Pensacola & Ship Island railroad, afterwards Gulf & Ship Island railroad, was one of the constituent members of the L., N. O. & T. railroad, and its charter was a constituent charter of that railroad, and that the Taylor case is authority for nothing. (8.) That the Lambert case was decided at the March term, 1893, ELEVEN YEARS after, not before the grant of the charter of the L., N. O. & T. R. R. Co. And it is hence utterly incomprehensible to the legal mind how anybody could invoke that case under the doctrine of *stare decisis* as affording a rule of property to a company constructed under a charter granted BEFORE it was rendered. Such claim becomes more incomprehensible still when the further facts are recalled that the consolidation of the L., N. O. & T. and Y. & M. V. into the present Y. & M. V. R. R. Co. took place October 24, 1892, long BEFORE the decision in the Lambert case."

Let us get out of the realm of idle and reckless assertion
713 into the realm of fact, and inquire more particularly and accurately exactly what was decided, even in the opinion of the court, which went far beyond the record, in the Miss. Mills v. Cook. The vice of that decision is, that it looked exclusively to the word "subject" in section 13, article 12, and failed to give force and effect to the words, "the same as that of individuals." When we say that the court's construction of the word "subject" attributed to it some supposed magical effect, we are simply reiterating the language of Chalmers, justice. He said, p. 5956 Miss.: "I find no such *magic* as my colleague in the words 'shall be subject to taxation the same as that of individuals.' To me they have no meaning other than that which would be conveyed by the equivalent phrases shall be treated or shall be dealt with the same as that of individuals, or shall be liable to taxation the same as that of individuals. This, and many similar phrases, which might perhaps be suggested convey one and the same idea, namely: that the lawgiver in the imposition of taxes shall *know no difference between the property of individuals* and *that of corporations for pecuniary profit.*" The opinion of the court declares as its gist that section 13 was not mandatory upon the legislature to tax the property of private corporations for pecuniary profit whenever the property of individuals was taxed. It distinctly put the property of such private corporations as to the power to tax them, or exempt them, in a class by themselves distinct from the class of individuals. In other words, it held that although the property of individuals might be taxed, yet the property of such corporations might be at the same time exempted by the legislature from taxation; provided, such exemption extended to all corporations of the same class in the State. We think it is perfectly manifest that the language "the same as the property of individuals" imperatively commanded the legislature whenever they tax the property of private individuals, to tax also the property of such corporations, and under the same rules of equality and uniformity. It was well said by Campbell, justice, that this provision of section 13 "sprang from the experience that corporations were in the habit of asking and obtaining

legislative exemption from liability to taxation." That experience the State had acquired in the 35 years lapsing between the constitution of 182– and the constitution of 1869, and that experience was wisely availed of to put an end to the grant of exclusive privileges to such corporations. It marked a new era in the history of corporate taxation in this State; it laid down a fundamental new line of great public policy, one that will be found essential to the preservation of the rights of the people, as is abundantly attested by the experience of older States dealing with such corporations. It is that feature of the decision thus holding that this section 13 merely permitted the taxation of such corporations, but did not require that taxation whenever the property of individuals was taxed, and in just the same manner, in all respects as the property of private individuals was taxed, which we now condemn and overrule. In no other respect do we interfere with the decision in that case. That case decided, and properly decided, that under the constitution of 1869 the legislature had the power to select for exemption from taxation certain designated kinds of property, such as the agricultural implements of farmers, the tools of the mechanics, etc., etc. Such exemption of particular kinds of property, for reasons of public policy, the constitution allowed the legislature to grant, and when granted, it applied to such property, whether owned by individuals or such corporations. And to permit such exemp-
714 tions was perfectly consistent with holding that said section mandatorily required the legislature to tax the property of such corporations whenever and just as it taxed the property of individuals. The vice of the holding of the court was in disregarding and repudiating the correlation by the constitution of the property of such corporations and the property of private individuals in the same category as to the *right* to tax and the *duty* to tax, and in declaring that under that section the legislature might put into operation a scheme of taxation which taxed property of all the private individuals in the State, and at the *same time*, at the will of the legislature exempt all property of such corporations from any taxation whatever. The constitution plainly and clearly *yoked together indissolubly* the property of such corporations and the property of individuals and subjected both alike to the same taxation to be imposed under the same rules of equality, or uniformity. The legislature might not exempt all the property of private corporations for pecuniary profit and tax all the property of private individuals, but it might exempt certain selected kinds of property in pursuance of a wise public policy, whether that property belonged to such corporations or to private individuals. One other observation. The case before us most emphatically does NOT present a claim to exemption under a charter identical with the charter in the Miss. Mills *v.* Cook, nor the case of any corporation which has acted on the faith of a decision construing a charter identical with the charter in the case of Miss. Mills *v.* Cook, and which might thus be said to constitute, for such corporation, acting on it and investing its capital on it, a rule of property. It will be time enough to decide that precise question when that question shall be presented. Whence

did we get section 13, article 12, of the constitution of 1869? It is said in the Miss. Mills *v.* Cook that we get it from the constitution of Iowa; the clauses in the constitution of Iowa and constitution of Mississippi 1869 are identical on this subject, and the supreme court of Iowa in The City of Davenport *v.* Railroad Co., 36 Iowa 635 and The City of Dubuque *v.* Illinois Central R. R., 39 Iowa, expressly decided that this identical section prohibited the legislature from exempting the property of corporations from the same taxes imposed on the property of individuals, and that the property of corporations must be taxed whenever that of individuals was taxed. The constitution of Alabama in Mobile *v.* Stonewall Ins. Co., 53 Ala., 70, declared that the provision was in itself self-executing without the aid, in fact in restraint of, legislative power,—subjecting corporate property to the taxation imposed on individuals, and expressly declared further that if property of a particular kind is subjected to taxation and owned by a corporation, it must bear the rate of taxation imposed on individuals.

The constitution of California contains an identical provision, and in the case of People *v.* McCrary decided at January term 1868, the supreme court of California announced the same construction held in Iowa and Alabama expressly overruling early decisions to the contrary, just as we do here. The constitutions of Arkansas and Florida contain similar provisions and the supreme courts of those States announced the same construction which we here announce. When therefore section 13 of the constitution of 1869 was adopted in this State it was written in the organic law of our land, bringing with it the *same meaning precisely*, under well-settled rules of construction, which it had in the State *from which it came here.* And the same construction was unanimously approved by the Supreme Court of the United States in four concurring de-
715 cisions rendered in November 1883, March 1885, April, 1893, and March 1894 to wit: Louisville, etc., *v.* Palmer, 109 U. S., 248–254. St. Louis, etc., *v.* Berry, 113 U. S., 475. Schurz *v.* Cook, 148 U. S., 408. Keokuk *v.* Mo., 152 U. S., 303–304 and 310–312.

In overruling this feature of the decision in Mississippi Mills *v.* Cook, therefore, we were announcing a rule of construction supported by four decisions of the United States Supreme Court and by the decisions of five State supreme courts, as against a rule of construction announced in *no case in this Union except Mississippi Mills v. Cook.*

We have all proper respect for the doctrine of *stare decisis*, but it is a doctrine not inflexible and departed from over and over by the wisest courts in proper cases.

And if the doctrine of *stare decisis* can be disregarded in proper cases, where the question is one merely of *property rights* between *individuals*, how much stronger is the reason for disregarding it when, so to do, results as herein merely restoring to a sovereign State the right to tax corporations and make them bear their just share of the burdens of that government whose protection they so constantly and persistently invoke. This distinction is not one of our invention. It is well settled in the law and it was voiced in

words which we quote to approve by Chief Justice George in Lombard *v.* Lombard, 57 Miss., p. 177, who said: "Speaking for myself alone, I would say that on *constitutional* questions, where the former decision refused a right reserved to individuals as against the power of the Government, or where it impaired the powers of the people or their representatives to prevent maladministration by their officers and agents, or sanctioned an *alienation by the legislature of powers conferred for the public good*, I should feel little hesitation in departing from it, when satisfied of its incorrectness." And in Beck *v.* Allen, 58 Miss., 173, Judge George delivering the opinion of the court, overruled two previous decisions on the same point, justifying departure from the rule of *stare decisis*, by the very distinction here referred to, the case being one involving the taxing power. In concluding this ground of decision we repeat that it is wholly independent of the first ground of decision hereinbefore elaborated, and whether we are right or wrong in the view announced in this second ground, the exemption must be denied looking to the first alone.

In our summary of the holdings in this case, we said there were other views leading to the same conclusion, which we might embrace in the opinion. We proceed to notice these. We come now to a third ground of decision, and that is this: that the exemption claimed here under said 21st section of the Mobile and North Western charter whether applied to the property of the Natchez, Jackson & Columbus railroad alone, or to the other property of the L., N. O. & T. R. R. Co. has been repealed by legislation, certainly since the Code of 1892 went into effect. It was declared in the Lambert case, 70 Miss., 787, through Judge Campbell,—the author of the Code of 1880,—that by the Code of 1880, each railroad in this State was subjected to taxation. That code, therefore repealed all railroad exemptions then existing. The Lambert case further held that by the act of 1884, p. 29, the exemption of the Natchez, Jackson & Columbus railroad was restored, and that by the act of 1890, p. 12, if it then existed, it was continued. An examination of all the statutes on the subject, which are as follows: Code of 1880, sec. 596–606, inclusive, and secs. 607 and 608; Acts of 1886, sec. 6, p. 23; Acts of 1888, p. 49; Acts of 1890, p. 12; Code of 1892, secs. 3379 and 3875, and sec. 3744; will show that the scheme pro-
pounded by the legislature was, up to the Code of 1892, this:
716 That railroad companies should pay ad valorem taxes unless they should accept the conditional exemption provided in the privilege tax law in lieu of the ad valorem tax and manifest their acceptance of the law providing this conditional exemption from ad valorem taxation by putting such acceptance in writing and annually paying the privilege tax specified. The provisions of law respecting such conditional exemption from ad valorem taxation by accepting the privilege tax imposed in lieu thereof and paying it run side by side through all the legislation from the Code of 1880 to the Code of 1892. The scheme was that ad valorem taxes should be paid by all railroads in the State, but that any railroad should be exempt from such ad valorem taxes

which would pay the privilege tax provided in the various acts, provided it manifested its acceptance of such exemption in writing and paid such privilege tax. As to the Natchez, Jackson & Columbus R. R. Co. the Code of 1880, as shown, repealed its special exemption in its special charter by sections 597 through 606, and placed its conditional exemption from ad valorem taxation upon acceptance manifested, in writing, and upon payment of the privilege tax thenceforward, under the *general law* of the State, thus *withdrawing* any right that railroad company had to claim a special exemption under this special charter. And whether it had an exemption from ad valorem taxes thenceforward was to be determined not by reference to a special charter but by reference to the general law, on the subject of privilege taxes enacted from time to time. The act of 1884 in fixing the privilege taxes did, however, restore by recognition to the Natchez, Jackson & Columbus R. R. Co. the exemption of its charter according to the opinion in the Lambert case. As the act of 1884 did not pretend to affect secs. 597 through 606 Code of 1880 in imposing ad valorem taxes but only secs. 606–608 relating to the privilege taxes, it is to our mind quite doubtful whether the act of 1884 did have the effect to restore the charter exemption; but conceding that it did, it is strange that the court in the Lambert case overlooked the act of 1886, sec. 6, p. 23, amending the privilege-tax chapter, Code of 1880, fixing the privilege taxes to be paid by each railroad in the State, and expressly declaring, "That hereafter said railroad companies shall pay privilege taxes respectively 25 per centum greater per mile than is fixed in said acts" without once alluding to any exemption of the Natchez, Jackson & Columbus railroad, or any other railroad. Clearly if the exemption of the N., J. & C. R. R. Co. was restored by the act of 1884 it was repealed by said act of 1886 and was not in existence from that time until the act of 1890 was passed. The act of 1890, p. 12, amended the act of 1884 and then re-enacted it as amended; this seems to have been an ingenious effort on the part of some one who knew that the act of 1886 had repealed the exemption of the Natchez, Jackson & Columbus R. R. Co. recognized in the act of 1884, to again restore it by an effort to repeal the act of 1886 without disclosing the fact or referring to the act of 1886. But the holding in the Lambert case is that the act of 1890 continued the exemption, if it existed, and since it is clearly shown that no exemption existed when the act of 1890 was passed, there was no exemption to be continued, and the act of 1890 under the rules of construction with reference to taxation most certainly cannot be held to have created then *anew* such exemption. It follows from this that when the constitution of 1890 was adopted the Natchez, Jackson & Columbus railroad had no exemption and consequently section 181 of the constitution had no effect to continue the exemption which was not then in existence. When the Code of 1892 was adopted the legislature carrying out the
717 mandate of the constitution of 1890, paragraph 90 (*h*) expressly provided in sec. 2379 that the privilege tax should be imposed on all railroads without a suggestion of any exemption to

any, and this code was a revision of all general laws on the subject and wholly omitted all the provisions of the acts of 1884 and 1890 in respect to exemptions. The scheme of the taxation up to the Code of 1892 was that railroad companies might escape ad valorem taxation by accepting the provisions of the law as to privilege taxes, in writing, and paying the same. The scheme of taxation under the Code of 1892 changed all this and repealed all former exemptions of all railroads from taxation by said section 3379 and said section 3875. A consideration showing that this was the purpose of the legislature is the smallness of the privilege tax under sec. 3379 no longer in lieu of ad valorem taxes as compared with its amount under former laws. The Code of 1892 provides for the exemption of all property which is to be exempt in sec. 3744 and railroads are not mentioned in that section; the provision of that section is as follows: "The following property and NO OTHER shall be exempt from taxation" which declaration is as positive and emphatic an exclusion of all railroad exemption as language can furnish. But not only did section 3379 of said code impose privilege taxes but section 3875 imposed ad valorem taxes. By that section every railroad company in the State without exception was required to return all its property within and without this State with its value so that the assessors might know what value should be the basis of State, county and municipal taxation and the section further declares as to railroads that all of its property, real and personal, taxable and non-taxable shall be included. The word non-taxable in this connection does not mean exempt property, but property like Government bonds that are not taxable at all, and this is made plain by the provision at the close of the section "that if the said property is claimed to be exempt from taxation it shall be separately stated and the law cited under which the claim is made." In other words, they were to return three classes of property, taxable property, non-taxable property, that is, property that could not be taxed in its nature, and exempt property, if any, citing the law for the exemption. The word non-taxable therefore *creates* no exemption and does not describe exempt property which is otherwise provided for but means merely, as stated, property like Government bonds that cannot be taxed at all. So that we hold that certainly since the Code of 1892 went into effect, and as we think, since the act of 1886 the exemptions set up by the railroad company in this case were repealed by the legislature, and on this ground independently of any other ground, heretofore set out, the exemptions must be denied.

4th. Counsel for the State revenue agent presents another very ingenious view to this effect that the 21st section of the Mobile and North Western charter was plainly prospective and intended to carry the benefit of the exemption therein provided only to a company which should build a railroad after the grant to it of the exemption. We think it is entirely clear that said provision was prospective and that the consideration to the State for the grant of the exemption was that recited in the act, to wit: "The construction of the railroads provided for therein and the great benefit which the State

would receive in the development of its agricultural resources by means of said railroads as works of internal improvement, and also the increased value which would thereby be added to the property of the State thus enabling the State to greatly increase its revenue without burdensome taxation upon the people." That was
718 the consideration to the State; that clearly was the reason and object of the statute. So far we agree with counsel. Counsel's argument then proceeds to claim that the act of March 3, 1882, authorized the Memphis & Vicksburg Railroad Company and Mississippi Valley and Ship Island R. R. Co. to consolidate, and that the object was to construct a railroad from Memphis through Vicksburg to Ship Island—a scheme well known to be dearly cherished by the people of Mississippi for years back. Counsel then proceeds to claim that section 1 of the act of March 3, 1882, in providing that the consolidated company should have all the rights, property, immunities, etc., now possessed by the companies which may enter into such consolidation merely meant such rights, etc., as belonged to the companies existent at the date of the passage of the act; that as the Baton Rouge R. R. Co. was not chartered until March 9, '82, it was not contemplated that THAT company should be a constituent member of the consolidation and that section 5 of the Acts of 1882, p. 1015, was meant by the legislature to extend the exemption of said 21 section to such road only as the consolidated company—the L., N. O. & T. R. R. Co.—might build AFTER it came into existence; and that as said company did not come into existence until after the road from Memphis to New Orleans was completed, it is a perversion of the spirit and purpose of the legislature to allow the L., N. O. & T. R. R. Co. to blanket this exemption over a road which was never built by it, and in the construction of which it incurred no indebtedness. This is certainly very persuasive, but we do not now decide whether it is a correct contention or not. Another contention of counsel for the revenue agent, worthy of serious consideration, is this: that taking the charter of the Baton Rouge Company and the Memphis and Vicksburg Company as written into the charter of the L., N. O. & T. Co. as part thereof, the legislation of the State shows that it was the purpose of the legislature to extend this exemption of the 21st section to the company created by the FIRST consolidation, the L., N. O. & T. R. R. Co., but to exclude it from the present Y. & M. V. R. R. Co., the result of the SECOND consolidation. Counsel's argument on this point is about as follows: That conceding that the first section of the act of March 3, 1882, the L., N. O. & T. charter—contained the word "immunity" and that by virtue thereof the exemption of the said 21st section passed to the L., N. O. — T. R. R. Co., the only authority for any future consolidation of the said L., N. O. & T. R. R. Co. with the Y. & M. V. R. R. Co. is to be found in section 16 of the Baton Rouge charter and section 25 of the Memphis and Vicksburg charter and that in both these sections the legislature intentionally omitted the word "immunity" and any other words equivalent thereto, and that this omission conclusively shows that it was the purpose of the legislature to limit the existence of the exemption

provided by said 21st section to the L., N. O. & T. Railroad Co., the result of the consolidation of the Memphis & Vicksburg Railroad Co. and the Baton Rouge Railroad Co.—only so long as it retained its existence as the said L., N. O. & T. R. R. Co., and not indefinitely to pass this exemption along to all future consolidations. Counsel has so succinctly stated the facts on this subject that we cannot do better than to quote that part of his brief, which is as follows: "All of these sections thus put in the same charter, demonstrate that it was the purpose of the legislature to pass the exemption into the L., N. O. & T. under the word *immunities* but to withhold it from any future consolidation by ommitting the word *immunities*, in said sections 16 and 25; and by using therein no words to indicate the inten-
719 tion of passing the exemption to any future consolidation. But, in this connection, the court will bear in mind that the act of 1890 as to the sale of the N., J. & C. R. R., on which the Lambert case is based, used the word *immunities*, as elsewhere shown. When the legislature passed the act of March 3, 1882, the L., N. O. & T. charter, it necessarily had in mind the provisions of the charters of the M. & V. Co. and the Miss. Valley and Ship Island Co., because both of these companies are mentioned in the very beginning of the act, and it was passed for their express benefit; and the legislature made these charters necessary parts of the act because, by its terms, it could not be made effectual without the charters of said consolidated company be taken and held to be parts of this act." "Said M. V. & S. I. R. R. Co. was incorporated in 1871, Acts 1871, p. 237, as the Vicksburg, Pensacola & Ship Island R. R. Co. In 1873 its name was changed to M. V. & S. I. R. R. Co., Acts 1873, p. 562. The 15th section of the original charter of this company gave the power of consolidation (Acts '71, p. 247) but omits the word *immunities* and gives no power to vest in the consolidated company the exemption from taxation contained in the 21st section of the charter. Besides the amendatory act of 1873 which vested this exemption from taxation in the charter as amended, uses the word *immunities*, in sec. 1, p. 562, Acts 1873. The charter of the Y. & M. V. Co. uses the word *immunities*, to embrace exemption from taxation, Acts 1881, p. 843, sec. 5. The amendment of the Y. & M. V. Co. charter, Acts 1884, sec. 3, p. 985, uses the word *immunities* for the same purpose. The amendment of the L., N. O. & T. charter, Acts 1884, p. 936, uses the word *immunities* for the same purpose. All these things were in the mind of the legislature as parts of said act of March 3, 1882, and show they used the word *immunities* advisedly, and did not intend that any exemption should pass into any FUTURE consolidation, after the formation of the L., N. O. & T., and this section 15 of the M. & V. & Sh. I. R. R. Co. expressly provided that any consolidation should FORM ONE COMPANY and have a JOINT COMMON stock."

Certainly the significance counsel seeks to have attached to the omission of the word "immunity" in the act referred to seems fully borne out by the opinion of Mr. Justice Peckham in Phœnix Ins. Co. *v.* Tennessee, 161 U. S., at p. 177; but we decline now to pass definitely upon this contention. There is also much force in another view presented by counsel for the revenue agent to

the effect that since 1888, the proof in the record shows that the railroad company had been able to declare and pay the annual dividend of 8 per cent. upon even its fictitious capital stock over and above its fixed charges on the proper construction debt. But to go into this would protract this opinion beyond anything necessary for present decision. There is a rather curious proposition of counsel for the railroad companies in his brief at pp. 118 *et seq.* The argument is that what was provided by the 21st section of the North Western charter was not an *ordinary exemption* at all, although counsel admits that the Lambert case expressly so decided, but that it was a *contract* of *appropriation irrepealable* in its nature, and not an exemption at all. If counsel's contention as to this is sound, then it is perfectly plain that the claim of rule of property and vested right under former decisions of this court falls at once to the ground, for no one will contend that this court has ever treated the said 21st section as an appropriation by contract irrepealable in its nature. Counsel's construction is therefore utterly inconsistent with the re-
iterated claim that the view we take is trenching upon any
720 rule of property laid down in any previous decision rendered by this court. This is the first time that such a construction was ever presented to this court or asserted in any form.

Finally, all the judges concur that because of the inconsistent compromise verdict, the judgment must be reversed both on appeal and the cross-appeal.

The judgment is reversed both on appeal and the cross-appeal, and verdict set aside, and the cause remanded for a new trial.

NOTE.—The above opinion having been filed since the meeting of the court, Woods, C. J., has been unable to prepare his dissenting opinion, but will do so as soon as possible.

721 STATE OF MISSISSIPPI,
County of Hinds, First District.

In the Supreme Court, at November Special Term, 1898.

WIRT ADAMS, State Rev. Agent, Appellant,
v.
YAZOO & MISS. VALLEY R. R. Co., ET AL. Appellees,

and

YAZOO & MISS. VALLEY R. R. Co. ET AL., Cross-appellants,
v.
WIRT ADAMS, State Rev. Agent, Cross-appellees.

Come the appellees and cross appellants in the above-entitled cause, The Yazoo & Miss. Valley R. R. Co. and The Illinois Central R. R. Co., and move the court to take & strike from the files in said cause the document herein filed on the 22nd day of November, 1898, which purports to be the opinion herein of a majority of this court for the reasons following:

1st. For that the same is filed too late, being filed after the said

cause was remanded to the lower court to be tried anew, and that the same did not and could not constitute any part of the mandate of the court below and could not be and was not attached to said mandate, and that the said document was not and could not be furnished with said mandate for the use of the court below and of these parties at the June term, 1898, of said court below, and at said June term these parties, defendants below, were forced into trial of said cause and to final judgment therein, from which judgment these parties did on the — day of ——, 1898, and before the filing of said document prosecute their appeal to this court, which appeal was pending herein on the said 22nd of November, 1898, and that said document announces decisions on points of law alleged to be controlling in this cause and in said appeal now pending
722 additional to and different from any decision announced in the abstract of a proposed opinion which was filed herein on the 26th day of June, 1898, and certified to the court below with the mandate as the opinion of this court, all of which is in violation of the statutes of this State in such case provided.

2. For the further reason that the filing of such document on the 22nd of November, 1898, under the facts & circumstances hereinbefore set forth and the affecting this cause therewith as the decision of this court, is in violation of the fourteenth amendment of the Constitution of the United States, not being due process of law.

Respectfully submitted.

MAYES & HARRIS,
Att'ys for Motion.

Endorsed: Filed Nov. 25, 1898. E. W. Brown, clerk, by C. C. Campbell, D. C.

And on November 26th, 1898, the following order was entered:

WIRT ADAMS, State Revenue Agent,
v. & ats.
YAZOO AND MISSISSIPPI VALLEY RAILROAD CO. ET AL. } 8629.

The motion of appellees and cross-appellants to strike from the files the opinion of the court filed Nov. 22, 1898, was argued orally by Mr. Edward Mayes for the motion and Messrs. J. A. P. Campbell and R. C. Beckett contra and submitted on brief by Messrs. J. A. P. Campbell and Critz & Beckett against the motion.

And on November 28th, 1898, the following order overruling said motion was rendered:

WIRT ADAMS, State Revenue Agent,
v. & ats.
YAZOO AND MISSISSIPPI VALLEY RAILROAD CO. ET AL. } 8629.

The court, having sufficiently examined and considered the motion of the appellees and cross-appellants to strike from the files the opinion of the court filed herein on the 22nd day of November, 1898, doth order that said motion be, and the same is hereby, denied

And on same day the following opinion was filed:

723 WIRT ADAMS, State Rev. Ag't, *v. & ats.* Y. & M. V. R. R. CO. ET AL. } 8629.

WHITFIELD, *J.:*

Section 4352 and section 4381 of the Code of 1892 were fully complied with by the summary of holdings handed down in June last, certified to and used in the circuit court on the trial of the case after it was remanded.

Every reason for decision contained in that summary is also set out in the opinion filed recently, insisted on and enforced. The court has receded from no position in that summary announced. It has added one new reason, and one only, for the decision: That the exemption was repealed by legislation, to wit: the act of 1886 and the provisions of the Code of 1892. With this single exception the reasons given for decision in the summary are identical with the reasons given in the opinion now on file. And it is
724 too plain for argument that had the new reason for decision now set out in the opinion been also set out in the summary the circuit court would merely have had one more reason for sustaining the action it took. The railroad companies were not and could not possibly have been prejudiced by the fact that the summary did not contain this additional reason. Nor is it now nor can it be prejudiced now by the fact that the opinion does not contain this one additional reason for our decision.

Other views of counsel are adverted to in the opinion, but it is distinctly declared that as to them we decide nothing—not adopting them in anywise as reasons for decision. Moreover, we distinctly stated in the summary, "there are other views leading to the same conclusion which we may embrace in the opinion yet to be filed. What we have said is a mere summary of the holdings set forth." And at the last term of this court a motion was made to have a fuller opinion handed down then before the trial in the circuit court based on section 4352, Code 1892, which we overruled on the ground that the summary was a sufficient compliance with that section and should stand as the opinion of the court for the time being. The argument made then, and repeated now, as to this was that the law requires the opinion to accompany the mandate and that the court below could not proceed without both. This point was disposed of adversely to this contention in Foster *v.* Gordon, 54 Miss., p. 510, the court saying: "This is an erroneous conception of the province of the mandate. It is the judgment of this court reversing and remanding a case which gives the lower court authority to enter upon a new trial." And the opinion of this court is not more necessary to the jurisdiction of the circuit court than the mandate. Both are mere matters of practice. Beyond this the scope of the motion is to assert the proposition that this court has not the power after the trial of a remanded cause in any way to revise, add to or take from the mere reasons for its decision, even though the reason added or

taken away in nowise affected the party losing in the lower court prejudicially.

That, precisely and exactly, is the proposition asserted. It is hardly necessary to say that this wholly novel and extraordinary proposition is untenable. This court, of equal and co-ordinate dignity with the legislative and executive departments in matters judicial, "uttering the voice and registering the will of the State," is reduced to no such pitiable plight. The very question here presented has been settled by authority over and over again. In Houston *v.* Williams, 13 California, 24, Mr. Justice Field, afterwards on the Supreme Bench of the United States, says for an unanimous court after citing the statute there relied on which provided that "all decisions given upon an appeal * * * shall be given in writing with the reasons *therefor* and filed with the clerk of the court." "It will not be impertinent to say a few words as to the control of the courts over its opinions and records. There are some misapprehensions on the subject, arising chiefly from a confusion of terms and from a misconception of the relations of the different departments of government to each other and the entire independence in its line of duties of the judiciary. The terms 'opinions' and 'decisions' are often confounded, yet there is a wide difference between them and in ignorance of this or by overlooking it, what has been a mere revision of an opinion has sometimes been regarded as a mutilation of a record. A decision of a court is its judgment. The opinion is the reasons given for that judgment. The former is entered on record immediately upon its rendition and can only be changed through a regular application to the court upon a petition for rehearing or a modification. The latter is the property of the judges subject to their revision, correction and modification in any particular deemed advisable until, with the approbation of the writer, it is transcribed in the records. * * *

All these errors whether in language from or *substance*
725 should be corrected before a publication is permitted as an authoritive exposition of the law and as such binding upon the court. In no civilized State except California has the existence of this power ever been doubted. Every judge from the Chief Justice of the Supreme Court of the United States down, claim and exercise without question the right of revision including thereby *modification* and *partial suppression of his opinions.* * * * When the opinions have been revised and finally approved and recorded, then they cease to be the subject of change."

There has been no suppression here. The majority of the court have receded from no position announced in the summary but positively affirm every one of them in the opinion. And that this is so we here make part of this opinion that summary in its entirety so that a comparison of it with the opinion now on file may show the facts as they are. That summary is as follows:

Summary of the Court's Holdings.

WHITFIELD, *J.:*

First. Because of the inconsistent, compromise verdict, the judgment is reversed, and cause remanded, on the appeal and the cross-appeal.

Second. The Lambert case is *res adjudicata* as to the taxes for the year 1892 on all the property that originally belonged to the N., J. & Columbus R. R. Co., which was in Adams county, and being *res adjudicata*, it is, as to that, beyond our power to overrule it.

Third. The Lambert case is not *res adjudicata* as to any of the other taxes here involved, on the property that once belonged to the N., J. & Columbus R. R. Co., or on any of the other property here involved.

Fourth. The Lambert case did decide that § 180 of the constitution of 1890, did not cut off the exemption from taxation asserted in this case, on the ground that this is a case of mere merger, and not of consolidation; that the resultant corporation was not a new corporation, and applied the principles of Whitworth *v.* Tennessee, 117 U. S.—which, is beyond all controversy—a clear case of simple merger, and not of consolidation, taking merger proper to mean the absorption of one corporation, by another, the autonomy of the absorbing corporation being preserved, without the formation of a new company, and consolidation proper to mean such union of two corporations as results in a third new corporation, under whatever name. We hold that the clear legislative purpose was—(using the words in the sense indicated)—*consolidation, and not merger*, yet consolidation in such sense as to result in the formation of a new corporation; and besides that what was *actually* done here was necessarily the creation of a new corporation, and not mere merger; that, hence, the principles of the Whitworth case do not apply, but the principles of Keokuk *v.* Mo., 152 U. S., do apply; that, consequently the constitution of 1890, § 180, cut off the exemption; that the Lambert case cannot be upheld and should be, and is hereby overruled. If it be conceded that the purpose aimed at by the articles of agreement of the R. R. Co. was mere merger, it is not to be permitted that the Co. could overthrow the purpose of the legislature to authorize consolidation and not merger, nor to NAME THAT, merger, which the actual things done show, was consolidation. Consolidation is a privilege, to be exercised or not—not a contract. § 181 of the constitution, and § 279 of the schedule thereto, merely mean that so long as corporations existing at the adoption of the constitution having then exemptions, or other "rights" should have them "continue," so long as such corporations retained the *precise corporate existence they then had.* The new corporation here, takes its life as from a new grant of corporate life from the date of the consolidation.

But we hold further, that the 21st section of the Mobile & Northwestern R. R. Co.'s charter was an effort to secure—as is expressly recited in its face—an irrepealable grant of exemption, and violative

of the constitution of 1869, § 13, art. 12, and *and* § 20, art. 12,
725½ even as construed in Miss. Mills *v.* Cook, 56 Miss. The exemption claimed in Miss. Mills *v.* Cook HAD NO IRREPEALABLE feature.

But again, we hold, that such section violated said clauses of said constitution, even had it not been irrepealable. Miss. Mills *v.* Cook, turned upon some supposed magical distinction in the particular connection, between the words "SUBJECT" and "SUBJECTED," and sacrificed a great constitutional principle to a piece of mere verbal jugglery. Precisely the SAME clause, using precisely the SAME word "SUBJECT" occurs in the constitution of Florida and Arkansas and the supreme courts of both States held, in precisely identical contention, that the clause forbade exemption from taxation of "corporations for pecuniary profit," and both of these decisions were on this identical proposition, affirmed by the U. S. Supreme Court. St. Louis, &c., *v.* Berry, 41 Ark., 509, 115 U. S., 475, and L. & N. R. R. Co. *v.* Palmes, 19 Fla., 231, and 109 U. S., 253–254. And this construction is reaffirmed in Keokuk, &c., *v.* Missouri, 152 U. S., 310–311. The word "subject" should have been given its plain, popular signification, occurring in the connection it did, in a great popular instrument—the constitution—the very signification attached to it by the Supreme Court of the United States. We prefer to align ourselves now with that court in this matter, and overrule Miss. Mills *v.* Cook on that point.

It passes all understanding how the court could gravely hold, in Miss. Mills *v.* Cook, that a solemn declaration in the constitution of a State—its organic law—formulating FUNDAMENTALLY GREAT LINES OF PUBLIC POLICY—that "the property of all corporations for pecuniary profit" should be subject to taxation *the same as that of individuals*, added no new feature, but merely stated what was the law before and without the declaration, to wit: that the "property of corporations for pecuniary profit" was *liable* to taxation. All the world knew that before!

Judge Campbell, in his dissenting opinion, in Beck *v.* Allen, 58 Miss., at p. 177, most wisely said: "Subtilty and refinement and astuteness are not admissible to explain away an expression of the sovereign will. The framers of the constitution, and the people who adopted it, must be understood to have intended the words employed in that sense most likely to arise from them on FIRST READING THEM." Doubtless the rule of *stare decisis* is a wise rule, and one not lightly to be infringed. But instances justifying its disregard find manifold illustration in the reports. And surely, stronger reasons for not applying it can never arise, than, where, as here to disregard it, restores to the sovereign the exercise of one of the highest attributes of sovereignty—the taxing power, and merely requires that corporations for pecuniary profit, constantly demanding and securing the protection of the Government, shall also bear their just share of the burdens of taxation. We feel, therefore, confident of the propriety of overruling, as we now expressly do—the Lambert case, and the case of Cook *v.* Miss. Mills, *supra*. There are other views leading to the same conclusion, which we may embrace in the opinion yet

to be filed. What we have said, is a mere summary of the holdings set forth.

Reversed and remanded.

But the California case is not the only authority. In the appendix to 131 U. S., at p. 18, it is said: "Judges frequently correct their opinions in the hands of a reporter after a printed copy has been filed with the clerk." * * * If one curious in such things would know how far back this corrective practice has existed let him look as far back as the 7th of Cranch, 1st edition, where he will find corrections made by Mr. Justice Story in the opinion of the court delivered by him in Barnitz *v.* Casey, 7th Cranch, at p. 456. In later editions the changes are incorporated in the text. We have examined this first edition and it is there stated on the page following the table of cases cited in that volume as follows: "*Since*
726 *this volume was printed*, Mr. Justice Story has requested that the following corrections and *additions* should be made in the opinion delivered by him." So that illustrious judge actually corrected and added to his opinion in 7th Cranch after the official volume of reports had been published. So far as due "process of law is concerned," it is too obvious for discussion that it cannot be involved in mere matters of practice of the courts. We conclude with these words of Judge Field in the case cited:

"The power over our opinions and the records of this court we shall exercise at all times, while we have the honor to sit on the bench, against all encroachments from any source, but in a manner we trust befitting the highest tribunal in the State." The motion is denied.

727 STATE OF MISSISSIPPI,
Hinds County, First District.

In the Supreme Court, at the November Special Term, 1898.

YAZOO & MISSISSIPPI RAILROAD CO. ET AL., Appellants,
v.
WIRT ADAMS, State Revenue Agent, Appellee.

Agreement of Counsel.

In this cause it is agreed by the appellants and the appellee as follows, to wit:

1. That the assessment-rolls made by the State railroad commission as railroad assessors, whereby the taxes — sought to be recovered in this suit for the years 1896 and 1897, need not be certified to the supreme court of the State as a part of the transcript to be sent up by the clerk of the circuit court, and that the originals of the same may be used on the argument of the cause in the supreme court and shall be treated to all intents and purposes as if they had been incorporated into said transcript.

2. That the various mortgages of the Louisville, New Orleans & Texas Railway Company and the Yazoo & Mississippi Valley Rail-

road Company, referred to by the fourth, fifth, and sixth pleas offered by the defendants in the cause below and stricken out by the court, need not be certified to the supreme court by the clerk below as a part of the transcript sent up to the supreme court on this appeal, but that the same may be read from and referred to in the charter book of the Yazoo & Mississippi Valley Railroad Company, which will be produced by the attorneys for the appellants, and the same shall be considered for all intents and purposes as if they had been incorporated into said transcript.

3. It is agreed that the "Summary of the court's holdings," which was certified to the circuit court at the June term, 1898,
728 attached to the mandate of the supreme court, need not be copied by the clerk of the circuit court into the transcript sent up in this cause, and also that the copy of said summary which is made and set forth in the petition for removal into the United States circuit court, as the same does appear in the transcript herein, is a correct copy and shall for all intents and purposes be taken as if the same were also certified in the transcript in connection with the said mandate.

4. When it is said herein that such assessment-rolls and said mortgages shall be treated to all intents and purposes as if the same were incorporated into this transcript it is meant thereby that the same shall be so treated for all intents and purposes not only in the supreme court of the State, but also in the Supreme Court of the United States, if this cause should be carried before that tribunal.

J. A. P. CAMPBELL &
CRITZ, BECKETT & KIMBROUGH,
Attorneys for Appellee.
MAYES & HARRIS, *Att'ys for Appellants.*

Endorsed: Filed Jan'y 3, 1899. E. W. Brown, clerk, by C. C. Campbell, D. C.

729 STATE OF MISSISSIPPI, *County of Hinds, First District.*

In the Supreme Court, at November Special Term, 1898.

YAZOO & MISSISSIPPI VALLEY RAILROAD CO. ET. AL, Appellants,
v.
WIRT ADAMS, State Revenue Agent, Appellee.

Assignment of Errors.

Come the appellants in this cause, The Yazoo & Mississippi Valley Railroad Company and The Illinois Central Railroad Company, and for error in the court below assign as follows, to wit:

1. The court below erred in failing to attach plaintiff's demurrer to defendants' plea to the plaintiff's own declaration.

2. The court below erred in failing to attach defendants' demurrers to plaintiff's replications to plaintiff's own declaration.

3. The court below erred in overruling the objection of appellants

to any action or proceeding at the June term of the court on account of the absence of the opinion of the supreme court of the State, required by section 4381 of the Annotated Code of 1892.

4. The court below erred in overruling the objection of the defendants to the taking of any steps in this cause at the June term, 1898, of the circuit court for the reason that two weeks of the term had gone by and the cause was not on the trial docket as made up when the term began, and to the docketing of the cause on the 4th day of July, being the Monday of the third and last week of the term.

5. The court below erred in overruling the objection of the appellants to any action or proceeding at the June term of the circuit court on account of the absence of the opinion of the supreme court of the State, required by section 4381 of the Code of 1892; also in overruling the objection of the appellants to the taking of
730 any steps in this cause at the June term, 1898, of the circuit court for the reason that two weeks had gone by and the cause was not on the trial docket as made up when the term began, and to the docketing of the case on the 4th day of July, being Monday of the third and last week of the term, each of which and the combined effect of which was violative of the fourteenth amendment to the Constitution of the United States as being a deprivation of the property of appellants without due process of law.

6. The court below erred in overruling the motion of the appellants to remove the cause into the circuit court of the United States for the southern district of Mississippi.

7. The court erred in overruling the appellants' motion for a continuance.

8. The court below erred in overruling the objection of the appellants to any action or proceeding at the June term of the circuit court on account of the absence of the opinion of the supreme court of the State, required by section 4381 of the Code of 1892, and also in overruling the objection of the appellants to the taking of any steps in this cause at the June term, 1898, of the circuit court for the reason that two weeks of the term had gone by and the cause was not on the trial docket as made up when the term began, and to the docketing of the cause on the 4th day of July, being Monday of the third and last week of the term, and also in overruling the application of appellants for a continuance on the 5th day of July, 1898, all of which and the combined *effort* of which was violative of the fourteenth amendment to the Constitution of the United States as being a deprivation of the property of appellants without due process of law.

9. The court erred in striking out the fourth pleas of the appellants respectively.

10. The court below erred in sustaining the motion to strike out the two fifth pleas of the defendants respectively.

11. The court below erred in striking out the sixth pleas of the defendants respectively.

731 All of which is respectfully submitted.

MAYES & HARRIS,
Attorneys for the Appellants.

Endorsed: Filed Dec. 6th, 1898. E. W. Brown, clerk, by C. C. Campbell, D. C.

And on the 2nd day of January, 1899, the following order was entered:

Y. & M. V. R. R. Co. ET AL. }
v. } 9251.
WIRT ADAMS, State Rev. Ag't. }

Argued orally by Mr. Tim E. Cooper for the appellants and Mr. J. A. P. Campbell for the appellees.

And on the 3rd day of January, 1899, the cause was submitted in the following order, to wit:

YAZOO & MISSISSIPPI VALLEY RAILROAD CO. ET AL. }
v. } 9251.
WIRT ADAMS, State Rev. Ag't. }

Argued orally by Mr. Edward Mayes for appellants and Messrs. R. C. Beckett and F. A. Critz for appellee, and submitted on briefs by Messrs. Cooper & Waddell and Mayes and Harris for the appellants and Messrs. J. A. P. Campbell and Critz & Beckett for appellee.

And on the 20th day of February, 1899, the opinion of the court was filed in words and figures following, to wit:

732 Y. & M. V. R. R. Co. ET AL. }
v. } 9251.
WIRT ADAMS, Rev. Ag't. }

WHITFIELD, *J.*:

The petition for removal of the cause to the Federal court was properly denied. The decisions of the United States Supreme Court cited in briefs of counsel for appellee put this at rest. K. C. R. R. *v.* Doughty, 138 U. S., 303; Ten *v.* Bush, 152 U. S., 454; Galveston *v.* Texas, 170 U. S., 226.

The application for continuance was properly overruled. The court's action in striking out the special pleas stricken out was correct, for the obvious reason that they presented no defense to the action, in whole or in part. The former opinion of this court in this case settled definitely and conclusively all the issues involved, and the special pleas are in effect, nothing else than an effort to have the circuit court disregard that opinion. The futility of that sort of pleading needs no comment.

These matters of practice and procedure and all the other assignments of error touching matters of practice and procedure were correctly settled by the court. The former opinion of this court in this cause, and its opinion on the motion to strike that opinion from the files disposed effectively of such of these matters as are not here specifically adverted to.

So far as concerns the argument that the appellants relied on the case of Mississippi Mills *vs.* Cook, 56 Miss., and that if the overruling of that case is correct, nevertheless the appellants should be protected from taxation accruing before the overruling of that case, it is enough to say that question is not material here, since all the taxes here sued for, accrued after the consolidation of October 24, 1892, and the appellants were expressly held to have lost their exemption, if any they had, by their own voluntary act of consolidation. That was the first and main ground on which our former opinion was distinctly rested. It must be too clear for serious disputation, in this view, that all discussion of the case of Mississippi Mills *vs.* Cook is wholly unavailing as to these taxes. Moreover, the twenty-first section of the Mobile and Northwestern charter was not passed on in Mississippi Mills *vs.* Cook, and we held in our former opinion that its constitutionality was never squarely
733 presented, as to the point for decision, until the former judgment in this case. Whatever merit there may be in this line of argument in a proper case, it is clear that here it has, by reason of the fact of the consolidation when and as it occurred, no room for play.

The last proposition which we notice is the one that the Lambert case, in 70 Miss., was erroneous and ought not to be followed, in its announcement that the Code of 1880 repealed the exemption here claimed. It was said, *inter alia*, that the Mobile and Ohio Railroad Company had an identical exemption with the twenty-first section of the Mobile and Northwestern charter, and that section 598 of the Code of 1880 by providing for a "sworn statement of the capital expended in the construction of its road," recognized the exemption, and meant by this section 598 to furnish the State with the means of knowing when the M. & O. Railroad Company should become liable to taxation; and that since it recognized the M. & O. Railroad Company's exemption, of course, it must also have recognized the alleged identical exemption of appellants. Such was the argument gravely pressed upon the court. It is singular that learned counsel overlooked the easy and overwhelming answer springing from the fact that the twenty-first section of the Mobile & Northwestern charter was granted by an act of the legislature passed in 1870, *after* the constitution of 1869 was apopted, while the charter of the Mobile & Ohio Railroad Company was granted in 1848, twenty-one years before that constitution was adopted, at a time when the legislature had full power to grant, so far as any constitutional restriction was concerned, an irrepealable exemption.

But it is said that section 8 of the Code of 1880 provides that "no private act, not revised and brought into this code, shall be affected by its provisions," and that general laws as to taxation ought not to be held to repeal private grants of exemption, unless expressly so stated. The principle is correct enough. But we think the alleged exemption of the Natchez, Jackson & Columbus Railroad Company, expressly repealed. There were two bills of injunction in the Lambert case—rather there were two cases. The court distinctly held that this exemption from taxation was an exemption both from

ad valorem taxes and privilege taxes. Now the scheme of railroad taxation provided by the Code of 1880 was primarily to subject, "each railroad owning and operating a railroad in this State" to ad valorem taxes. That scheme is set forth in sections 597–606, Code of 1880, inclusive. But secondarily, and as a substitute each railroad was permitted by sections 607 and 608 of that code, to escape ad valorem State and county taxes by paying the privilege tax named in section 608. Now the Natchez, Jackson & Columbus Railroad Company is expressly named in section 608, and required to pay a privilege tax of $30 per mile, if it would escape ad valorem State and county taxes. Manifestly no one can be found who would dispute the proposition that the exemption from privilege taxes of that railroad was expressly repealed by section 608. But since this privilege tax was provided only secondarily, and as a means of escaping the ad valorem State and county taxes due by each railroad in the State, primarily imposed by section 597 *et seq.*, it is plain that all the sections taken together expressly provide that the N., J. & C. R. R. Co. was to pay ad valorem taxes, State and county, unless it embraced the conditional exemption therefrom by paying the privilege tax assessed by section 608 *eo nomine*, against it. There is no escape from this reasoning. If it be asked why, if the N., J. & C. R. R. Co. was expressly named in section 608, it was not so named in section 597 *et seq.*, the obvious reason is that it was necessary to expressly name it in imposing privilege taxes, since each railroad paid a different privilege tax; but it was unnecessary to name it in imposing ad valorem taxes, since the rate there was the same
734 for all. And this leaves out of view whatever of force there may be in the suggestion that the phrases "each railroad," "every railroad," etc., might be effective to include this railroad with all others as fully as if named in section 597. But as to this we say nothing.

Finally it is said that this twenty-first section was given the L., N. O. & T. R. R. Co., by independent grant in 1882, by its proper charter, after the Code of 1880 had been adopted. But if the Code of 1880 had the effect, as held in the Lambert case, to repeal by its provisions this section as applied to the N., J. & C. R. R. Co., then *a fortiori*, did the more emphatic provisions of the Code of 1892, have the effect to repeal the same section as applied to the L., N. O. & T. R. R. Co. This last company could not be named in the Code of 1880, since it did — come into existence till 1882.

It will be remembered that this third ground of our former opinion—that this alleged exemption was repealed by legislation if it ever had a valid existence—was wholly uninfluential with the circuit judge, on this second trial below, since it was for the first time made part of the opinion, when the opinion in full was written and filed, which was several months after the trial in the circuit court. It is perfectly obvious, therefore, that the mere adding a new reason for the decision which reason did not influence the second trial of the case, in no respect prejudiced the appellants in the trial.

We discover no error and the judgment is affirmed.

C. J. Woods, while recognizing the authority of the former decision to the effect that the consolidation cut off the exemption under section 180 of constitution of 1890, and not, therefore, dissenting, adheres to the view formerly expressed by him.

735 And on the 20th day of February, 1899, the following final judgment was rendered by said supreme court, to wit:

YAZOO AND MISSISSIPPI VALLEY RAILROAD CO. ET AL.
v.
WIRT ADAMS, State Revenue Agent. } 9251.

This cause having been submitted on a former day of this term on the record herein from the circuit court of Hinds county, 1st district, and this court, having sufficiently examined and considered the same and being of opinion that there is no error therein, doth order and adjudge that the judgment of said circuit court rendered in this cause at the June term thereof, A. D. 1898, on the 8th day of July, 1898, be, and the same is hereby, affirmed; and it is further considered and so ordered and adjudged by this court that the appellee do have and recover of the appellants and the Chicago, St. Louis and New Orleans Railroad Company, the Canton, Aberdeen and Nashville Railroad Company, Stuyvesant Fish, and J. T. Harahan, sureties in the appeal bond, the sum of five hundred and forty-eight thousand six hundred and seventy-six and $\frac{92}{100}$ dollars, the amount of the judgment in the court below, together with the further sum of twenty-seven thousand four hundred and thirty-three and $\frac{84}{100}$ dollars, being damages, at the rate of 5 per centum, as allowed by law, as well as interest on the amount of said judgment from date of rendition till paid, at the rate of 6 per centum per annum, and also the costs of this cause in this court and in the court below expended, &c., to be taxed, &c.

736 UNITED STATES OF AMERICA, } *ss:*
State of Mississippi,

THE YAZOO & MISSISSIPPI VALLEY RAILROAD Company *et al.*
v.
WIRT ADAMS, State Revenue Agent. } Petition for Writ of Error, etc.

To the Honl. Thomas H. Woods, chief justice of the supreme court of the State of Mississippi:

The petition of the Yazoo & Mississippi Valley Railroad Company, and of the Illinois Central Railroad Company, and of the Chicago, St. Louis & New Orleans Railroad Company, and of the Canton, Aberdeen & Nashville Railroad Company, and Stuyvesant Fish, and of James Theodore Harahan respectfully shows that on the 20th day of February, 1899, the said supreme court rendered judgment against the petitioners in a certain cause wherein your petitioners The Yazoo & Mississippi Valley Railroad Company

and The Illinois Central Railroad Company were the appellants and the other petitioners were their sureties on their appeal bond, and Wirt Adams, State revenue agent in and for the State of Mississippi, was appellee, for the sum of $548,676.99, with 6 per cent. interest from July 8, 1898, and also for statutory damages, amounting to $27,433.84, and for costs, and in legal effect awarded thereon, as will appear by reference to the record and proceedings in said cause; that in said suit was drawn in question the validity of certain statutes of the said State of Mississippi, on the ground of their being repugnant to the Constitution of the United States and the amendments thereto, and the decision of said supreme court was in favor of the validity of such statutes, and that in said suit was drawn in question the validity of certain provisions of the constitution of the said State of Mississippi, adopted November 1st, 1890, on the ground of their being repugnant to the Constitution of the United States and the amendments thereto, and the decision of said supreme court was in favor of the validity
of such provisions, and in that said writ was also drawn
737 in question the validity of an authority exercised by the
State revenue agent under the statutes and constitution of said State, on the ground that the same is repugnant to the Constitution of the United States and the amendments thereto, and the decision of said supreme court was in favor of the validity of such authority, and that in said suit was drawn in question the validity of an authority exercised by the railroad commission of said State, acting as assessors of the railroad property for taxation under the statutes and constitution of said State, on the ground that the same is repugnant to the Constitution of the United States and the amendments thereto, and the decision of said supreme court was in favor of the validity of such authority, and that in said suit was also drawn in question the validity of an authority exercised by the said supreme court of said State by the circuit court of Hinds county, in said State, under the statutes and constitution of said State, on the ground that the same is repugnant to the Constitution of the United States and the amendments thereto, and the decision of the said supreme court was in favor of the validity of such authority, and that in said suit the petitioners, who were the appellants, claimed a right under the Constitution and statutes of the United States, and the decisions of said supreme court was against the said right specially set up and claimed under such constitution and statutes, and that in said suit petitioners, who were appellants, claimed a privilege and immunity under the Constitution and statutes of the United States and under the fourteenth amendment to said Constitution and the decision of said supreme court was against the said privilege and immunity set up and claimed specially under such Constitution and under said fourteenth amendment and under said statutes.

And the decision of the said supreme court of the State of Mississippi was final, and the said supreme court is the court of the highest resort in said State.

Wherefore your petitioners are aggrieved, and they pray for a

writ of error, with citation and supersedeas, returnable into
738 the Supreme Court of the United States on the —.

And, as in duty bound, they will ever pray, etc.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD CO.,
By EDWARD MAYES, *Att'y.*
THE ILLINOIS CENTRAL RAILROAD COMPANY,
By EDWARD MAYES, *Att'y.*
THE CANTON, ABERDEEN & NASHVILLE RAILROAD CO.,
By EDWARD MAYES, *Att'y.*
THE CHICAGO, ST. LOUIS & NEW ORLEANS RAILROAD CO.,
By EDWARD MAYES, *Att'y.*
STUYVESANT FISH,
By EDWARD MAYES, *Att'y.*
JAMES THEODORE HARRAHAN,
By EDWARD MAYES, *Att'y.*

STATE OF MISSISSIPPI:

Desiring to give petitioners an opportunity to test in the Supreme Court of the United States the questions presented in the foregoing petition and in the assignment of errors by which it is accompanied, it is ordered that a writ of error be, and the same is hereby, allowed to the said court, and that the same be made a supersedeas, the bond, in the penal sum of eight hundred thousand dollars, also herewith presented, being hereby approved.

In testimony whereof witness my hand this the 2nd day of March, 1899.

THOMAS H. WOODS,
Chief Justice of the Supreme Court of the State of Mississippi.

Endorsed: Filed Mc'h 3, 1899. E. W. Brown, clerk, by C. C. Campbell, D. C.

739 STATE OF MISSISSIPPI:

In the Supreme Court, November Special Term, 1898.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY ET AL., Appellants,
v.
WIRT ADAMS, State Revenue Agent.

I, Thomas H. Woods, chief justice of the supreme court of the State of Mississippi at the present time and upon the argument and hearing of the above-entitled appeal, do hereby certify:

I. That upon the said argument and hearing the validity of legislation and of section 180 and 181 of the constitution of Mississippi subsequent to the statute of Mississippi of March 3rd, 1882

was drawn in question by the said Yazoo & Mississippi Valley Railroad Company, the said Illinois Central Railroad Company, the said Chicago, St. Louis and New Orleans Railroad Company, the said Canton, Aberdeen and Nashville Railroad Company, the said Stuyvesant Fish, and the said James T. Harrahan, on the ground of such legislation being repugnant to section 10 of article 1 of the Constitution of the United States, in that such legislation and constitutional provisions impaired the obligation of a contract between the State of Mississippi and the Yazoo and Mississippi Valley Railroad Company, and that the decision of the said supreme court of Mississippi was in favor of the validity of such legislation and such constitutional provisions.

II. That upon the said argument and hearing the said Yazoo and Mississippi Valley Railroad Company, the said Illinois Central Railroad Company, the said Canton, Aberdeen and Nashville Railroad Company, the said Chicago, St. Louis and New Orleans Railroad Company, the said Stuyvesant Fish, and the said James T. Harrahan specially set up and claimed the right, privilege, and immunity, under the fourteenth amendment to the Constitution of the United States, that the said Yazoo and Mississippi Valley Railroad Company should not be deprived of property without due process of law, and that the decision of the said supreme court
740 of Mississippi was against the said right, privilege, and immunity set up and claimed as aforesaid.

III. That upon the said argument and hearing the validity of the statutes of Mississippi in the Annotated Code of 1892 providing for the taxation of railroads and of the act of 1894 defining the powers of the State revenue agent and of sections 180 and 181 of the Mississippi constitution of 1890 *were* drawn in question by the said Yazoo and Mississippi Valley Railroad Company, the said Illinois Central Railroad Company, the said Chicago, St. Louis and New Orleans Railroad Company, the said Canton, Aberdeen and Nashville Railroad Company, the said Stuyvesant Fish, and the said James T. Harrahan, on the ground of their being repugnant to the Constitution of the United States and the fourteenth amendment thereto, in that in and by the said statutes and constitutional enactments the State of Mississippi denies to the said Yazoo and Mississippi Valley Railroad Company within its jurisdiction the equal protection of the laws, and that the decision of the said supreme court of Mississippi was in favor of the validity of the said statute.

IV. That upon the said *agreement* and hearing the said Yazoo and Mississippi Valley Railroad Company, the said Illinois Central Railroad Company, the said Chicago, St. Louis and New Orleans Railroad Company, the said Canton, Aberdeen and Nashville Railroad Company, the said Stuy-sant Fish, and the said James T. Harrahan claimed the right of the said Yazoo and Mississippi Valley Railroad Company and the said Illinois Central Railroad Company to remove this cause from the circuit court of Hinds county, Mississippi, into the circuit court of the United States in and for the southern district of Mississippi under the acts of Con-

gress in such case provided, and that the decision of said supreme court of Mississippi was adverse to such claim of right.

In witness whereof I have hereunto subscribed my name this 2d day of March, in the year one thousand eight hundred and ninety-nine *ninety-nine.*

THOMAS H. WOODS,
Chief Justice Supreme Court.

Endorsed: Filed M'ch 3, 1899. E. W. Brown, clerk, by C. C. Campbell, D. C.

741 *Writ of Error Bond.*

Know all men by these presents that the Yazoo and Mississippi Valley — Company and the Illinois Central Railroad Company, the Chicago, St. Louis and New Orleans Railroad Company, the Canton, Aberdeen and Nashville Railroad Company, Stuyvesant Fish, of the city of New York, and James T. Harahan, of the city of Chicago, as principals, and R. W. Millsaps and John Hart, as sureties, are held and firmly bound unto Wirt Adams, State revenue agent, in the full and just sum of eight hundred thousand dollars ($800,000), to be paid to the said Wirt Adams, State revenue agent, his successor in office or his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, successors, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 25th day of February, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas lately, at a supreme court of the State of Mississippi, in a suit depending in said court between The Yazoo and Mississippi Valley Railroad Company, The Illinois Central Railroad Company, The Chicago, St. Louis and New Orleans Railroad Company, The Canton, Aberdeen and Nashville Railroad Company, Stuyvesant Fish, and James T. Harahan, appellants, and Wirt Adams, State revenue agent, respondent, a judgment was recovered against the said Yazoo and Mississippi Valley Railroad Company and others, appellants, and the said Yazoo and Mississippi Valley Railroad Company and others having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Wirt Adams, State revenue agent, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said Yazoo and Mississippi Valley Railroad Company, the Illinois Central Railroad Company, the Chicago, St. Louis and New Orleans Railroad Company, the Canton, Aberdeen and Nashville Railroad Company, Stuyvesant Fish, and James T. Harahan shall prose-
742 cute their writ of error to effect and answer all damages and

costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY,
[SEAL.] By JOHN C. WELLING, *Vice-President.*

Attest: A. G. HACKSTAFF, *Secretary.*

ILLINOIS CENTRAL RAILROAD COMPANY,
[SEAL.] By JOHN C. WELLING, *Vice-President.*

Attest: W. G. BRUEN,
Assistant Secretary.

[SEAL.] CHICAGO, ST. LOUIS AND NEW ORLEANS RAILROAD COMPANY,
By JOHN C. WELLING, *Vice-President.*

Attest: A. G. HACKSTAFF, *Secretary.*

[SEAL.] CANTON, ABERDEEN AND NASHVILLE RAILROAD COMPANY,
By JOHN C. WELLING, *Vice-President.*

Attest: A. G. HACKSTAFF, *Secretary.*

STUYVESANT FISH,
By WILLIAM D. GUTHRIE, *Attorney-in-fact.*
JAMES T. HARAHAN.
R. W. MILLSAPS.
JOHN HART.

Sealed and delivered in presence of—
As to A. G. Hackstaff & Stuyvesant Fish:
NOEL GALE.
ISAAC E. GARVEY.

As to John C. Welling and W. G. Bruen:
JAMES McKINLAY.
L. A. HARKNESS.

As to James T. Harahan:
HUNTER C. LEAKE.
L. RENE VILLARS.

STATE OF NEW YORK, } ss:
County of New York, }

Personally appeared before me, Isaac E. Garvey, a commissioner of the State of Mississippi for the State of New York and a notary public in and for the State and county of New York Alex-
743 ander G. Hackstaff, to me personally known and known to me to be the secretary of the Yazoo and Mississippi Valley Railroad Company, of the Chicago, St. Louis and New Orleans Rail-

road Company, and of the Canton, Aberdeen and Nashville Railroad Company, who acknowledged that he signed and dealed the foregoing bond on the day and year therein mentioned as the secretary of each of the above-named railroad companies and as the act and deed of each of said railroad companies, and that he affixed thereto the respective corporate seals of said companies; and the said Alexander G. Hackstaff, being by me duly sworn, deposes and says that he knows the corporate seal of each of the above-named railroad companies, and that the seals affixed by him as aforesaid are said corporate seals respectively.

Given under my hand and official seals this the twenty-fifth day of February, 1899.

[10-cent documentary stamp, canceled Feb. 25, '99, I. E. G.]

[SEAL.] ISAAC E. GARVEY,
Commissioner of the State of Mississippi and for the State of New York.

[SEAL.] ISAAC E. GARVEY,
Notary Public in and for New York County.

STATE OF NEW YORK, }
County of New York, } ss:

Personally appeared before me, Isaac E. Garvey, a commissioner of the State of Mississippi for the State of New York and a notary public in and for the State and county of New York, Alexander G. Hackstaff, to me personally known and known to me to be the secretary of the Yazoo and Mississippi Valley Railroad Company, of the Chicago, St. Louis and New Orleans Railroad Company, and of the Canton, Aberdeen and Nashville Railroad Company, who acknowledged that he signed and sealed the foregoing bond on the day and year therein mentioned as the secretary of each of the above-named railroad companies as the act and deed of each of
744 said railroad companies, and that he affixed thereto the respective corporate seals of said companies; and the said Alexander G. Hackstaff, being by me duly sworn, deposes and says that he knows the corporate seal of each of the above-named railroad companies, and that the seals affixed by him as aforesaid are said corporate seals respectively.

Given under my hand and official seals this the twenty-fifth day of February, 1899.

[10-cent documentary stamp, canceled Feb. 25, '99, I. E. —.]

ISAAC E. GARVEY,
[SEAL.] *Commissioner of the State of Mississippi for the State of New York.*

ISAAC E. GARVEY,
[SEAL.] *Notary Public in and for New York County.*

STATE OF LOUISIANA, } ss:
Parish of Orleans, }

Personally appeared before me, Meloncy C. Soniat, a commissioner of the State of Mississippi for the State of Louisiana and a notary public in and for the parish of Orleans, in the State of Louisiana, James T. Harahan, who acknowledged that he signed and delivered the foregoing bond.

Given under my hand and official seal- this the first day of March, 1899.

[10-cent documentary stamp, canceled 3, 1, '99, M. C. S.]

M. C. SOMIAT,
[SEAL.] *Commissioner of the State of Mississippi for the State of Louisiana.*

M. C. SONIAT,
[SEAL.] *Notary Public for Orleans Parish, Louisiana.*

745 STATE OF ILLINOIS, } ss:
County of Cook, }

Personally appeared before me, Mark A. Foote, a commissioner of the State of Mississippi for the State of Illinois and a notary public in and for the county of Cook, in the State of Illinois, John C. Welling, to me personally known and known to me to be the vice-president of the Yazoo and Mississippi Valley Railroad Company, of the Chicago, St. Louis and New Orleans Railroad Company, and of the Canton, Aberdeen and Nashville Railroad Company, who acknowledged that he signed the foregoing bond as the vice-president of each of the foregoing companies and as the act and deed of each of the said companies; and the said John C. Welling, being by me duly sworn, deposes and says he knows the corporate seal of each of the foregoing railroad companies, and that the seals affixed to the foregoing bond are such corporate seals respectively.

And on the same day personally appeared before me William G. Bruen, to me personally known and known to me to be the assistant secretary of the Illinois Central Railroad Company, who acknowledged that he signed and sealed the foregoing bond as such assistant secretary and as the act and deed of the Illinois Central Railroad Company, and that he affixed thereto the corporate seal of said railroad company; and the said William G. Bruen, being by me duly sworn, deposes and says that he knows the corporate seal of the said Illinois Central Railroad Company, and that the seal so affixed by him as aforesaid is said corporate seal.

Given under my hand and official seals this the 27th day of February, 1899.

[10-cent documentary stamp, cancelled 2, 27, '99. M. A. F.]

MARK A. FOOTE,
[SEAL.] *Commissioner of the State of Mississippi for the State of Illinois.*

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MARK A. FOOTE,
[SEAL.] *Notary Public in and for Cook County, Illinois.*

Endorsed: Filed M'ch 3, 1899. E. W. Brown, clerk, by C. C. Campbell, D. C.

747 UNITED STATES OF AMERICA:

In the Supreme Court.

YAZOO & MISSISSIPPI VALLEY R. R. CO. ET ALS., Plaintiffs in Error,
v.
WIRT ADAMS, State Revenue Agent, Defendant in Error.

Agreement of Counsel.

The record in this case being quite voluminous, in order to avoid expense and at the same time to avoid an altogether unnecessary enlargement of the record, it is agreed as follows:

1. That all of the assessment-rolls which were exhibited with the various declarations filed by the plaintiff and all of the assessment-rolls which were introduced in evidence on the various trials of the cause in the circuit court shall be omitted from the record to be sent to the Supreme Court of the United States.

2. That the list of stockholders of the Illinois Central Railroad Company which was introduced in evidence on the trial in the circuit court and which appears in the transcript in the supreme court of the State of Mississippi may be omitted from the copy of the transcript to be sent to the Supreme Court of the United States.

3. That in all such cases where voluminous documents, such as the charters of the various railroads and other incorporated companies and such as the articles of consolidation, etc., have been introduced into the record of the cause in its progress more than once, as by being made exhibits to pleadings and being introduced into evidence one or more times, etc., that such documents need be copied only once in making up the transcript of the record for the Supreme Court of the United States.

4. Also may be omitted from the record the objections of the railroad company made to the assessment by & before the
748 railroad commission in 1892; also the minutes of the meeting of the board of directors of the Mississippi Valley Company Oct. 4th, 1892.

5th. It is further agreed that the mortgage mentioned in the two pleas numbered four, filed & stricken out at June term, 1898, as a mortgage executed May 24th, 1893, is the same mortgage in the transcript dated April 14th, 1893.

EDWARD MAYES,
Att'y for Plaintiff in Error.
R. C. BECKETT,
Attorney for Defendant in Error.

Endorsed: 9251. Filed M'ch 13, 1899. E. W. Brown, clerk, by C. C. Campbell, D. C.

749 Supreme Court of Mississippi.

I, E. W. Brown, clerk of the supreme court of Mississippi, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from 1 to 748, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of — No. 9251 — Yazoo & Mississippi Valley Railroad Company *et al.*, plaintiffs in error, *v.* Wirt Adams, State revenue agent, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of said court to be hereunto affixed, at the city of Jackson, in the State of Mississippi, this the 23rd day of March, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States the one hundred and twenty-third.

[Seal Supreme Court, State of Mississippi.]

E. W. BROWN, *Clerk.*

750 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Mississippi, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in said suit, between Wirt Adams, State revenue agent, as plaintiff, and The Yazoo & Mississippi Valley Railroad Company and The Illinois Central Railroad Company, as defendants, and wherein judgment was rendered in favor of said plaintiff in said court on the 20th day of February, 1899 A. D., against said defendants and against the Chicago, St. Louis & New Orleans Railroad Company and the Canton, Aberdeen and Nashville Railroad Company and Stuyvesant Fish and James Theodore Harrahan, sureties, and in which suit was drawn in question the validity of certain statutes of the State of Mississippi, on the ground of their being repugnant to the Constitution of the United States and the amendments thereto, and the decision of said supreme court was in favor of the validity
751 thereof, and in which suit was also drawn in question the validity of certain provisions of the constitution of the State of Mississippi adopted November 1st, 1890, on the ground of their being repugnant to the Constitution of the United States and the amendments thereto, and the decision of said supreme court was in favor of the validity thereof, and in which suit was also drawn in question the validity of an authority exercised by the said State revenue agent under the statutes and constitution of said State, on the ground that the same is repugnant to the Constitution of the United States and the amendments thereto, and the decision of said supreme court was in favor of the validity of such authority, and in which suit was also drawn in question the validity of an authority exercised by the railroad commission of said State acting as

assessors of railroad property for taxation under the statutes and constitution of said State, on the ground that the same is repugnant to the Constitution of the United States and the amendments thereto, and the decision of said supreme court was in favor of the validity of such authority, and in which suit was also drawn in question the validity of an authority exercised by said supreme court and
752 by the circuit court of Hinds county, in said State, under the statutes and constitution of said State, on the ground that the same is repugnant to the Constitution of the United States and the amendments thereto, and the decision of said supreme court was in favor of the validity of such authority, and in which suit the Yazoo & Mississippi Valley Railroad Company and the Illinois Central Railroad Company claimed a right under the Constitution and statutes of the United States and the decision of said supreme court was against such right specially set up and claimed under such Constitution & statutes, and in which suit the said Yazoo & Mississippi Valley Railroad Company and the said Illinois Central Railroad Company claimed a privilege and immunity under the Constitution and the statutes of the United States and under the fourteenth amendment to such Constitution and the decision of the said supreme court was against the said privilege and immunity so set up and specially claimed under such Constitution and under said fourteenth amendment and under said statutes, a manifest error hath happened, to the great damage of said Yazoo
753 & Mississippi Valley Railroad Company and of the said Illinois Central Railroad Company and of said Chicago, St. Louis & New Orleans Railroad Company and of said Canton, Aberdeen & Nashville Railroad Company and of said Stuyvesant Fish and of said James Theodore Harrahan, as by their complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with the writ, so that you may have the same at Washington on the 1st day of April next in the said Supreme Court, to be then & there held, that, the record of proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 2d day of March, in the year of our Lord one thousand eight hundred and ninety-nine.

Witness also my signature and the seal of the circuit court of the United States in and for the southern district of Mississippi this the day & year aforesaid.

{Seal U. S. Circuit Court, Southern District of Mississippi, 5th Circuit.}

L. B. MOSELEY, *Clerk.*

754 [Endorsed:] Yazoo & Mississippi Valley R. R. Co. *et al. v.* Wirt Adams, State revenue agent. Writ of error. Filed M'ch 3, 1899. E. W. Brown, clerk, by C. C. Campbell, D. C.

Supreme Court of Mississippi.

I, E. W. Brown, clerk of the supreme court of Mississippi, by virtue of the within writ of error and in obedience thereto, do hereby send herewith the record and proceedings in said cause, duly certified and authenticated according to law, to the honorable Supreme Court of the United States.

In testimony whereof I have caused the seal of said court to be hereunto affixed, at the city of Jackson, in the State of Mississippi, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States the one hundred and twenty-third.

[Seal Supreme Court, State of Mississippi.]

E. W. BROWN, *Clerk.*

755 UNITED STATES OF AMERICA, *ss:*

To Wirt Adams, State revenue agent, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the supreme court of the State of Mississippi, wherein The Yazoo & Mississippi Valley Railroad Company, and the Illinois Central Railroad Company, and the Chicago, St. Louis and New Orleans Railroad Company, and the Canton, Aberdeen & Nashville Railroad Company, and Stuyvesant Fish and James Theodore Harrahan are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Thomas H. Woods, chief justice of the supreme court of the State of Mississippi, this the 2nd day of March, A. D. 1899.

THOMAS H. WOODS,
Chief Justice of the Supreme Court of Mississippi.

756 UNITED STATES OF AMERICA, *Southern District of Mississippi,* } *ss:*

Received the within citation on the 8th day of March, 1899, and served the same on the same day on Wirt Adams, State revenue agent of the State of Mississippi, personally, by reading the same to him, and also by delivering to him in his own hands a true & exact copy of the same; also delivered to him at the same time a true and exact copy of the writ of error in said cause issued pursuant to the fiat of the Hon. Thomas H. Woods, chief justice of the supreme

court of Mississippi, by L. B. Moseley, clerk of the circuit court of the United States in and for the southern district of Mississippi.

This the 11th day of March, A. D. 1899.

F. W. COLLINS,
U. S. Marshal,
By R. O. EDWARDS, *Deputy.*

Marshal's fees, $2.00.

UNITED STATES OF AMERICA,
Southern District of Mississippi.

Personally appeared before me, L. B. Mosely, clerk of the circuit court of the United States in & for the southern district of Mississippi, R. O. Edwards, a regular deputy marshall of the United States in & for the district & State aforesaid, duly appointed
757 according to law, who, being by me first duly sworn, on oath saith that the foregoing return made by him of a service of the citation and a copy of the writ of error in this cause of The Yazoo & Mississippi Railroad Company *et als.*, plaintiffs in error, *v.* Wirt Adams, State revenue agent, defendant in error, made on the said defendant in error on the 8th day of March, 1899, is true in every particular.

R. O. EDWARDS.

Sworn to & subscribed before me this the 11th day of March, 1899, as witness my signature & official seal.

[Seal U. S. Circuit Court, District of Mississippi, 5th Circuit.]

L. B. MOSELEY, *Clerk.*

758 [Endorsed:] Entered, No. 132, page 34. Yazoo & Mississippi Valley R. R. Co. *et al. v.* Wirt Adams, State revenue agent. Filed M'ch 3, 1899. E. W. Brown, clerk, by C. C. Campbell, D. C.

759 Supreme Court of the United States, —— Term, A. D. 189-, *ss.*

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY ET ALS.,
Plaintiffs in Error,
v.
WIRT ADAMS, State Revenue Agent, Defendant in Error.

Afterwards, to wit, on the — day of ——, 1899, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, come the said Yazoo & Mississippi Valley Railroad Company and the said Illinois Central Railroad Company and the said Chicago, St. Louis & New Orleans Railroad Company and the said Canton, Aberdeen & Nashville Railroad Company and the said Stuyvesant Fish and the said James T. Harrahan, plaintiffs in error, by their & each of their attorney, Edward Mayes, and say that in the record and proceedings aforesaid there is manifest error in the particulars following, to wit:

1. The said supreme court of the State of Mississippi erred in rendering the judgment of February 20th, 1899, whereby the tax provisions of the Annotated Code of 1892 and the act of 1894, defining the powers of the State revenue agent, and the constitution adopted November 1, 1890, were given effect against the con-
760 tract rights of the plaintiff in error The Yazoo & Mississippi Valley Railroad Company embodied in the act of March 3, 1882, which constituted the charter of the Louisville, New Orleans & Texas Railway Company, with the amendment thereto, in the year 1884, and whereby the obligation of such contract rights was impaired, contrary to sec. 10, art. 1, of the Constitution of the United States.

2. The said supreme court erred in rendering the judgment of February 20th, 1899, whereby the tax provisions of the Annotated Code of 1892 and the act of 1894, defining the powers of the State revenue agent, and the constitution adopted November 1, 1890, were given effect in such manner as to deprive the plaintiffs in error of their property without due process of law, and also to deny to them the equal protection of the laws, in violation of the 14th amendment to the Constitution of the United States.

3. The said supreme court erred in holding that the right conferred upon the Louisville, New Orleans & Texas Railway Company by section five of the act of March 3, 1882, entitled "An act to authorize the Memphis & Vicksburg Railroad Company and the Mississippi Valley and Ship Island Railroad Company to effect a consolidation," was not a contract of appropriation protected by section 10, article 1, of the Constitution of the United States, but was only such an exemption from taxation which was repealable at will by the legislature of Mississippi under sec. 13, art. 12, and sec. 20, art. 12, of the Mississippi constitution of 1869.

761 4. The said supreme court erred in holding that the right conferred upon the Louisville, New Orleans & Texas Railway Company by section five of the act of March 3, 1882, aforesaid, was repealable by the legislature, as aforesaid, and in holding further that such right was in fact repealed by the act of March 18, 1886, entitled "An act to amend section 557 and 585, Code of 1880, so as to increase the public revenue and provide for the faithful collection of the same."

5. The said supreme court erred in holding that the right conferred upon the Louisville, New Orleans & Texas Railway Company by section five of the act of March 3, 1882, aforesaid, was repealable by the legislature, as aforesaid, and in holding further that such right was in fact repealed by the provisions on taxation of the Annotated Code of 1892.

6. The said supreme court erred in holding that the taxes sued for in this cause were not payable by affidavits made in conformity with section 21 of the charter of the Mobile & Northwestern Railroad Company (adopted into and made a part of said act of March 3, 1882, by section five thereof), and that the State revenue agent can now sue for and recover the same in currency, without respect to and contrary to those acts, under color of authority conferred

on him and on the railroad commission of the State of Mis-
762 sissippi by provisions of the Annotated Code of 1892 and of the said act of 1894 defining the powers of said revenue agent.

7. The said supreme court erred in holding that said section 21 of the charter of the Mobile & Northwestern Railroad Company was void *ab initio* because repugnant to the provisions of sec. 13, art. 12, and sec. 20, art. 12, of the Mississippi constitution of 1869, and that its re-enactment as to the Louisville, New Orleans & Texas Railway Company by said section five of the act of March 3, 1882, was void for the same reason, and in overruling the case of The Mississippi Mills *v.* Cook, sheriff, reported in 56th Mississippi Reports, beginning at page 40 thereof, and announcing a new construction of said sections 13 and 20 of said article 12 and applying such new construction in this case.

8. The said supreme court erred in holding that the consolidation effected October 24, 1892, did not operate by way of merger, but created a new company and brought the new company so created under a new rule of corporate existence and liability, and a new rule of taxation enacted by sections 180 & 181 of the Mississippi constitution of 1890, the provisions on taxation of the Annotated Code of 1892, and the act of 1894 aforesaid defining the powers of the State revenue agent.

763 9. The said supreme court erred in holding that the charters of the Louisville, New Orleans & Texas Railway Company and of the Yazoo & Mississippi Valley Railroad Company did not authorize a consolidation between them to operate by way of a merger; and, further, that the deed of consolidation of October 24, 1892, did not provide for such a consolidation, but that the consolidation effected was and could only be one whereby the corporate existence of the consolidating companies was terminated and a new company was formed, subject to the provisions of the chapter on corporations in the Mississippi constitution of 1890.

10. The said supreme court erred in overruling the case of The Natchez, Jackson & Columbus Railroad Company *v.* Lambert, tax collector, 70th Mississippi Reports, beginning at page 779, decided in 1893, and announcing a new and different construction of the effect of the consolidation of October 24, 1892, from the construction adjudged in that case and in applying such new & different construction in this case.

11. The said supreme court erred in holding that the new constitution of Mississippi, adopted November 1, 1890, withdrew from the said Louisville, New Orleans & Texas Railway Company and the Yazoo & Mississippi Valley Railroad Company the powers of consolidation granted to them in the year 1882 by their respect-
764 ive charters and allowed them to consolidate with each other only on condition of becoming a new company, subject to the provisions of the chapter on corporations in said constitution and subject to the provisions of the Annotated Code of 1892 on the subject of taxation and to the provisions of the act of 1894 defining the powers of the State revenue agent.

12. The said supreme court erred in denying the suggestion of errors filed in this cause in said court on the 27th day of June, 1898.

13. The said supreme court erred in overruling the motion made by the Yazoo & Mississippi Valley Railroad Company and by the Illinois Central Railroad Company on the — day of ——, 1898, to strike from the files the opinion of said court which was filed on the 22d day of November, 1898.

14. The said supreme court erred in denying the fifth assignment of error made by the appellants, such assignment of error being as follows: "The court below erred in overruling the objection of the appellants to any action or proceeding at the June term of the circuit court on account of the absence of the opinion of the supreme court of the State required by section 4381 of the Code of 1892, and also in overruling the objection of the appellants to the
765 taking of any steps in this cause at the June term, 1898, of the circuit court for the reason that two weeks of the term had gone by and the cause was not on the trial docket as made up when the term began, and to the docketing of the case on the 4th day of July, being Monday of the third and last week of the term, each of which and the combined effect of which was violative of the 14th amendment to the Constitution of the United States as being a deprivation of the property of appellants without due process of law."

15. The said supreme court erred in holding that the circuit court committed no error in overruling the application of the Yazoo & Mississippi Valley Railroad Company and of the Illinois Central Railroad Company made at the June term, 1898, for removal of this cause into the circuit court of the United States in & for the southern district of Mississippi.

16. The said supreme court erred in denying the eighth assignment of error made by the appellants, such assignment of error being as follows: "The court below erred in overruling the objection of the appellants to any action or proceeding at the June
766 term of the circuit court on account of the absence of the opinion of the supreme court of the State required by section 4381 of the Code of 1892, and also in overruling the objection of the appellants to the taking of any steps in this cause at the June term, 1898, of the circuit court for the reason that two weeks of the term had gone by and the cause was not on the trial docket as made up when the term began, and to the docketing of the cause on the 4th day of July, being Monday of the third and last week of the term, and also in overruling the application of appellants for a continuance on the 5th day of July, 1898, all of which and the combined effect of which was violative of the fourteenth amendment to the Constitution of the United States as being a deprivation of the property of appellants without due process of law."

17. The said supreme court erred in holding that the circuit court committed no error in striking out the pleas of the Yazoo & Mississippi Valley Railroad Company and of the Illinois Central Railroad

Company respectively numbered four because the same presented no defense to this action.

18. The said supreme court erred in holding that the circuit court committed no error in striking out the pleas of the Yazoo &
767 Mississippi Valley Railroad Company and of the Illinois Central Railroad Company respectively numbered five because the same presented no defense to this action.

19. The said supreme court erred in holding that the circuit court committed no error in striking out the pleas of the Yazoo & Mississippi Valley Railroad Company and of the Illinois Central Railroad Company respectively numbered six because the same presented no defense to this action.

And the said Yazoo & Mississippi Valley Railroad Company and the said Illinois Central Railroad Company and the said Chicago, St. Louis & New Orleans Railroad Company and the said Canton, Aberdeen & Nashville Railroad Company and the said Stuyvesant Fish and the said James Theodore Harrahan pray that the judgment aforesaid may be reversed, annulled, and altogether held for naught, and that they may be restored to all things which they have lost by occasion of the said judgment.

EDWARD MAYES,
Att'y for Pl'ffs in Error.

768 [Endorsed:] Yazoo & Mississippi Valley R. R. Co. *et als.*, pl'ffs in error, *v.* Wirt Adams, State revenue agent, def't in error. Assignment of errors. Filed M'ch 3, 1899. E. W. Brown, clerk, by C. C. Campbell, D. C.

Endorsed on cover: File No., 17,341. Mississippi supreme court. Term No., 756. The Yazoo & Mississippi Valley Railroad Company *et al.*, plaintiffs in error, *vs.* Wirt Adams, State revenue agent. Filed April 1st, 1899.

IN THE SUPREME COURT OF THE UNITED STATES.

OCT. TERM, 1899.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY *et al.*, Plaintiffs in Error,
vs.
WIRT ADAMS, State Revenue Agent, Defendant in Error. } No. 244.

In error to the supreme court of the State of Mississippi.

In order to save expense of a recopy of the record from the supreme court of the State of Mississippi and certificate of the clerk of said court, it is hereby agreed that the following are the facts which would be shown by a full and true copy of said record, viz:

1st. That the true date of the judgment *in* June, 1898, and the true date on which the summary of holdings was filed *were* in each case June 20th, 1898, and that the dates of each as June 30th, 1898, as the same appears on pages 512 and 513 of the printed record and on pages 581 and 582 of the original record, *are* mistakes made in transcribing by the clerk of said supreme court; and it is further agreed that the clerk of the Supreme Court of the United States may correct said original record and the copies of the printed record by inserting in each the date "20th" instead of "30th."

2nd. It is further agreed as a fact in the case, and it is a fact, as shown by the records of said supreme court of Mississippi, that it adjourned for the term on the 1st day of July, 1898.

Agreed to and signed this September —, 1899.

EDWARD MAYES,
Attorneys for Plaintiffs in Error.
R. C. BECKETT,
Attorney for Defendant in Error.

THE STATE OF MISSISSIPPI, }
Hinds County. }

Office of the clerk of the supreme court of Mississippi.

I, E. W. Brown, clerk of said supreme court of Mississippi, do hereby certify that the foregoing agreed state of facts *are* the true facts; that judgment was rendered and summary of holdings filed on June 20th, 1898, and that said supreme court adjourned for the

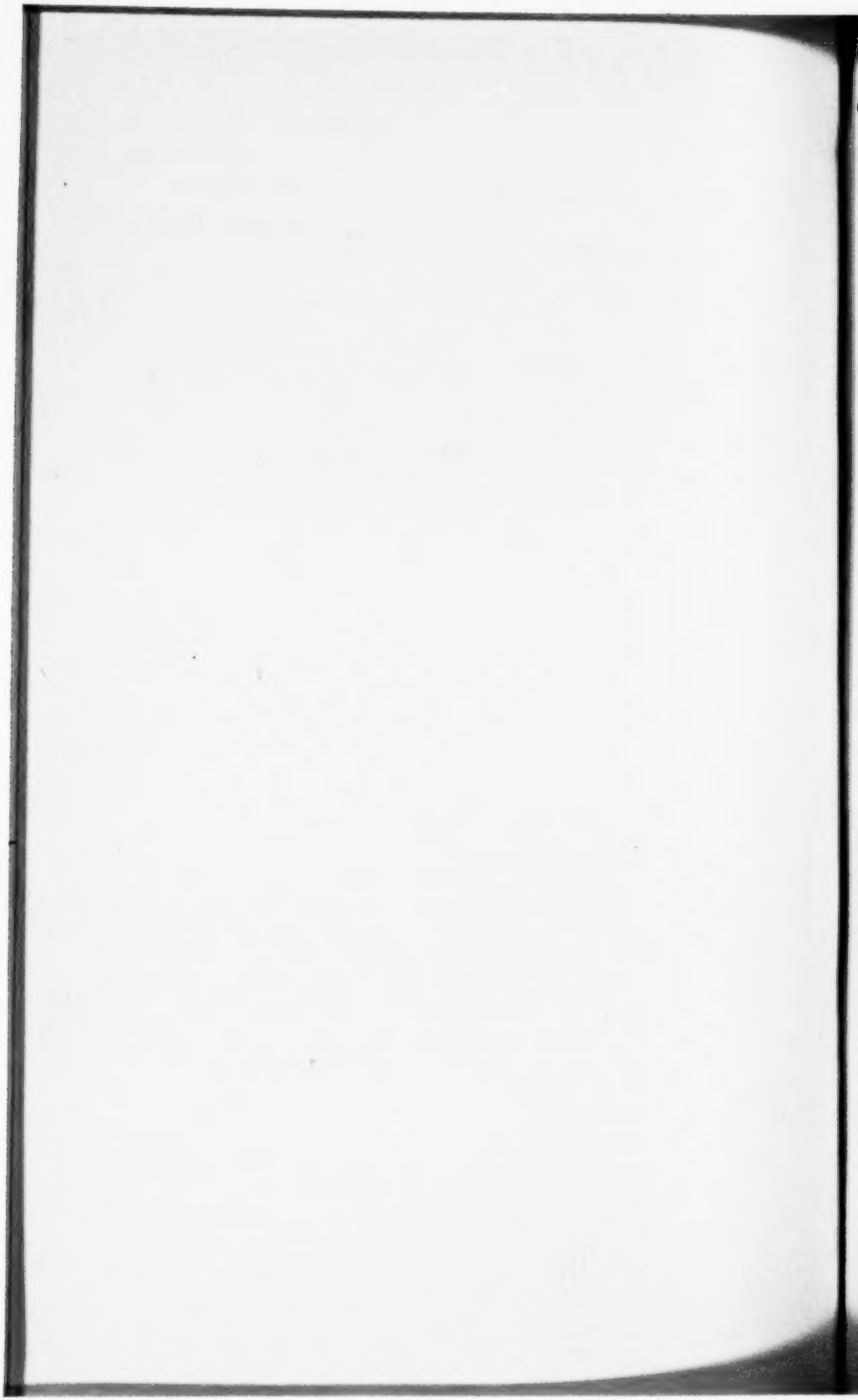
term on July 1st, 1898, as shown by the record- of said court in my office.

Witness my hand & seal of said court this September 9th, 1899.

[Seal Supreme Court, State of Mississippi.]

E. W. BROWN,
Clerk Supreme Court of Mississippi,
By C. C. CAMPBELL, *D. C.*

[Endorsed:] File No., 17,341. Supreme Court U. S., October term, 1899. Term No., 244. The Yazoo & Miss. Valley R. R. Co., P. E., *vs.* Wirt Adams, State revenue agent. Stipulation to correct transcript of record and certificate of clerk of supreme court of Mississippi. Office Supreme Court U. S. Filed Sep. 14, 1899. James H. McKenney, clerk.



Office Supreme Court U. S.
FILED
APR 24 1899
JAMES H. McKENNEY,
Clerk.

No. 244. 35

Brief of Guthrie, Mayes & Fentress for P. E. (mo.

MISSISSIPPI RAILROAD TAX CASES.

Filed April 24, 1899.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 244

ON MOTION TO DISMISS OR AFFIRM.

YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY ET AL.,
Plaintiffs in error,
vs.
WIRT ADAMS, State Revenue Agent, Etc.

In error to the Supreme Court of Mississippi.

BRIEF OF ARGUMENT ON BEHALF OF PLAINTIFFS IN ERROR IN OPPOSITION TO THE MOTION TO DISMISS OR AFFIRM.

WILLIAM D. GUTHRIE,
EDWARD MAYES,
JAMES FENTRESS,
NOEL GALE,
Of counsel for plaintiffs in error.

WASHINGTON, April 24, 1899.

(To replace file copy accidentally destroyed)

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 756.

YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY, ET AL.,
Plaintiffs in error,
vs.
WIRT ADAMS, State Revenue Agent, Etc.

In error to the Supreme Court of Mississippi.

BRIEF OF ARGUMENT FOR PLAINTIFFS IN ERROR IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

This application for the dismissal of the writ of error or affirmance without opportunity for a full hearing upon the question of jurisdiction and the merits should be denied. The present case not only involves a very large amount of money[1], but the points presented are of far-reaching consequence to the plaintiffs in error and other railroads in the State of Mississippi. The nature of the contract now impaired and nullified has never been considered by this court. A summary dismissal of the writ of error upon motion without argument would work great injustice to the plaintiffs in error by denying them their right to have their day in court. It is true that cases involving state taxes should be closely scrutinized and that any unnecessary delay in disposing of them should be prevented in order that a State may not be embarrassed in their collection. But this rule does not warrant a withholding of the right to be heard in argument upon the merits of such grave and serious issues as are here involved.

1. The judgment below is for $548,676 taxes and $27,433 penalty, and suits for the taxes of other years are pending.

In this case, moreover, it is quite proper to call the attention of the court to the fact that the State will not suffer any particular hardship or inconvenience by reason of the delay necessary for an argument. Taxes on the railroad in question have never been collected by the State, and therefore a short delay now cannot embarrass it. Indeed, it is only by a complete change of front on the part of the state courts—by the overturning of a long line of decisions and the reversal of the previous policy of the State[1]—that there is now any chance of these taxes being exacted in violation of what were relied on as contract and vested rights. At best, the present asserted right of the State to collect the taxes is purely accidental and the unintentional result of a voluntary consolidation of railroad companies. The argument on the merits can be advanced for hearing and an ample supersedeas bond has been furnished to protect the State.

The Federal question now presented has been litigated for years in the state court. The Supreme Court of Mississippi on the first hearing of this case ordered two reargruments and took eighteen months to reach a conclusion, and even then the decision was by a divided court, two judges to one. The result was the reversal of a decision which was exactly in point and which involved the same charter, the action being merely for a different year's taxes.[2] The particular decision now sought to be reviewed practically overrules and disregards rulings in similar cases acquiesced in for over twenty years. The Chief Justice of Mississippi dissented, lamenting the over-

1. *Mississippi Mills* v. *Cook*, 56 Miss. 40, 50; *McCulloch et al.* v. *Stone*, 64 Miss. 378; *Y. & M. V. R. R. Co.* v. *Thomas et al.*, 65 Miss. 553; *Vicksburg Bank* v. *Worrell*, 67 Miss. 47; *Attala County* v. *Kelly*, 68 Miss. 40; *L. N. O. & T. Ry. Co.* v. *Taylor*, *68 Miss.* 361; *Railroad Co.* v. *Lambert*, 70 Miss. 779.

2. *Railroad Co.* v. *Lambert*, 70 Miss. 779, 788.

ruling of the prior cases[1]. The present judgment, which was rendered upon the second appeal, is also upon a decision by a divided court; for the Chief Justice adheres to his former dissent. He also certifies to this court in the clearest language that a Federal question was involved below.[2]

The propositions upon which the plaintiffs in error have always relied and now rely as involving Federal questions are (1) that the provision as to the application of taxes embodied in the charter of the Louisville, New Orleans and Texas Railway Company constituted a valid

1. In dissenting Chief Justice WOODS said: "The Lambert and the Cook decisions are themselves supported by reason and authority, and should not be overruled. It is lamentable if no opinions, however supported in reason or by authority, and no matter what rights may have arisen under them, are to be permitted to stand simply because not in agreement with the personal views of succeeding judges. No greater reproach can be fixed upon the judiciary, no greater calamity can befall the State than to have it understood that, with every change in the mere membership of the court of final resort, the law as solemnly declared by former courts, composed of different membership, is to be unsettled, and again and again unsettled by every succeeding court, simply to enable new judges to exploit their peculiar views. In such case, all notion of stability and fixedness is gone, and absolute uncertainty and endless confusion will be introduced into our jurisprudence." (Special Record, p. 130).

2 STATE OF MISSISSIPPI,
IN THE SUPREME COURT, NOVEMBER SPECIAL TERM, 1898.

YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY ET AL.,
Appellants,
v.
WIRT ADAMS, State Revenue Agent.

I, Thomas H. Woods, chief justice of the supreme court of the State of Mississippi at the present time and upon the argument and hearing of the above-entitled appeal, do hereby certify:

I. That upon the said argument and hearing the validity of legislation and of sections 180 and 181 of the constitution of Mississippi subsequent to the statute of Mississippi of March 3rd, 1882, was drawn in question by the said Yazoo and Mississippi Valley Railroad Company, the said Illinois Central Railroad Company, the said Chicago, St. Louis and New Orleans Railroad Company, the said Canton, Aberdeen and Nashville Railroad Company, the said Stuyvesant Fish, and the said James T. Harrahan, on the ground of such legislation being repugnant to section 10 of article 1 of the Constitution of the

contract; (2) that this contract has not been waived but is still in full force and effect, and (3) that the giving effect to the subsequent tax laws impaired its obligation. The validity and effect of the contract were the only real issues ever involved in the controversy.

It is, of course, well established that the plaintiffs in error are entitled to have the original existence, the nature and the proper construction of the contract determined independently by this tribunal as well as the question whether the contract is still in existence and has been impaired. Upon those essentially Federal questions a hearing is now prayed. It must certainly seem unreasonable to say that an appeal to this court in this case involves no Federal question whatever, or that, even if a Federal question is involved, it is manifestly "so frivolous as not to need further argument."

United States, in that such legislation and constitutional provisions impaired the obligation of a contract between the State of Mississippi and the Yazoo and Mississippi Valley Railroad Company, and that the decision of the said supreme court of Mississippi was in favor of the validity of such legislation and such constitutional provisions.

* * * * * * *

III. That upon the said argument and hearing the validity of the statutes of Mississippi in the annotated code of 1892 providing for the taxation of railroads and of the act of 1894 defining the powers of the State Revenue agent and of sections 180 and 181 of the Mississippi constitution of 1890 were drawn in question by the said Yazoo and Mississippi Valley Railroad Company, the said Illinois Central Railroad Company, the said Chicago, St. Louis and New Orleans Railroad Company, the said Canton, Aberdeen and Nashville Railroad Company, the said Stuyvesant Fish, and the said James T. Harrahan, on the ground of their being repugnant to the constitution of the United States and the fourteenth amendment thereto, in that in and by the said statutes and constitutional enactments the State of Mississippi denies to the said Yazoo and Mississippi Valley Railroad Company within its jurisdiction the equal protection of the laws, and that the decision of the said Supreme Court of Mississippi was in favor of the validity of the said statute.

* * * * * * *

IN WITNESS WHEREOF, I have hereunto subscribed my name this 2d day of March, in the year one thousand eight hundred and ninety-nine.

THOMAS H. WOODS,
Chief Justice Supreme Court.

In the special record many important documents are not included which ought to be considered by the court on this application. Thus we find omitted:

1. The certificate of the Chief Justice of Mississippi that a Federal question was involved below (Transcript, p. 690).

2. The assignment of errors under section 997 of the Revised Statutes (*Id.*, p. 700).

3. The charter of the Yazoo and Mississippi Valley Railroad Company, the principal defendant below (*Id.*, p. 45).

4. The second, third, fourth and fifth declarations (*Id.*, pp. 70, 99, 611, 622).

5. The pleas of the Yazoo and Mississippi Valley Railroad Company (*Id.*, p. 551).

6. The judgment of the Supreme Court on the first appeal (*Id.*, p. 512).

It has been generally understood as a settled rule of practice that if any material paper be omitted from a special record, thus compelling the court to refer to the whole transcript for an accurate understanding of the case, the motion to dismiss will be denied or its consideration deferred until the hearing on the merits. But, as the interests involved in this case are very large, the plaintiffs in error have felt forced to print the record itself for use on this motion, should the court desire to consult it.

In the brief of the argument of the defendant in error on the motion to dismiss, fifteen grounds are set forth. It is difficult to understand why most of these grounds are assigned. Many are based upon arguments that the plaintiffs in error obviously could not make in this court. In support of three of the grounds (10, 11 and 12) the court is asked to refer to certain summonses which are not in the transcript and were not before the court below. Indeed, the special record and the papers filed with it have been inartificially prepared,

and evidently in too much haste. Some of the grounds of dismissal have not a semblance of merit, and were obviously inserted as mere ventures in the hope that they might possibly be considered as furnishing color or excuse for the experiment of the motion. The court ought not to be thus unnecessarily burdened.[1]

I.

THE NATURE OF THE CONTROVERSY BELOW.

In 1870, when the legislation in question in this controversy was first enacted, the condition of the State of Mississippi was indeed miserable.[2] Her resources had been exhausted by the struggle and sacrifices of the Rebellion. The great revolution in industrial, agricultural and economic conditions resulting from the Civil War and the liberation of the slaves had left the community so poor that with difficulty could the inhabitants bear the burden of the taxes necessary for carrying on the local government. Millions of acres were forfeited to the State for non-payment of taxes. It seemed a paramount necessity that means of communication and transportation by railroads should be provided. The State could

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1. The court is also asked to refer to several hundred folios of decisions of the state court not printed in the special record and is likewise referred to "our original brief on file, pp. 16, 17, 25-41," of which no copy was served on this application. There were three or four briefs filed in the state court. The plaintiffs in error are not apprised exactly what brief is referred to.

2. In *Mobile & Ohio Railroad* v. *Tennessee*, 153 U. S. 486, 502, Mr. Justice JACKSON said: "In *Preston* v. *Browder*, 1 Wheat. 115, 120, it was said that in the construction of the statutory laws of a State it is frequently necessary to recur to the history and situation of the country in order to ascertain the reason, as well as the meaning, of many of the provisions in them. * * * Legislative contracts, especially, should be read in the light of the public policy entertained, and the purposes sought to be accomplished at the time they were made, rather than at a later period when different ideas and theories may prevail."

not undertake nor even aid their construction by bonds or taxation. The topography of the country was such that both the construction and maintenance of railroads were unusually difficult and expensive. Especially in the Mississippi Delta—that extensive region lying between Memphis and Vicksburg, on the one hand, and the Mississippi River and the bluffs east of the Yazoo, on the other—the country was a wilderness. Except for small areas along the fronts of the navigable rivers, it was waste and wild swamp—uncultivated, uncleared, unexplored, subject to annual inundations from the Mississippi. The levees had been swept away. The only chance or prospect of development and improvement was by inducing the investment of capital belonging to the inhabitants of other States and countries. Facing this condition of things, the legislature, in the exercise of what must seem to all candid minds a wise foresight, for the purpose of attracting foreign capital to an enterprise of very doubtful profit, undertook to induce investment in railroads, and thus to provide the necessary means of communication and transportation. It thereupon passed an act under which the State pledged the public faith and agreed as follows (Laws of 1870, ch. 104, sec. 21, entitled "An Act to incorporate the Mobile and Northwestern Railroad," approved July 20, 1870):

> "SEC. 21. *Be it further enacted*, That in consideration of the construction of the Railroads provided for herein, and of the great benefit which the State will receive in the developement of its agricultural resources by means of said Railroads as works of internal improvement, and also of the increased value which will thereby be added to the property of the State, thus enabling the State to greatly increase its revenue without additional and burdensome taxation upon the people, the State hereby agrees with said Company (AND WHICH

AGREEMENT IS IRREPEALABLE),[1] that all taxes to which said Company shall be subject for the period of thirty years, are hereby appropriated and set apart, and shall be applied to the payment of the debts and liabilities which the said Company may have incurred in the construction of said road, or for money borrowed by said Company upon lands or otherwise, to be used in constructing said road, or paying debts incurred by said Company in constructing the same; and it shall be the duty of the Tax Collector in every county in each and every year, to give to said Company a receipt in full for the amount of said taxes upon receiving from said Company an affidavit made by the President or Cashier of said Company, that the amount of said taxes have actually and in good faith been paid and applied by said Company during the year, in payment of the debts incurred, or money borrowed as aforesaid, and which receipt so given shall be in full of all taxes, county, State and municipal, to which said Company shall be subject; *provided, however*, That, whenever the profits of said Company shall enable it to declare and pay to the stockholders an annual dividend of eight per cent. upon its capital stock over and above the payment of its debts and liabilities, then the appropriation of the taxes aforesaid shall cease, and said taxes shall be paid by said Company to the Tax Collector, to be by him paid over as required by law."

This provision was accepted by the railroad company and many millions of dollars were invested in the State upon the faith thereof. A large portion of the railroad now involved was built in reliance upon this act. As long as new railroads were necessary and construction continued with its consequent inpouring of foreign capital, the validity and inviolability of this statutory contract remained unchallenged. After twenty-

1. At the time the act of 1870 was passed, there was a general statute in Mississippi (Code of 1857, chap. 25, art. 5), which provided that the charters of all corporations should be repealable unless otherwise expressly provided in the charter. When the act of 1870 was passed and this right as to taxes was conferred, it was necessary that the above-quoted language should be inserted, in order to withdraw the act from the operation of the general statute as to repealability (*Shotwell* v. *Railway Co.*, 69 Miss. 541, 556).

eight years of acquiescence in the constitutionality of this legislation, the Supreme Court of Mississippi held last year that it was invalid from the beginning.

It will be fit and proper to appreciate at the outset that the State of Mississippi surrendered nothing in granting the privileges now stricken down as unconstitutional, and so vehemently criticised by the majority of the judges of her Supreme Court. Those privileges—call them exemptions or what you please—were not grants to existing corporations in order that taxpaying properties *in esse* might be relieved of their just share of taxation, but they were inducements held forth to attract capital from abroad, and thereby to create new property and value which at the time did not exist, but which would furnish a subject for taxation in the future. The legislature also had in mind the incidental, but far more important, result that the railroads so brought into being would develop the resources of the wilderness, and would create value and prosperity where waste, poverty and desolation then existed. And such has been the result.

The Railroad Companies have carried out their compact in overflowing measure. It was almost foolhardy to construct a railroad in the Delta region at that time, in view of the lack of levee protection, but it was done, and done in two years. Eight hundred miles of railroad, penetrating the wildest regions, have turned what was once a worthless and desolate wilderness into the finest portion of Mississippi. The State has gotten more than was bargained for. Yet it now repudiates the obligation, forgetting the unvarying experience and lesson of the past—that no community has ever, in the end, been a gainer by a breach of public faith.

The legislature of Mississippi in 1882 authorized the

creation of what became the Louisville, New Orleans and Texas Railway Company by the consolidation of certain existing companies. The act of 1882 expressly conferred upon the new company all the privileges of section 21, above quoted, by the following language (Laws 1882, p. 1013):

> "SEC. 5. *Be it further enacted*, That the provisions of the twenty-first section of an act entitled 'An Act to incorporate the Mobile and Northwestern Railroad,' approved July 20, 1870, is hereby made to *apply to the said consolidated company*, and for that purpose the said section is hereby declared to be part of this act, and this section shall be construed as though the said twenty-first section was specially and fully set out herein; but this section shall not be in force for a longer time than twenty-five years from the approval of this act."

The agreement embodied in section 21 was relied on by the L., N. O. & T. Company in the building of its railroad at great expense, and was the principal inducing cause for the investment of foreign capital within the State in its construction. This Company was consolidated in 1892 with the Yazoo and Mississippi Valley Railroad Company, which succeeded to all its rights. The Supreme Court of Mississippi now holds, among other things, that the rights under section 21 were lost by the consolidation, or, if not so lost, were unconstitutional and void from the beginning.

The State of Mississippi was also accustomed to grant exemptions from taxation. Indeed, at the session of 1882, at which was passed the act now relied on, the legislature incorporated the Yazoo and Mississippi Valley Railroad Company, and granted to it and fourteen other companies an express exemption from taxation upon compliance with certain conditions. This exemption from taxation was involved in the litigation before this

court in *Yazoo Railroad Co.* v. *Thomas*, 132 U. S. 174, 184, where the wording of the statute will be found. Many other instances of both classes of grants are set forth in the appendix.

Thus there were two distinct forms of legislative aid or contract in use in Mississippi, the one, as in the case of the Yazoo charter, granting an exemption from taxation, and the other, as in the charters of 1870 and 1882, agreeing to appropriate a certain amount, equal to the taxes, for the gradual reimbursement of the cost of construction. The State, therefore, clearly recognized the essential difference between the two forms of contract. It is also significant that the constitutionality of even the exemption from taxation, contained in the Yazoo Railroad Company's charter and those of many other roads, was for many years acquiesced in by all the courts and officials of Mississippi, and was never challenged previous to the case at bar. The court will recall that in *Yazoo Railroad Co.* v. *Thomas*, 132 U. S. 174, 184, Mr. Chief Justice FULLER, commenting upon this fact, said:

> "The Supreme Court of Mississippi did not put its decision upon the ground that it was not competent under the state constitution for the State to contract with the company that the latter should not be subjected to taxation."

All these contracts for exemption and the appropriation of taxes, upon the faith of which millions have been invested in Mississippi, are now to be torn up by the roots, and the State is to impair the obligation which it assumed and repudiate the contract which was made with investors. Surely there never was an instance presented to the court in which the protection of the contract clause of the Federal Constitution should more clearly

apply—never a case which came more completely within the very evil contemplated by the framers of the Constitution—never a case in which the plighted public faith has been more grossly broken and solemn obligations more indefensibly violated. That such a controversy essentially involves a Federal question of the gravest kind must be self-evident.

No extended argument is deemed necessary here upon the nature and effect of this contract. A few suggestions are, however, submitted in order to satisfy the court that the points are serious and that the questions warrant full argument upon the merits and the most careful consideration.

A.

Upon the merits, the plaintiffs in error expect that they will be able to convince this court that the contract for appropriation of taxes embodied in section 21 of the act of 1870 as re-enacted in 1882 did not constitute an exemption from taxation, but on the contrary was a contract and property right of such a character as survived the consolidation or merger of 1892. This distinction has been insisted on throughout the litigation, and is not an after-thought urged in this court for the first time. The prevailing opinion on the first appeal refers to the point in these words (transcript, p. 676):

> "There is a rather curious proposition of counsel for the railroad companies in his brief at pages 118 *et seq.* The argument is that what was provided by the 21st section of the North Western charter was not an *ordinary exemption* at all, although counsel admits that the Lambert case expressly so decided, but that it was a *contract* of *appropriation irrepealable* in its nature, and not an exemption at all."

The court below, however, refused to treat the contract

as differing in substance from an express exemption. But even if this court should hold that the contract does constitute an exemption, nevertheless the plaintiffs in error will contend and it is believed will satisfy the court that the exemption is a valid contract, "irrepealable" in the very language of section 21, and was not lost by the consolidation.

Section 21 not only does not in terms grant an exemption, but its purpose is entirely different. The railroad is left subject to all manner of taxation, and taxes to the amount of hundreds of thousands of dollars have been actually levied. The legislature simply agrees that all the taxes to which the railroad might be subjected for twenty-five years shall be appropriated and applied to the repayment or reimbursement of the cost of building. The act contemplates a regular assessment and levy of all taxes. The right to tax is reserved. Only when the amount is proved to have been applied as directed by law is the receipt or credit given. The amount to be specified in the affidavit can not be known until the tax had been imposed. The Railroad Company is not relieved or exempted from paying its taxes; it is merely permitted to pay them by applying the amount to payment of its construction debt in which the State and its inhabitants had a very direct and tangible interest. The act plainly contemplates the direct payment of the taxes assessed, in the usual and ordinary course, *unless* the company shall do, each year, two things—(1) pay an amount equal to the taxes on its construction debts, and (2) prove such payment by making the statutory affidavits. There is nothing in this transaction to show a surrender by the State of its taxing power. The amount of a tax has merely been appropriated for certain purposes which are undoubtedly public in character. The legisla-

ture could with perfect propriety have granted aid for these purposes to any given amount and for any specified term, and could have provided that a certain amount should be paid each year. The effect would have been the same as that accomplished by this act.

The State could indisputably appropriate, or agree to appropriate, say $100,000 a year to reimburse and pay for the cost of constructing a railroad as a public work of internal improvement. Instead of doing that, a contract was made with the bond and stockholders of these railroads, that, if they would loan the money and make the necessary advances for building the road, part of the cost would be repaid to them gradually out of a special fund made up of taxes on the very property the owners were creating, and in an annual amount equal at least to the taxes actually imposed. The State thus risked absolutely nothing.

A broad distinction must be observed between an ordinary bare exemption from taxation discussed in most of the cases, and a contract such as that involved in this case, by which the State appropriates, in aid of public improvements, the proceeds of a tax regularly levied and collected. Unless restrained by some specific inhibition of the state constitution, the legislature had full power to grant moneys for any public improvement. There was no such inhibition in the Mississippi Constitution of 1869, nor in that of 1890. The Supreme Court of Mississippi has repeatedly declared the doctrine that the building of a railroad is a public use, in aid of which taxes may be laid (*Brown* v. *Beatty*, 5 George, 227, 240; *Hawkins et al.* v. *Carroll Co.*, 50 Miss. 735, 757; *New Orleans, &c., R. R. Co.* v. *McDonald*, 53 Miss. 240, 245; *Miss. Const.* 1869, Art. 12, Sec. 14). The same rule has always been held in this court, and prevails throughout this country (*Rogers*

v. *Burlington*, 3 Wall. 654, 663; *Thomson* v. *Lee County*, 3 Wall. 327, 330; *Mitchell* v. *Burlington*, 4 Wall. 270, 273; *Railroad Company* v. *County of Otoe*, 16 Wall. 667, 672; *Olcott* v. *The Supervisors*, 16 Wall. 678, 694; *Sharpless* v. *Mayor of Philadelphia*, 21 Pa. St. 147, 169; *Thomas* v. *Leland*, 24 Wend. 65, 68; *Napa Valley R. R. Co.* v. *Napa Co.*, 30 Cal. 435, 437; *Stein* v. *Mayor of Mobile*, 24 Ala. 591, 614).

In *Pacific Railroad Company* v. *Maguire*, 20 Wall. 36, 44, an absolute exemption from taxation for a limited period had been conferred upon a railroad company. Subsequently, the people of the State adopted, as part of the state constitution, an ordinance taxing the gross receipts of the company and providing that the proceeds of the tax should be appropriated to the payment of certain bonds of the State lent by it to the company, and upon which, as between the State and itself, the company was liable. It was claimed that this legislation did not impose a tax, as such, since it merely applied the income of the company to the payment of debts which were alike debts of the State and of the company (argument for defendant in error, 20 Wall. 41). The court held that the ordinance in question clearly imposed a tax. This case is express authority for the proposition that, in the case at bar, section 21 in fact provides for taxation as such and for nothing else, and does not exempt the Railroad Company from taxation notwithstanding the appropriation of the tax to the payment of its construction debt.

The practical effect of the contract of appropriation was not only to confer a present benefit upon the State through the general increase of property and values flowing from the construction of the road and payment for a

public improvement without cost to the State, but also to confer a future benefit by adding to the taxable wealth of the State this particular property, with diminished debt, and, consequently, more valuable and subject to greater taxation. Necessarily, the net earnings of of such a company would be increased by the payment of so much of its debt. Another and greater public benefit would accrue from the fact that the reimbursement of the construction debt would put it in the power of the State to compel lower rates of carriage. (*Smyth* v. *Ames*, 169 U. S. 466, 546).

In other words, the State, by the contract under consideration, undertook to aid in the repayment of the construction debt, and this undertaking tended directly to induce and secure the actual construction of the road. In fact, the builders of the railroad were advancing the amount of the taxes in order to construct a public improvement, for the construction of which the whole community might properly have been taxed. The owners of the railroad remained liable for taxes certainly to the full amount and probably to an increased amount because of the increased value of their property resulting from the gradual payment of the construction debt. Not a dollar of taxation was exempted or remitted. The State did nothing to impair or diminish its resources or funds. The only sum appropriated consisted of taxes levied upon property which, but for the appropriation, might never have existed. In this indirect way there was accomplished what no one can doubt might have been accomplished by a direct and undisguised grant of state funds.[1]

1. The State in 1871 passed a subsidy act (ch. 359) donating $4,000 per mile to any railroad building in the State.

B.

The next point to consider upon the merits is whether the benefit of the contract for the appropriation of taxes, or exemption, if it be so held, was lost by the consolidation agreement of 1892 (special record, p. 3). The general rule is well settled that the rights, privileges and contract rights of consolidating corporations pass to and are vested in the consolidated company, and that tax exemptions are lost only when a new corporation is created by the consolidation.

In the case of *Railroad Co.* v. *Lambert*, 70 Miss. 779, 790, decided in 1893, the Supreme Court of Mississippi expressly upheld the contract rights of the plaintiffs in error and decided that they had not been lost by the consolidation, viz.:

> "We think it clear that the immunity possessed by the Natchez, Jackson & Columbus Railroad Company was not lost by its sale *and consolidation*, which was expressly authorized, and that, as to this, everything remained as before.[1]
>
> "By their charters, the Louisville, New Orleans & Texas Railway Company and the Yazoo & Mississippi Valley Railroad Company, were empowered to consolidate, and *the immunity claimed by the Louisville, New Orleans & Texas Railway Company, for the right to pay taxes on what was the Natchez, Jackson & Columbus Railroad Company was not lost by its merger in the Yazoo & Mississippi Valley Railway Company, but it went into that company with all its rights, privileges and immunities, as far as could be in the merger, and nothing was lost thereby, except as necessarily resulted from the union.*"

The effect of the merger upon the contract between the State and the Railroad Company is entirely different from what it would have been upon a mere im-

1. That is, the consolidation later between the L., N. O. & T. and the Y. & M. V.; for there never was any consolidation between the N. J. & C. and any other company.

munity or exemption from taxation. This grant or appropriation is not an immunity or exemption, but is a contract right under which the Railroad Company had the privilege of paying its taxes in a specified manner. If it does not see fit to pay off any part of its construction debt, it still must pay the taxes; but it is not exempted from paying in one form or another the full amount of the taxes whatever they may be—that is, either to the tax collector or to the persons to whom it is indebted for construction. The case is analogous to those which deal with the effect of consolidation upon ordinary property rights, privileges and contracts, rather than to those which are limited to the consideration of the effect of consolidation or merger upon special statutory exemptions from taxation.

In *County of Scotland* v. *Thomas*, 94 U. S. 682, 693, it was held, following certain decisions of the Supreme Court of Missouri, from which State the case came, that a charter to a railroad company, giving counties the right to subscribe for stock of the company, conferred a right and privilege upon the railroad company which passed upon consolidation to the consolidated company. A subsequent constitution of the State had declared that no county should become a stockholder in, or loan its credit to, any corporation without the assent of two-thirds of the voters, but it was held that this language was prospective, and that the right and privilege of the existing company to receive such subscriptions was not affected by it. The case is particularly in point because the new constitution—as in the case at bar—was adopted after the charter and before the consolidation; that is to say, the charter was granted in 1857, the new constitution was adopted in 1865, and the consolidation was authorized in

1869. In delivering the opinion of the court, Mr. Justice BRADLEY said:

> "The power was sought at the hands of the legislature, and was given. It was relied on by those who subscribed their private funds to the enterprise. It was involved in the general scheme as an integral part of it, and as much contributory and necessary to its success as the prospective right to take tolls. Why it should not still attach to this portion of the road, as one of the rights and privileges belonging to it, into whose hands soever it comes, by consolidation or otherwise, it is difficult to see. * * * Subscription to the stock was not only a power of the county, but a privilege to the company,—being a portion of the rights and privileges which it obtained by translation from the charter of the North Missouri Railroad Company. * * * The power of the counties to subscribe being thus held to be a right and privilege of the company, in our opinion, passed with its other rights and privileges into the new conditions of existence which the company assumed under the consolidation."

To the same effect see: *Town of East Lincoln* v. *Davenport*, 94 U. S. 801, 805; *County of Henry* v. *Nicolay*, 95 U. S. 619, 626; *County of Schuyler* v. *Thomas*, 98 U. S. 169, 173; *Wilson* v. *Salamanca*, 99 U. S. 499, 504; *Empire* v. *Darlington*, 101 U. S. 87, 91; *Menasha* v. *Hazard*, 102 U. S. 81, 95; *Harter* v. *Kernochan*, 103 U. S. 562, 573; *County of Tipton* v. *Locomotive Works*, 103 U. S. 523, 537; *New Buffalo* v. *Iron Co.*, 105 U. S. 73, 76; *Livingston County* v. *Portsmouth Bank*, 128 U. S. 102, 114; *Denison* v. *Mayor, etc., of City of Columbus* (District of Mississippi), 62 Fed. Rep. 775, 777; S. C., affirmed in Circuit Court of Appeals, 69 Fed. Rep. 58, 60.

In *Green County* v. *Conness*, 109 U. S. 104, 106, it was held that where the act authorizing consolidation did not expressly declare that the rights, privileges and franchises of the consolidating company should pass over to

the company with which it might become consolidated, but only that it might consolidate "with any other company upon such terms as may be deemed just and proper,"[1] the new company, nevertheless, acquired the right to receive subscriptions belonging to the consolidating company. Mr. Justice BRADLEY said:

> "* * * When two companies are authorized to consolidate their roads, IT IS TO BE PRESUMED THAT THE FRANCHISES AND PRIVILEGES OF EACH CONTINUE TO EXIST IN RESPECT TO THE SEVERAL ROADS SO CONSOLIDATED. This point was considered in the case of *Tomlinson* v. *Branch*, 15 Wall. 460, and *Branch* v. *City of Charleston*, 92 U. S. 677, and was decided in accordance with this view. This being so, the authority given to consolidate, 'upon such terms as may be deemed just and proper,' would include the power to transfer to the consolidated company the franchises and privileges connected with the road, if the law itself did not have that effect."

In *Keokuk & Western Railroad* v. *Missouri*, 152 U. S. 301, 305, Mr. Justice BROWN said:

> "In the numerous cases which have arisen in this court as to the effect of a consolidation upon the existence and status of the constituent corporations, it has been held that the question of the dissolution of such corporations depended upon the language of the statute under which the consolidation took place—the presumption in each case being that each of the two lines of road will be held respectively to the privileges and burdens originally attaching thereto. *Tomlinson* v. *Branch*, 15 Wall. 460. If, upon the one hand, the identity of the prior corporations is preserved, an exemption from taxation, which one of them possessed, falls to that portion of the new corporation to which, under its former name, it had been attached. If, upon the other hand, the consolidation worked a dissolution of the prior corporations, their former privileges and franchises also ceased to exist."

1. Almost the same words as are used in the act of August 8, 1870.

The *Keokuk* case did not overrule *Tomlinson* v. *Branch*, 15 Wall. 460; *Central Railroad, etc., Co.* v. *Georgia*, 92 U. S. 665, and the other cases to the same effect.[1] These decisions are directly in point in the case at bar and should govern the branch of the case relating to the effect of the consolidation.

The true test in consolidation cases, when considering exemptions from taxation, is to inquire whether or not the prior corporations were absolutely dissolved and a new corporation created, so that it can be said that the privileges, immunities and franchises of the prior corporations ceased to exist. The presumption is that each of the consolidating lines of railroad continues entitled to any privilege or exemption attached to it. In order to rebut this presumption, it must appear that the consolidation "worked a dissolution of the prior corporations." The determination of this question clearly depends "upon the language of the statute under which the consolidation took place." If this language necessarily created a new company, then it may be said that the exemptions from taxation of the old corporations ceased to exist, but never has it been held that other contract rights of the constituent corporations disappear. In the case at bar, the language of the Mississippi statutes authorizing the consolidation not only did not work a dissolution of the consolidating companies, but, as matter of fact, did not authorize or sanction the creation of any new corporation. No new corporate franchises sprang into existence; no new capital stock was created; no new corporate entity arose. There was simply

1. *Philadelphia and Wilmington Railroad Co.* v. *Maryland*, 10 How. 376, 393; *The Delaware Railroad Tax*, 18 How. 206, 227; *Southwestern Railroad Company* v. *Georgia*, 92 U. S. 676; *Green County* v. *Conness*, 109 U. S. 104, 106; *Tennessee* v. *Whitworth*, 117 U. S. 139, 145.

a merger or transfer of the property and franchises of one corporation into another existing corporation, as was the case in *Tomlinson* v. *Branch*, 15 Wall. 460, and *Central Railroad, etc., Co.* v. *Georgia*, 92 U.S. 665. The mere use of the word "consolidation" in the statute or consolidation agreement signifies nothing,[1] for it was used in all the cases in which the court has held that even exemptions from taxation survived. And it is immaterial that in some other State a new corporation *quoad* that State was created. We are dealing solely with the legislation of Mississippi. Did it authorize and contemplate a new corporation, and was that the effect of the merger agreement in Mississippi? Clearly not, if we correctly construe the statutes which authorized the consolidation of 1892.

The power of the L., N. O. & T. Company to consolidate was contained in section 16 of the act of August 8, 1870, originally incorporating the Memphis and Vicksburg Railroad. This right passed to the L., N. O. & T. Company under the consolidation authorized by the act of 1882. The statute of 1870 provided:

> "That said Company shall have the right and power to consolidate the stock, property, and franchises of the road with any other road or roads, in or out of this State, at any time that the President and Directors of the road may deem proper, and upon such terms as may be consistent with the powers conferred upon said Company."

The authority conferred upon the Yazoo Company to consolidate, and under which the consolidation on its part was effected, was contained in the act of February 17, 1882, as follows:

> "Said company may consolidate with any other railroad company in or out of the State of Mississippi upon

1. Morawetz on Corporations, Sec. 942, p. 900.

such terms as the consolidating companies may agree upon."

The two companies thereupon agreed to consolidate upon the following terms (special record, pp. 3, 4):

"ARTICLE 1. Such consolidation shall be effected by uniting or merging the stock, property and franchises of the party of the first part, with and into the stock, property and franchises of the said Yazoo & Mississippi Valley Railroad Company, without disturbing the corporate existence of the last named company, or the formation of any new distinct corporation, unless such result shall be necessary to give legal effect to this agreement; but whatever may be the legal consequence of the consolidation herein provided for, this agreement is to stand and be effective.

"ARTICLE 4. Any holder of the stock of either of the said companies now outstanding shall be entitled to cast one vote for each share of stock held by him at all stockholders' meetings of the consolidated company, which vote may be cast either in person or by proxy, and shall have all the rights of a stockholder of the consolidated company, as fully as if new shares of the consolidated company had been issued and exchanged therefor, and in case the consolidated company shall determine to issue new shares, such shares shall be exchangeable at par for the new outstanding shares of each of the constituent companies, and the remainder of the capital stock of the consolidated company shall be issued from time to time, and upon such terms and conditions as may be prescribed by the Board of Directors of said Company.

"ARTICLE 5. All and singular the rights, powers, privileges, immunities and franchises, and all the railroads, real and personal estate, easements, fixtures, equipments, choses in action and property, and assets of any kind, nature or description, belonging to either of the parties hereto, shall be vested in and become the property of the said consolidated company, without any further act, deed, conveyance or assurance being required in the premises."

It is confidently asserted that the plaintiffs in error will be able to convince this court by an oral argument on

the merits that all contract rights and exemptions from taxation survived the consolidation of 1892; and that the decision of the *Lambert* case, in 1893, was correct and should not have been overruled.

II.

As to the Federal question involved.

The Supreme Court of Mississippi decided five points, each of which involved a Federal question. In order that there may be no possible dispute as to this, we shall quote the language of the brief of the defendant in error on this motion as to the grounds of the decision below (pp. 10, 11), viz.:

> "In these consolidated causes the Supreme Court of Mississippi decided five things:
>
> 1st. That the legislature could not grant an exemption to a railroad company by name as such under said Constitution of 1869.
>
> 2d. That it could not grant an irrepealable exemption under said Constitution.
>
> 3d. That a new company was formed by the consolidation of October 24, 1892, and no exemption passed into it.
>
> 4th. That, if the consolidation was a technical merger, still Section 180 of the Constitution of 1890 prevented any exemption from passing into it.
>
> 5th. That any alleged exemption was repealed by the acts of 1884, 1886 and 1890."

Each of these grounds of decision obviously involved a Federal question, namely, (1) whether or not there was a contract to be protected from impairment, and (2) whether or not its obligation had been impaired. This is not a case in which a sufficient ground of decision exists other than the Federal question, for the validity and present existence of the legislative contract was the only question involved.

A memorandum as to the subsequent tax legislation given effect by the judgment below is printed in the appendix.

The theory of the defendant in error evidently is that the nature of the contract and its repealability are questions upon which this court, whatever its own opinion may be, must take the view of the court below, because the construction of the constitution and statutes of Mississippi is in some measure involved. It is urged by him that the case comes within the general rule that this court adopts the construction of state laws by state courts; but the one exception to this rule, namely, when the contract clause of the Federal Constitution is involved, has been overlooked by counsel, although but recently reiterated in *Douglas* v. *Kentucky*, 168 U. S. 488, 500; *McCullough* v. *Virginia*, 172 U. S. 102, 109; and *Water Power Co.* v. *Street Railway Co.*, 172 U. S. 475, 484.

In all cases arising under the contract clause of the Federal Constitution, it is the prerogative and duty of this court to inquire and judge for itself (1) whether a contract has or has not been made and is still in existence; and (2) whether the obligation of that contract has been impaired. In cases involving rights which do not arise under the contract clause of the Federal Constitution, this court may follow the decisions of the state courts as to the construction of local constitutions and laws; but whenever the Federal question arises under the contract clause, the construction of the local constitutions and laws is a matter which must be determined by this court according to its own views.

If this doctrine be applied, there will be no difficulty in perceiving that each of the five grounds of decision below clearly presented a Federal question under the contract

clause. Thus, the first two grounds of the decision—that the legislature had no power to grant an exemption — necessarily involved the question whether a contract had been made; the third ground presented the question whether the contract so made had been waived by consolidation proceedings, or, in other words, whether the contract still existed; the fourth ground gave effect to the new state constitution which was adopted eight years after the contract was made; and the fifth ground was based on an alleged repeal of a contract right which the plaintiffs in error claimed was irrepealable.

The state court could not have held the plaintiffs in error liable for the taxes in suit without deciding either (1) that the provision of section 21 did not constitute a contract, or that that contract had been waived, surrendered or abrogated, or (2) that the subsequent tax legislation of the state did not impair the obligation of that contract.

Willson and others v. *The Black Bird Creek Marsh Company*, 2 Pet. 245, 250; *Satterlee* v. *Matthewson*, 2 Pet. 380, 410; *Harris* v. *Dennie*, 3 Pet. 292, 301; *Craig et al.* v. *The State of Missouri*, 4 Pet. 410, 429; *Lessor of Fisher* v. *Cockerell*, 5 Pet. 247, 255; *Crowell* v. *Randell*, 10 Pet. 368, 392; *Armstrong et al.* v. *The Treasurer of Athens County*, 16 Pet. 281, 285; *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116, 141; *Furman* v. *Nichol*, 8 Wall. 44, 55; *Edwards* v. *Elliott*, 21 Wall. 532, 550; *Murray* v. *Charleston*, 96 U. S. 432, 441; *Smith* v. *Greenhow*, 109 U. S. 669, 670; *Chapman* v. *Goodnow*, 123 U. S. 540, 546; *Des Moines Nav. Co.* v. *Iowa Homestead Co.*, 123 U. S. 552, 555; *Great Western Telegraph Co.* v. *Purdy*, 162 U. S. 329, 334; *Chicago, Burlington, &c., R'd*, v. *Chicago*, 166 U. S.

226, 231; *Missouri, Kansas & Texas Railway* v. *Haber*, 169 U. S., 613, 621.

As Chief Justice WAITE said in *Chapman* v. *Goodnow*, 123 U. S. 540, 548:

> "We are aware that a right or immunity set up or claimed under the Constitution or laws of the United States may be denied as well by evading a direct decision thereon as by positive action. If a Federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of § 709 of the Revised Statutes, as if it had been specifically referred to and the right directly refused."

The defendant in error contends that, even if a valid contract was made providing for the appropriation of taxes for a particular public purpose, nevertheless the court below held that this contract right was lost by the consolidation of 1892, and, further, that this decision of the court below as to the effect and result of the consolidation "is merely a construction by the state court of its own local laws, and raises no Federal question" (defendant's brief, p. 25). In other words, the position is that the decision of a state court, as to whether a contract is still in existence or has been waived, is conclusive upon this court. This is not the rule. This question as to the existence of a contract as well as its true construction has been in all cases determined by this court independently of the decisions of the state court, and in some cases in direct opposition to the rulings of those tribunals: *Ohio Life Insurance and Trust Company* v. *Debolt*, 16 How. 416, 432; *Jefferson Bank*, v. *Skelly*, 1 Black 436, 443; *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116, 145; *Delmas* v. *Insurance Company*, 14 Wall. 661, 668; *Railroad Companies* v. *Gaines*, 97 U. S. 697, 709; *University* v. *People*, 99 U. S. 309, 321, 323;

Wright v. *Nagle*, 101 U. S. 791, 793; *Louisville & Nashville R. R. Co.* v. *Palmes*, 109 U. S. 244, 256; *Memphis Gas Co.* v. *Shelby County*, 109 U. S. 398, 399; *Vicksburg, &c., Railroad Co.* v. *Dennis*, 116 U. S. 665, 667; *Given* v. *Wright*, 117 U. S. 648, 655; *N. O. Water Works* v. *La. Sugar Co.*, 125 U. S. 18, 38; *Yazoo Railroad Co.* v. *Thomas*, 132 U. S. 174, 184; *McGahey* v. *Virginia*, 135 U. S. 662, 669; *Wilmington & Weldon Railroad* v. *Alsbrook*, 146 U. S. 279, 293; *Bryan* v. *Board of Education*, 151 U. S. 639, 649; *Mobile & Ohio Railroad* v. *Tennessee*, 153 U. S. 486, 492; *Shelby County* v. *Union &c. Bank*, 161 U. S. 149, 151; *Phœnix Insurance Co.* v. *Tennessee*, 161 U. S. 174, 185; *Douglas* v. *Kentucky*, 168 U. S. 488, 502; *McCullough* v. *Virginia*, 172 U. S. 102, 109; *Water Power Co.* v. *Street Railway Co.*, 172 U. S. 475, 487.

In a number of the foregoing cases motions were made to dismiss upon the ground that the construction by the state court of its own constitution and laws was binding upon this court, but in every instance the motion to dismiss was denied. In *Yazoo Railroad Co.* v. *Thomas*, 132 U. S. 174, 184, a motion to dismiss was made upon the same ground as that urged in the case at bar. In overruling the motion, Mr. Chief Justice FULLER said:

> "The taxes in question were assessed under the act of 1888, and if the charter of the company, which became a law on the 17th of February, 1882, inhibited such taxation, then this court has jurisdiction to re-examine the conclusion reached. Although by the terms of the act of 1888 the taxes therein referred to were not to be levied as against a railroad exempt by law or charter, yet the Supreme Court held that this company is not exempt, and is embraced within the act; so that if a contract of exemption is contained in the company's charter, then the obligation of that contract is impaired by the act of 1888, which must be considered, under the ruling of the Supreme Court, as intended to apply to the company.

> The result is the same, although the act of 1888 be regarded as simply putting in force revenue laws existing at the date of the company's charter, rather than itself imposing taxes, for if the contract existed those laws became inoperative, and would be reinstated by the act of 1888. The motion to dismiss the writ of error is therefore overruled."

In *Keokuk & Western Railroad* v. *Missouri*, 152 U. S. 301, which is the latest case involving the effect of consolidation upon an antecedent right of exemption from taxation, a motion was made to dismiss the case upon exactly the same ground as that assigned in the case at bar—namely, that the determination of the state court as to the effect of consolidation was a construction by the state court of its local constitution and laws, and was therefore binding upon this court; yet this court denied the motion to dismiss, and considered and determined the whole question upon the merits. This case is on all fours with the case at bar, and affords a valuable precedent in support of jurisdiction[1].

In no class of cases has this court oftener exercised its power to determine for itself the existence of an alleged contract than in the long line of decisions involving so-called exemptions or immunities from taxation.

The inquiry as to whether a consolidation has resulted in a loss of any exemption or privilege or immunity of the prior corporations, has always been deemed by this court to be essentially a Federal question. From the case of *Tomlinson* v. *Branch*, 15 Wall. 460 (1872), until the present time, never has this court considered itself bound in any way by the construction of the state

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1. The disposition of the motion in the *Keokuk* case is not reported, but the records in the clerk's office show that the motion was submitted March 23, and denied March 30, 1891.

courts of the statutes authorizing the consolidation.[1] Therefore, even if the state court had only decided that the rights acquired under section 21 had been lost by consolidation and that a contract no longer existed, it would have clearly rendered a decision upon a Federal question, pure and simple.

III.

AS TO THE FIFTEEN GROUNDS OF DISMISSAL STATED IN THEIR ORDER.

For the sake of convenience, the various grounds of the motion to dismiss will be considered in their numerical order. This method of treatment necessitates some repetition and a longer argument than otherwise would be justifiable; but it is unavoidable.

1

THE FIRST GROUND.

The first ground of the motion to dismiss is that the Federal question was not raised at the proper time or in the

1. The following cases involved the creation of the alleged contract: *East Hartford* v. *Hartford Bridge Co.*, 10 How. 511, 532; *Chesapeake, etc., R. R. Co.* v. *Virginia*, 94 U. S. 718, 722; *Railroad Companies* v. *Gaines*, 97 U. S. 697, 707; *Railroad Co.* v. *Commissioners*, 103 U. S. 1, 3; *Memphis Gas Co.* v. *Shelby County*, 109 U. S. 398; *Vicksburg, &c., Railroad Co.* v. *Dennis*, 116 U. S. 665, 667; *Chicago &c., Railroad* v. *Guffey*, 120 U. S. 569; S. C., 122 U. S. 561; *Yazoo Railroad Co.* v. *Thomas*, 132 U. S. 174, 184; *McGahey* v. *Virginia*, 135 U. S. 662, 667; *Wilmington & Weldon Railroad* v. *Alsbrook*, 146 U. S. 279, 293; *Bryan* v. *Board of Education*, 151 U. S. 639, 650; *Bank of Commerce* v. *Tennessee*, 161 U. S. 134, 139; *Phœnix Insurance Co.* v. *Tennessee*, 161 U. S. 174, 175; *Douglas* v. *Kentucky*, 168 U. S. 488, 495; *Chicago, &c. Railroad* v. *Nebraska*, 170 U. S. 57, 68; *McCullough* v. *Virginia*, 172 U. S. 102, 109.

In the following cases, the court determined for itself whether or not there was still an existing contract or whether the rights acquired thereunder had been waived or in any way lost or surrendered: *Morgan* v. *Louisiana*, 93 U. S. 217, 219; *Railroad Co.* v. *County of Hamblen*, 102 U. S. 273, 275; *Wilson* v. *Gaines*, 103 U. S. 417; *Louisville & Nashville R. R. Co.* v. *Palmes*, 109 U. S. 244, 256; *Memphis Railroad Co.* v. *Commissioners*, 112 U. S. 609, 617; *St. Louis, &c., Railway Co.* v. *Berry*, 113 U. S. 465, 472; *Chesapeake & Ohio Railway Co.* v. *Miller*, 114 U. S. 176; *Given* v. *Wright*, 117 U. S. 648, 655; *Keokuk & Western Railroad Co.* v. *Missouri*, 152 U. S. 301, 305; *Mobile & Ohio Railroad* v. *Tennessee*, 153 U. S. 486, 492; *St. L. & San Francisco Railway* v. *Gill*, 156 U. S. 649, 656; *Nor. & Western Railroad* v. *Pendleton*, 156 U. S. 667, 673; *Mercantile Bank* v. *Tennessee*, 161 U. S. 161, 171.

appropriate way. The contention seems to be that the question must be expressly "pleaded." In support of this ground, reliance is placed upon many cases belonging to the third class mentioned in section 709 of the Revised Statutes, in which the final decree of a state court may be re-examined in this court. The jurisdiction in the case now before the court is, however, under the second class. It is, of course, well established that in cases which belong to the second class—that is to say, where "is drawn in question the validity of a statute of, or an authority exercised under a statute of, any State on the ground of its being repugnant to the Constitution," etc.—it is not necessary that the Federal question should be specially set up or claimed in order to give this court jurisdiction, but it is sufficient that it appear that the Federal question was involved in the case, and that the case could not have been determined without deciding it. This well-established rule of practice has been most emphatically reiterated at the present term in *Water Power Co.* v. *Street Railway Co.*, 172 U. S. 475, 485, in which case Mr. Justice BROWN, in referring to a state of facts quite analogous to those now presented, used the following language:

> "While no special mention is made in the complaint of the Constitution of the United States, the whole theory of the plaintiff's case, taken in connection with the answer is that the rights which it acquired to the five hundred horse-power in question under the act of 1887 were impaired by the subsequent act of December 24, 1892, ratifying and approving the contract of the board of directors of the state penitentiary with the defendant. The contract of the defendant is set up in the complaint, and although the act of December, 1892, ratifying the same is not set up there, it appears in the answer and is relied upon as validating the contract; so that, reading the complaint and answer together, the question whether the contract of the plaintiff was impaired by subsequent

state action appears on the face of the pleadings. * * *

"While, in so holding, the court disposed of the case upon the construction of the contract under which the plaintiff asserted its right, such construction is no less a Federal question than would be the case if the construction of the contract were undisputed, and the point decided upon the ground that the subsequent act confirming the contract with the defendant did not impair it. The question in either case is whether the contract has been impaired, and that question may be answered either by holding that there is no contract at all, or that the plaintiff had no exclusive rights under its contract, or granting that it had such exclusive rights, that the subsequent legislation did not impair it. These are rather differences in the form of expression than in the character of the question involved, and this court has so frequently decided, notably in the very recent case of *McCullough* v. *Virginia*, 172 U. S. 102, that it is the duty of this court to determine for itself the proper construction of the contract upon which the plaintiff relies, that it must be considered no longer as an open question *N. O. Water Works* v. *La. Sugar Co.*, 125 U. S. 18; *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116.

"TO THE ARGUMENT THAT THE FEDERAL RIGHT WAS NOT 'SPECIALLY SET UP AND CLAIMED' IN THE LANGUAGE OF REVISED STATUTES, SECTION 709, IT IS REPLIED THAT THIS IS NOT ONE OF THE CASES IN WHICH IT IS NECESSARY TO DO SO."

A.

In the case at bar, the very statutes relied upon by the Railroad Companies, defendants below, were set forth by appropriate reference in the declaration or complaint (special record, pp. 22, 23), and the declaration prayed "that they be considered as part of this declaration." Among the statutes referred to is the one constituting the contract upon which these plaintiffs in error relied. Therefore, upon the face of the declaration or complaint the charter contract was brought before the court for adjudication. The question of its validity and the plaintiff's right

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to recover taxes already paid in the manner provided in the act, could, of course, have been fully raised by demurrer if the facts showing compliance with the statute had been alleged. As the charter was thus brought before the court, it was not necessary to plead it again in the answer, and all that was done was to allege the facts which brought the defendants within the provisions of the statutes. This allegation was made in almost the very language of the statute. To this defense the plaintiff demurred, and this was one of the issues presented on the first appeal. It is, therefore, evident that on the face of the pleadings, the validity of the statute was necessarily involved. Moreover, we have the statement of the defendant in error in the brief now submitted on the motion to dismiss—that there were five grounds of decision in the court below; and each one of these grounds involved the validity or impairment of the contract. In addition to this concession, we also have, in the defendant's brief on this motion, another admission that the original pleadings did raise or involve the Federal question (pp. 28, 29), viz:

> "But the pleadings show that the defendants had full notice that these points were being made and pressed, from the inception of the litigation. One of the grounds of the demurrer to their plea, which recited in detail a full compliance with the requirements of this 21st section, was that "said plea is no defense."
>
> "The fifth and sixth replications to this plea claimed that the exemption was lost in the consolidation and cut off by the Constitution of 1890.
>
> "The charges asked by plaintiff to the jury were among others a peremptory instruction, and specific charges on the effect of the consolidation; among the errors assigned in the motion for a new trial was the overruling of these contentions, and so among plaintiff's assignments of errors in the Supreme Court; and the

> points were all made in the brief of plaintiff in the Supreme Court, so that these points were openly and continuously pressed, and it is idle for defendants now to claim any surprise, or that they never had any opportunity to plead Section 10, Article I, or the 14th Amendment of the Constitution of the United States. They must plead at the *proper time* and in the *appropriate way*."

The plaintiff below moved on the second trial to strike out the pleas of the Railroad Companies which set forth at greater length the Federal question. The motion was made in part upon the following grounds (special record, p. 183):

> 3. "Because all of the defenses set up in said pleas can be set up under their pleas filed prior to the filing of these pleas.
>
> 4. Because all matters [*i. e.* the Federal question] set up in said pleas have been adjudicated against said defendants in this case by the Supreme Court."

B.

Even were this not a case of the second class and were it a case within the third class—that is, involving a right, title, privilege or immunity under the Constitution —the court would nevertheless hold that the Federal question had been duly raised, and that the right, title, privilege or immunity had been specially set up or claimed in a proper way and in ample time. *Chicago Life Ins. Co.* v. *Needles* 113 U. S. 574, 579; *Spencer* v. *Merchant*, 125 U. S. 345, 352; *Kaukauna Co.* v. *Green Bay, &c., Canal*, 142 U. S. 254, 269; *Roby* v. *Colehour*, 146 U. S. 153, 159; *Powell* v. *Brunswick County*, 150 U. S. 433, 439; *Chicago, Burlington, &c., R'D* v. *Chicago*, 166 U. S. 226, 231; *Green Bay &c. Canal Co.* v. *Patten Paper Co.*, 172 U. S. 58, 66.

When the Supreme Court of Mississippi overruled its prior decisions and announced a new construction of its constitution, the Railroad Companies at once filed a

suggestion of specific errors before final judgment was entered (special record, p. 102), specially setting up and claiming the contract right under the Federal Constitution.[1] Under the local practice, they were entitled as of right to have these suggestions considered, and determined before the issuance of a mandate to the court below. This is, therefore, a case in which a party is entitled as of right to suggest errors, and to invoke the decision of the court thereon. The practice is not at all similar to an application for a rehearing, which depends upon discretion, for the right to have an adjudication upon the suggestion of errors is given absolutely. The difference is distinctly recognized in the rule printed on the margin.[2] Besides, in all the cases which hold that it is too late to raise the Federal question on an application for a rehearing, the application was made after the very decision sought to be reviewed and not after a decision on a first appeal, on which no final judgment could be entered, and from which error would not lie to this court. The result of the first appeal in this case was not a final judgment or even a mandate directing proceedings such as an accounting.

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1. The suggestion of errors was filed June 27, 1898, and the full opinion of the Supreme Court of Mississippi was not filed until November 22, 1898. Thus the court below had the suggestion of errors before it for five months and undoubtedly considered it in preparing the definitive opinion on the first appeal.

2. Under the practice in the Supreme Court of Mississippi, there is a clear distinction between a petition for a reargument and a suggestion of error, the latter being presented to and considered by the court as of right. Rule 10 of the Supreme Court of Mississippi is as follows: "Petition for re-argument—suggestion of error. Applications for re-argument shall be presented in open court by petition, and noted on the minutes of the court on or before the Monday succeeding the delivery of the opinion; and no re-argument shall be granted upon any point or question not distinctly made and insisted upon at the original hearing or submission of the cause. No extension of the time for making such application will be granted except on account of sickness or other extreme cause. The court will, at any time during the term at which a judgment is rendered, consider a written suggestion of error of law or fact therein, and will take such action as may seem proper" (70 Miss. XXII.).

The language was: "The judgment is reversed both on the appeal and the cross-appeal, and the verdict set aside, and the cause remanded for a new trial" (see transcript, p. 676, but not printed in special record). Either party on such new trial could make any point and advance any argument within the pleadings.

On the new trial directed by the appellate court, the Railroad Companies attempted specially to set up and claim the protection of the Federal Constitution, although it was really sufficiently raised under the pleadings as they stood. This was done out of extreme prudence and in order to narrow the real issue. The local court struck out the pleas as presenting no defense, and this ruling was sustained by the appellate court. But whether an amended answer or plea could under the local practice be then set up, is immaterial. The question is whether this court will consider that the Federal question has been duly set up or claimed, when, as in this case, upon a *new trial on the issues and merits*, the party specially sets up and claims the right and it is overruled and denied by the trial court as presenting no defense, which ruling is duly excepted to and is subsequently affirmed by the highest state court on the same ground. Of course, no particular form of words need be used in order to raise the Federal question, nor is it necessary that it shall be raised in the original pleading or in any pleadings or at any particular time (*Dewey* v. *Des Moines*, 173 U. S. 193, 199). All that is necessary is that before final judgment below there shall be "something in the case before the state court which at least would call its attention to the Federal question as one that was relied on by the party." It affirmatively appears by the record before this court, in

addition to the certificate of the Chief Justice of Mississippi, that the Federal question was raised before final judgment in the appellate court on the first appeal and months before its final opinion was delivered; that it was specially set up and raised in the court of original jurisdiction on the new trial; and that it was likewise before the Supreme Court of the State on the appeal from the judgment now before this court.

C.

Under the first ground of dismissal, it is also urged (defendant's brief, p. 12) that, as this is a writ of error from a second appeal to the state supreme court, the rule is that what could have been examined and decided on the first appeal is *res adjudicata* and cannot be re-examined on a second trial or on a second appeal. It is quite true, as we have seen, that the Federal questions could have been examined and decided on the first appeal, and, as matter of fact, they were actually examined and decided. But, even if this were not so, does it in any way affect the questions here? It is the statutory right of a defendant in Mississippi to amend his pleadings and set up new defenses at any time before verdict. (*Railroad Co.* v. *King*, 69 Miss. 852; *Taylor* v. *Chickasaw Co.*, 74 Miss. 23; *Millsaps* v. *Bank*, 71 Miss. 361, 378.) The Mississippi cases cited on page 12 of the defendant's brief are not to the contrary. The rule is well established that, where a new trial is ordered upon the merits—not as in *Mutual Life Insurance Co.* v. *Kirchoff*, 169 U. S. 103, simply to take an accounting—the whole case is open to a defendant or plaintiff to make any point that may properly be presented under the original or amended pleadings.

But the point is certainly without force as respects the taxes of 1896 and 1897. As to these taxes, the Railroad Companies had but one hearing in the circuit court and but one appeal to the state supreme court. When the suits were consolidated on July 4, 1898 (special record, p. 117), there had been no adjudication by the appellate court respecting these taxes; it was therefore the duty of the circuit court to receive and consider any defense which might be asserted to these taxes, irrespective of the action of the state supreme court in other cases.

As to these taxes of 1896 and 1897, therefore, the proceedings in July, 1898, were the first and only trial. The consolidation order expressly preserved all rights. Thus (p. 118):

> "This order is made to save expenses and inconvenience of separate pleadings and trial in each case, and is not to be construed to the prejudice of either party, and all objections and exceptions are reserved, which would be reserved if said orders, proceedings and pleadings were all separate."

This court is asked, nevertheless, to hold that the practical effect of the consolidation order was to deprive the defendants of a ground of defense because that point was not made on the trial of the first three cases.

Nor is the case of *Mutual Life Insurance Co.* v. *Kirchoff*, 169 U. S. 103, applicable. In that case it was claimed that a right or title under the United States was involved, which, however, was not set up or claimed until after a decision in the state supreme court on the merits settling all the questions. There was no new trial awarded, but simply an accounting, and, as this court pointed out (at p. 112), "there was no contention that any Federal question arose on the accounting itself." In the case at bar, the Federal question was necessarily involved in a new trial on the merits.

2.

THE SECOND GROUND.

The second ground of dismissal is based upon the withdrawal of certain pleas, and the entry of a judgment *nil dicit*.

Immediately upon the filing of the mandate ordering a new trial, the defendants below (plaintiffs in error here) asked for time in which to prepare additional pleas, and the court granted the application (transcript, p. 608). Thereupon the pleas were prepared, and were actually filed in open court in the presence of counsel for the defendant in error, and without objection (*Ib.*). The pleas thus appear, as stated in the special record (p. 551), to have been filed after "leave of the court had been first obtained." These pleas set forth in full detail the Federal questions involved. The plaintiff thereupon moved to strike out the pleas upon grounds which are set forth in the special record at pages 183–185, and the court granted the motion, "to which the defendants then and there excepted, and their exception was allowed." The motion was granted upon the ground that these pleas presented no defense; and this ruling was sustained on appeal by the Supreme Court of Mississippi upon that ground, as follows (transcript, p. 685).

> "The court's action in striking out the special pleas stricken out was correct, for the obvious reason that they presented no defense to the action in whole or in part. The former opinion of this court in this case settled definitely and conclusively all the issues involved, and the special pleas are in effect nothing else than an effort to have the circuit court disregard that opinion."

It would seem that the defendant in error is representing that the only pleas which alleged "a compliance with the requirements of the charter" were those which

were withdrawn, but the contrary is the fact. The court will see by reference to the concluding paragraph of the fourth plea stricken out (transcript, p. 568; special record, pp. 168, 169) that compliance with the requirements of the statute was fully and distinctly alleged. There can be no doubt whatever upon this point. The pleas stricken out covered the whole case in all its aspects; and when they were stricken out as presenting no defense to the action in whole or in part, there was nothing left to try.

The trial court having decided that the plea of the charter agreement and its impairment in violation of the contract clause of the Federal Constitution presented no defense, the defendants, in accordance with the local practice, withdrew the remaining pleas and appealed upon a special bill of exceptions (special record, p. 186), which presented the question of law whether or not the special pleas so setting up the Federal question did or did not present a defense to the plaintiff's action. The judgment below clearly shows that the pleas involving the Federal question were not withdrawn, for it says (special record, p. 188) "*not including, however, the pleas which have been stricken out by the court*," and those pleas, to repeat, were stricken out because "they presented no defense to the action in whole or in part." It would, of course, have been futile to continue litigating in the face of a ruling by the court that as matter of law the defense was unavailing.

Even if the point as to the pleas being filed too late was made below in the trial court and in the state supreme court, it must have been decided against the defendant in error, for the court placed its decision squarely on the ground that the pleas stricken out presented no defense. If the point as to the effect of withdrawing some

of the pleas and allowing judgment *nil dicit* was also urged in both courts, it was overruled as untenable. In a word, if these points were decided, they were decided in our favor. But these possible grounds of decision are immaterial. "It is what was actually decided that we are to consider, not what might have been decided" (*Detroit Railway Co.* v. *Guthard*, 114 U. S. 133, 136).

To say that the judgment in this case is the equivalent of a default or a consent judgment is unwarranted. It is no more than if these defendants had demurred to a declaration which properly set forth all the facts and the court had overruled the demurrer, with leave to answer or go to trial upon the merits. The defendant, of course, would have a perfect right to allow the entry of judgment and to appeal upon the law.[1] That was what was done in this case; what the trial court understood was being done, and what the state supreme court in affirming the judgment below understood had been done when it ruled that the pleas "presented no defense to the action in whole or in part." Had the court not so ruled, the defendants would, of course, have gone to trial on the merits. It would tend to introduce most unfair practice, in cases in which a party has had his pleas stricken out on the ground that they presented no defense, if this court would approve a claim that the pleas

1. In *Ker* v. *Illinois*, 119 U. S. 436 (a criminal case), it appeared that the defendant during the trial presented a plea in abatement which was overruled, and "the defendant refusing to plead further, a plea of 'not guilty' was entered for him according to the statute of that state by order of the court, on which the trial and conviction took place." The plea in abatement set forth the alleged Federal right claimed to be involved. This question was held to be preserved by these proceedings, and the judgment of the Supreme Court of Illinois was considered and affirmed upon the merits. See also, *Argentine Co.* v. *Terrible Co.*, 122 U. S. 478, 479; *Coburn* v. *Cedar Valley Land Co.*, 138 U. S. 196, 221; *Clyde Mattox* v. *United States*, 146 U. S. 140, 147; *Perego* v. *Dodge*, 163 U. S. 160, 164.

might have been stricken out upon some technical point of local practice, which the court below did not assign in depriving a party of his rights, but, on the contrary, held to be untenable. "It is enough to say that a trial in a court of justice is meant to be a fair struggle after the truth, and not a rivalry of shrewdness, or a trap for the unwary."[1]

3 AND 4.

THE THIRD AND FOURTH GROUNDS.

The third and fourth grounds assert that the petition to remove the case was too late.

The petition for removal is not relied upon as a ground of reversal in this court by the plaintiffs in error. The other errors are sufficient to present all questions. The practice of presenting the petition at that time seemed to be authorized by the case of *Powers* v. *Chesapeake & Ohio Railway*, 169 U. S. 92, 98. When the state supreme court reversed its prior decisions and for the first time held the contract invalid or to be no longer in existence, thus clearly overruling the doctrine of the prior cases, it seemed to counsel for the Railroad Companies that the case then, for the first time, might perhaps be held to have become in its nature removable, and that, if a petition for removal was presented immediately upon the filing of the mandate from the state supreme court, it would be in due time. This was done the day after the filing of the mandate. But, as the point is not relied on by the plaintiffs in error, it would be a waste of the time of this court to go more in detail into the theory upon which the petition for removal was filed.

1. *Salisbury* v. *Howe*, 87 N. Y. 128, 134.

5.

THE FIFTH GROUND.

The fifth ground of the motion is (p. 23):

> "That the alleged exemption is unconstitutional because in terms *irrepealable*."

There can surely be no doubt that the inquiry whether the contract relied on is repealable does present a Federal question.

In a subdivision of this point, however, the defendant attempts to state the position of the plaintiffs in error as follows (p. 24):

> "It is not claimed by the plaintiffs in error anywhere that their alleged exemption was ever repealed or attempted to be repealed by the Legislature. But they claim that the *decision of the Supreme Court* violates section 10, article I., and the 14th amendment of the Constitution of the United States."

This statement entirely misrepresents the point upon which the plaintiffs in error rely.

The taxes in question were assessed under the revenue act of 1892, printed in the appendix. The plaintiff could not possibly maintain his suit without relying upon this subsequent legislation and having effect given to it. The plaintiff below, as State Revenue Agent, sued, and the recovery herein has been awarded, under statutes passed long after these charters. Nothing can possibly be clearer than that the judgment below gave effect to subsequent legislation, which has impaired the obligation of the contract relied on (*Yazoo Railroad Co.* v. *Thomas*, 132 U. S. 174, 184; *McCullough* v. *Virginia*, 172 U. S. 102). In the Yazoo case, as appears from the quotation at page 28 of this brief, this very point was expressly decided.

6 AND 7.

THE SIXTH AND SEVENTH GROUNDS.

These grounds are (pp. 25, 27):

> "That the alleged exemption was lost in and by the consolidation of October 24, 1892. * * That section 180 of the Constitution of November 1, 1890, prevented any exemption from passing into the consolidation of October 24, 1892."

These points necessarily involve the question whether there is a contract still in existence to be impaired. The defendant in error contends under this head that the effect of the consolidation on existing contract rights "is merely a construction by the state court of its own local laws, and raises no Federal question" (p. 25). This point, however, is discussed at length on pages 26–29 of this brief.

8.

THE EIGHTH GROUND.

This ground is (p. 29):

> "That the alleged exemption was repealed by the acts of 1884, 1886 and 1890."

No argument can be necessary to show that this involves a Federal question.

Yet in support of this point, it is solemnly urged that the plaintiffs in error are estopped from denying that their contract rights are repealable because it was held in the *Mississippi Mills* case, 56 Miss. 40 (now repudiated and overruled after twenty years of acquiescence) that the charter rights there discussed were repealable. In the case at bar, the contract right in the charter is expressly made irrepealable, viz.: "and which agreement is irrepealable." In the Mississippi Mills charter no such clause was contained. The court below, in referring to the *Mississippi Mills* case, which the defendant in

error now attempts to use as a basis for estoppel, said (transcript, pp. 514, 686):

> "The exemption claimed in *Miss. Mills* v. *Cook* HAD NO IRREPEALABLE feature. * * * Moreover, the twenty-first section of the Mobile and Northwestern charter was not passed on in *Mississippi Mills* v. *Cook*, and we held in our former opinion that its constitutionality was never squarely presented, as to the point for decision, until the former judgment in this case."

9.

THE NINTH GROUND.

This ground presents questions of local practice, such as the refusal to adjourn the case, which do not involve points that the plaintiffs in error will urge here.

10, 11 AND 12.

THE TENTH, ELEVENTH AND TWELFTH GROUNDS.

In these three grounds, the defendant in error urges this court to dismiss the writ of error because a citation has not issued to parties who were never before the court below and who are not parties to the judgment appealed from. *The summonses printed in the special record* (*p.* 26) *were not before the court below, and are not in the transcript of the record before this court.* In support of these grounds of dismissal, the case of *Wilson* v. *Kiesel*, 164 U. S. 251, 252, is cited. In that case, it was quite properly held that where a citation had not been issued to certain parties who were defendants in the court below and who were directly and vitally interested in the disposition of the cross-complaint and necessary parties to the appeal, the appeal could not be sustained.

It should hardly lie in the mouth of the defendant in error, as State Revenue Agent, to assert in this court that the proceedings instituted and conducted by him below

were defective for want of necessary parties; for, if the parties are necessary here, *a fortiori* they were necessary below.

The defendant in error may, however, be proceeding under a misapprehension. He fails to refer the court to the amended statute under which this suit was brought. This omission is probably an oversight; but the court will at once see that this omitted statute is most pertinent, and expressly authorizes the maintenance of this suit by the defendant in error as sole plaintiff. Thus section 2 of the Mississippi Act of February 7, 1894 (Laws of 1894, p. 29), provides:

> "The State Revenue Agent * * shall have power, and it shall be his duty to proceed by suit in the proper court against all officers, county contractors, persons, corporations, companies and associations of persons for all past due and unpaid taxes of any kind whatever, for all penalties or forfeitures for all past due obligations and indebtedness of any character whatever owing to the State or any county, municipality or levee board, and for damages growing out of the violation of any contract with the State or any county, municipality or levee board. *He shall have a right of action and may sue at law or in equity in all cases where the State or any county, municipality or levee board has the right of action or may sue.*"

The assessors and tax collectors were not parties to the original suits. The only persons named as parties in the declarations therein were Wirt Adams, State Revenue Agent, plaintiff, and the Yazoo and Mississippi Valley Railroad Company and the Illinois Central Railroad Company, defendants (special record, pp. 13, 24). It is true that the declarations conclude with a formal allegation that the assessors and collectors are made parties, and with a prayer that "they *and* said defendants be summoned," etc.; but, as appears by the special record (pp. 29, 31), none of these officials was ever actually summoned, ex-

cept that the summons upon the declaration for the taxes of 1897 seems to have been served upon the clerk of the Railroad Commission and to have been received by the Sheriff of Hinds County. *These facts, however, do not appear in the transcript of the record below, but are imported into the case by the special record.* None of these officials appeared or was represented upon the trial of the action. No evidence affecting them was adduced. No relief was asked against them. None of them joined in the appeal to the state supreme court or was made a party appellee therein. The final judgment of the circuit court entered July 8, 1898, is in form a common-law judgment in favor of Wirt Adams against the two Railroad Companies and no others (special record, p. 188); and the final judgment of the state supreme court is also in form a common-law judgment in his favor against the two Railroad Companies and the sureties upon the appeal bond and no others (*Id.* p. 197).

It will also be observed that the question affecting the assessors and tax collectors involves nothing which could be the subject of discussion or decision in this court (*Murdock* v. *City of Memphis*, 20 Wall. 590, 615). The only relief possible against an assessor or tax collector is upon a collateral point, namely: "If it shall appear that the failure of the taxpayer to properly pay his taxes was caused by any willful default or negligence of the assessor or tax collector, judgment shall be rendered against the defaulter or defaulters for the amount of compensation of the revenue agent" (special record, pp. 25, 26).

The court has, at this term, settled the question upon very similar facts in *Central Loan and Trust Co.* v. *Campbell*, 173 U. S. 84, 90, where Mr. Justice WHITE said:

> "On the threshold it is necessary to dispose of a suggestion of want of jurisdiction made by the appellee. It is based on the proposition that, as the intervenors in the trial court are not made parties to this appeal, we are without jurisdiction, since the judgment to be rendered may materially prejudice their rights. *But the intervenors did not except* to the action of the trial court in vacating the attachment and dismissing the action. *They were not made parties to the proceedings in error* prosecuted from the judgment of the trial court to the Supreme Court of the Territory. In that court the cause was determined without any suggestion, so far as the record discloses, that the questions arising in the record could not be decided in the absence of the intervenors, and the Supreme Court of the Territory manifestly assumed that the intervenors were not essential parties to a determination of the controversy before it, since it passed on the case as presented without their presence. *If their absence was treated by the parties to the proceedings in the Supreme Court of the Territory as not affecting the right to a review of the judgment of the trial court, there can be no reason why we should now hold that the presence of such intervenors is necessary on this appeal, which has solely for its object a review of the judgment rendered by the Supreme Court of the Territory.* Considering the facts just stated, and the further fact that it is obvious that the rights of the intervenors cannot be prejudiced by a review of the action of the Supreme Court of the Territory in dismissing the cause for want of jurisdiction, the motion to dismiss is overruled."

In *Payne et al.* v. *Niles et al.*, 20 How. 219, 221, Chief Justice TANEY said:

> "It is very well settled in all common-law courts that no one can bring up as plaintiff in a writ of error the judgment of an inferior court to a superior one unless he was made a party to the judgment in the court below; nor can any one be made a defendant in the writ of error who was not a party to the judgment in the inferior court."[1]

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[1] See, also: *Cox and Dick* v. *United States*, 6 Pet. 172, 182; *Forgay et al.* v. *Conrad*, 6 How. 201, 203; *Brewster* v. *Wakefield*, 22 How. 118, 129; *Germain* v. *Mason*, 12 Wall. 259, 261; *Simpson* v. *Greeley*, 20 Wall. 152, 157; *Basket* v. *Haskell*, 107 U. S. 602, 608; *Hanrick* v. *Patrick*, 119 U. S. 156, 164; *Gilfillan* v. *McKee*, 159 U. S. 303, 312.

It is then urged (defendant's brief, p. 34), that, because the State Revenue Agent is "not liable for costs and may appeal without bond" under the Mississippi statute of 1892, this court cannot violate the state statute and award costs, and consequently should make other state officials parties simply to award costs against them. The act of 1894, under which these suits were brought, is silent as to liability for costs. But the court will view with some surprise the proposition that, because a state officer is not liable for costs in a state court, he cannot be made liable here, and that a local provision of practice as to liability for costs is to regulate and determine who are proper and necessary parties in this court.

This point is far-fetched and ought not to have been made even for the chance of creating "color" for the motion to dismiss. If all such parties were necessary to an appeal or writ of error, it would bring before this court on every appeal parties whose interest in the litigation was most remote. Such a rule of practice could hardly commend itself as wise or prudent. But, even if it were held that in this case such parties were technically necessary, the court would not hesitate to direct a citation to issue to bring them in, as was done in *Mendenhall* v. *Hall*, 134 U. S. 559, 567.

CONCLUSION.

For the foregoing reasons, it is submitted that the motion to dismiss should be denied and the case reserved for oral argument on the merits.

Washington, D. C., April 24, 1899.

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APPENDIX A.—Laws creating the contract in question.
" *B.—Laws impairing the obligation of the contract.*
" *C.—Lists of railroad charters.*

APPENDIX A.

Laws creating the contract in question.

An Act to incorporate the Mobile and Northwestern Railroad Company, approved July 20, 1870.

LAWS OF 1870, Ch. 104, Sec. 21.

SECTION 21. *Be it further enacted*, that in consideration of the construction of the railroads provided for herein, and of the great benefit which the State will receive in the development of its agricultural resources by means of said railroads as works of internal improvement, and also of the increased value which will thereby be added to the property of the State, thus enabling the State to greatly increase its revenue without additional and burdensome taxation upon the people, the State hereby agrees with said Company (and which agreement is irrepealable), that all taxes to which said Company shall be subject for the period of thirty years, are hereby appropriated and set apart, and shall be applied to the payment of the debts and liabilities which the said Company may have incurred in the construction of said road, or for money borrowed by said Company upon lands or otherwise, to be used in constructing said road, or paying debts incurred by said Company in constructing the same; and it shall be the duty of the tax collector in every county in each and every year, to give to said Company a receipt in full for the amount of said taxes upon receiving from said Company an affidavit made by the president or cashier of said Company that the amount of said taxes have actually and in good faith been paid and applied by said Company during the year, in payment of the debts incurred, or money borrowed as aforesaid, and which receipt so given shall be in full of all taxes, County, State, and Municipal, to which said Company shall be subject; *provided, however*, that whenever the profits of said Company shall enable it to declare and pay to the stockholders an annual dividend of eight per cent. upon its capital stock over and above the payment of its debts and liabilities, then the appropriation of the taxes aforesaid shall cease, and said taxes shall be paid by said Company to the tax collector, to be by him paid over as required by law. Laws Mississippi, 1870, p. 268.

ACT APPLYING SECTION 21 TO THE MEMPHIS AND VICKSBURG RAILROAD COMPANY AND OTHERS.

An Act supplemental to the Acts of incorporation of certain Railroad Companies, approved August 8, 1870.

LAWS OF 1870, CH. 113.

SECTION 1. *Be it enacted by the Legislature of the State of Mississippi*, That the provisions of the twenty-first section of an Act entitled, "An Act to incorporate the Mobile and Northwestern Railroad," be, and they are hereby made to apply to the following railroad companies: The Memphis and Vicksburg Railroad; the Vicksburg, Yazoo Valley, and Grenada Railroad; the Canton and Vicksburg Railroad; the Natchez and Jackson Railroad; the Meridian and Red River Railroad; the Ship Island, Mississippi City, and Paducah Railroad; the Elyton and Aberdeen Railroad; the Grenada, Louisville, and Meridian Railroad; the Greenville and Rolling Fork Railroad; and the charters of said companies are hereby amended so as to confer upon said companies all the rights, privileges, immunities, and franchises granted by the act of incorporation of the said Mobile and Northwestern, embraced in the twenty-first section thereof.

SEC. 2. *Be it further enacted*, That this Act take effect and be in force from and after its passage. Laws Mississippi, 1870, p. 327.

CHARTER OF THE MEMPHIS AND VICKSBURG RAILROAD COMPANY.

An Act to incorporate the Memphis and Vicksburg Railroad Company, approved August 8, 1870.

LAWS OF 1870, CH. 112.

(Authority to consolidate was conferred by this act upon the Memphis and Vicksburg Railroad Company.)

SEC. 16. *Be it further enacted*, That said company shall have the right and power to consolidate the stock, property, and franchises of the road with any other road or roads, in or out of this State, at any time that the President and Directors of the road may deem proper, and upon such terms as may be consistent with the powers conferred upon said company. Laws Mississippi, 1870, p. 326.

CHARTER OF THE NEW ORLEANS, BATON ROUGE, VICKSBURG AND MEMPHIS RAILROAD COMPANY.

An Act to incorporate the New Orleans, Baton Rouge, Vicksburg and Memphis Short Line Railroad Company, approved March 9, 1882.

LAWS OF 1882, CH. 547.

(Authority to consolidate was conferred by this act upon the "Baton Rouge" Company.)

SEC. 25. *Be it further enacted*, That the company shall have power and authority to purchase and hold any connecting railroad, and operate the same or to consolidate the company with any other company, under the name of one or both; but when such purchase is made or consolidation is effected the said company shall be entitled to all the benefits, rights, franchises, lands and property of every description belonging to said road or roads so sold or consolidated. Laws Mississippi, 1882, p. 932.

CHARTER OF THE LOUISVILLE, NEW ORLEANS AND TEXAS RAILWAY COMPANY.

LAWS OF 1882, CH. 555.

(By this act the power to consolidate already conferred upon the Memphis and Vicksburg Railroad Company and the "Baton Rouge" Company was extended to the company to be formed; and the provisions of Section 21 were also made applicable to such Company.)

An Act to authorize the Memphis and Vicksburg Railroad Company, and the Mississippi Valley and Ship Island Railroad Company to effect a consolidation, approved March 3, 1882.

SECTION 1. *Be it enacted by the Legislature of the State of Mississippi*, That the Memphis and Vicksburg Railroad Company and the Mississippi Valley and Ship Island Railroad Company, be, and they are hereby authorized and empowered to consolidate with each other, or with each other and any other railroad company or companies, whether such company or companies have been incorporated under the laws of this State or of any other State, so that all of the companies so consolidating shall be merged into and become one company; and the company so formed by such consolidation shall be deemed and held to be a corporation created by the laws of this State, and shall have, enjoy and possess all the rights, ways, privileges, franchises, property, grants and immunities, which are

now possessed by the companies which may enter into such consolidation, as fully as though the same were conferred specially in this Act, and to that end the charters of said consolidating companies shall be taken and held to be a part of this Act. Laws Mississippi, 1882, p. 1011.

SEC. 5. *Be it further enacted*, That the provisions of the twenty-first section of an Act entitled, "An Act to incorporate the Mobile and Northwestern Railroad," approved July 20, 1870, is hereby made to apply to the said consolidated company, and for that purpose the said section is hereby declared to be part of this Act, and this section shall be construed as though the said twenty-first section was specially and fully set out herein; but this section shall not be in force for a longer time than twenty-five years from the approval of this Act. *Id.*, p. 1013.

CHARTER OF YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY.

LAWS OF 1882, CH. 541.

An Act incorporating the Yazoo and Mississippi Valley Railroad Company, and declaring its powers, approved February 17, 1882.

SEC. 5. *Be it further enacted*, That said company may, from time to time, mortgage or convey in trust any or all of its property, real, personal or mixed, of any and every description whatsoever, then owned or thereafter to be acquired, and also all or any of its rights, powers, privileges, liabilities, immunities and franchises whether then owned, possessed and enjoyed or thereafter to be acquired, including its rights to be a corporation; and under such deed or deeds of trust or mortgage secure, execute and dispose of the mortgage bonds of said company, to such amounts and maturing at such times and bearing such interest as it may deem best; said company may also execute a mortgage or mortgages and trusts as aforesaid, to secure bonds or obligations of other railroad companies, or may endorse the bonds of any other railroad company or companies; or in any other manner guarantee such bonds, and secure the same by a mortgage or mortgages on its own property and franchises, then owned or thereafter to be acquired, as fully as it could do if the bonds were issued by it as aforesaid; said company may consolidate with any other railroad company in or out of the State of Mississippi upon such terms as the consolidating companies may agree upon; and it may lease its railroads and all its property and franchises, rights, powers, privileges and immunities then owned or thereafter to be acquired,

or lease other railroads in or out of this State, for a term of years or in perpetuity, and upon any such consolidation the consolidated company shall have and enjoy all the property, rights, privileges, powers, liberties and immunities and franchises herein granted; but such consolidation shall not have the effect of exempting from taxation the railroad or property owned by such other consolidating company prior to its consolidation with the company hereby chartered; nor of exempting from taxation any property which the consolidated company may, after such consolidation acquire under the provisions of the charter of such other consolidating company; and in case of a lease, the lease (lessee) shall, so far as the terms of the lease may allow, enjoy and possess all the property, rights, powers, privileges, liberties, immunities and franchises which the lessor had as to the leased premises; the said company is also authorized to do an express business over its own and other lines of railroad and steamboats or other conveyances in and out of this State; and to acquire or put up, use and operate a line or lines of telegraph in this and other State or States, and to acquire, hold and enjoy all such property as may be proper, necessary or convenient in doing the said express or telegraph business *provided*, that by such consolidation the maximum in section six applies only to roads hereafter built. Laws Mississippi, 1882, p. 842.

AMENDATORY ACT OF MARCH 15, 1884 (CH. 593).

(This act, supplemented by the consolidation agreement, operated to confer upon the Louisville, New Orleans and Texas Railway Company the power to consolidate already possessed by the Memphis and Vicksburg and the "Baton Rouge" Railroad Companies. The consolidation agreement expressly covered "*franchises, grants, * * * privileges*," thus including the existing right to consolidate).

An Act to amend an Act entitled "An Act to authorize the Memphis and Vicksburg Railroad Company and the Mississippi Valley and Ship Island Railroad Company to effect a consolidation," approved March 3, 1882.

SECTION 1. *Be it enacted by the Legislature of the State of Mississippi*, That the act entitled "An act to authorize the Memphis and Vicksburg Railroad Company and the Mississippi Valley and Ship Island Railroad Company to effect a consolidation," approved March 3, 1882, be, and the same is hereby so amended as to authorize and empower the Memphis and Vicksburg Railroad Company and any other railroad company or companies incorporated under the laws of this State, to consolidate, in the manner and upon

the terms and conditions, and with the rights, privileges and immunities, in said act mentioned, with each other and any railroad company or companies incorporated or organized under the laws of any other State or States, and that such consolidation may be so effected whether the Mississippi Valley and Ship Island Railroad Company becomes a party to such consolidation or not.

SEC. 2. *Be it further enacted*, That this Act take effect and be in force from and after its passage. Laws Mississippi, 1884, p. 936.

ACT AUTHORIZING CONSOLIDATION BY NATCHEZ, JACKSON AND COLUMBUS RAILROAD COMPANY.

LAWS 1890, CH. 502.

An Act to authorize the Natchez, Jackson and Columbus Railroad Company to sell its railroad, situated in this State, or to consolidate the same, approved February 19, 1890.

SECTION 1. Be it enacted by the Legislature of the State of Mississippi, That the Natchez, Jackson and Columbus Railroad Company, incorporated on the 21st day of July, 1870, under the laws of this State, be and it is hereby authorized and empowered to sell absolutely all or any part of its railroad and other property, lying, being and situated in the State of Mississippi, together with all franchises, rights, powers, privileges and immunities, unto the said Natchez, Jackson and Columbus Railroad Company appertaining and belonging.

SEC. 2. That the Louisville, New Orleans and Texas Railway Company, and the Natchez, Jackson and Columbus Railroad Company are hereby authorized to consolidate with each other, under the name of the 'Louisville, New Orleans and Texas Railway Company,' and upon such terms as may be agreed upon by said companies.

SEC. 2. (3). That this Act take effect and be in force from and after its passage. Laws Mississippi, 1890, p. 675.

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APPENDIX B.

Laws impairing the obligation of the contract.

CONSTITUTION OF THE STATE OF MISSISSIPPI, 1890.

SECTION 180. All existing charters or grants of corporate franchise under which organizations have not in good faith taken place at the adoption of this constitution shall be subject to the provisions of this article; and all such charters under which organizations shall not take place in good faith and business be commenced within one year from the adoption of this constitution, shall thereafter have no validity; and every charter or grant of corporate franchise hereafter made shall have no validity, unless an organization shall take place thereunder and business be commenced within two years from the date of such charter or grant.

SECTION 181. The property of all private corporations for pecuniary gain shall be taxed in the same way and to the same extent as the property of individuals, but the legislature may provide for the taxation of banks and banking capital, by taxing the shares according to the value thereof (augmented by the accumulations, surplus, and unpaid dividends), exclusive of real estate, which shall be taxed as other real estate. Exemptions from taxation to which corporations are legally entitled at the adoption of this constitution, shall remain in full force and effect for the time of such exemptions as expressed in their respective charters, or by general laws, unless sooner repealed by the legislature. And domestic insurance companies shall not be required to pay a greater tax in the aggregate than is required to be paid by foreign insurance companies doing business in this State, except to the extent of the excess of their ad valorem tax over the privilege tax imposed upon such foreign companies; and the legislature may impose privilege taxes on building and loan associations in lieu of all other taxes except on their real estate.

SECTION 279. All writs, actions, causes of action, proceedings, prosecutions, and rights of individuals and bodies corporate, and of the State, and charters of incorporation shall continue; and all indictments which shall have been found, or which shall hereafter be found, and all prosecutions begun, or that may be begun, for any crime or offense committed before the adoption of this constitution may be proceeded with and upon as if no change had taken place.

ANNOTATED CODE OF MISSISSIPPI, 1892, p. 860—CHAPTER 116—REVENUE.

3875 (597). *Assessment and taxation of railroads; each company to file schedule.*—Each railroad company owning and operating

a railroad, shall, on or before the first Monday in April in each year, file with the railroad commission a complete schedule, under oath, of all its property, real or personal, taxable and non-taxable, setting forth therein the length in miles or fractions thereof of its entire road-bed, switches, and side tracks, and showing how many miles or fractions thereof lie in this state, and in each county of the state, and each city, town, or village, and the value of the whole and each part thereof, as subdivided herein; the total amount of capital stock, its par value and its actual value, and the value of its franchise; the number of engines and their respective values; the gross amount of receipts in the year preceding; the number of cars of all kinds, their classes and value; the number of depot-buildings and warehouses and other buildings; in what county and city, town, village, or levee district located, and the value of each, including the lands and lots upon which the same are built; the value of all machine and car shops and stationary machinery and tools therein, and in what county and city, town, village, or levee district located, including the land upon which the same are built; all real, personal, or mixed property belonging to the company within the State, not enumerated, with its value; the number of bridges and ferries in this state, in what county and city, town, village, or levee district situated, and the value of each, and specifying whether such value is or is not included in the value of the road-bed; a list of all lands in this state owned, describing the same, and giving the location and value thereof, the quantity of land used for depots and machine-shops, and its value aside from the buildings thereon; the gross amount of receipts the year preceding from passengers and freights separately, and the proportion thereof earned within and from this state; and if any of said property is claimed to be exempt from taxation, it shall be separately stated, and the law cited under which the claim is made.

3876. *The same; penalty for failure.*—If any company, corporation, or person who should do so, shall fail, neglect, or refuse to render the schedule required by the last section, such company, corporation, or person shall forfeit and pay to the state, for every such failure, neglect, or refusal, the sum of five thousand dollars, to be recovered by action, which shall be instituted and prosecuted under the direction of the railroad commission; and, in case of such failure, neglect, or refusal, the commission shall make out such schedule from the best information obtainable.

3877. *The same; state railroad assessors.*—The members of the railroad commission are constituted state railroad assessors, and they shall, upon the receipt or making and completion of the sched-

ules provided for in the last two sections, assess all railroads, telegraph, sleeping-car, and express company property liable to taxation in the state, affixing its true value, so that such property shall bear its just proportion of taxation, taking into consideration the value of the franchise, the capital stock engaged in the business in this state; and the railroad assessors may adopt other and further rules necessary and proper to ascertain the value of property to be assessed by them, including the amount of capital engaged in the business in this state.

3878. *The same; not bound by schedules rendered.*—If in any case the state railroad assessors have reason to believe that any railroad company, or person owning or operating a railroad, has rendered a false or fraudulent schedule, and that an assessment predicated thereon will relieve such company or person of a just share of taxation, they shall not, in making the assessment, be bound thereby, but they shall make out a proper schedule as if none had been rendered, first giving such person or company five days' notice to come forward at a time and place to be named, and show cause why such a course should not be pursued. Such notice shall be served and returned as a summons from a court.

3879. *The same; records to be kept and preserved.*—Complete and full records shall be kept by the railroad commission of all things done under the authority conferred upon it and on its members by the provisions of this chapter.

3880. *The same; assessments to be made by the counties, etc.*—The state railroad assessors shall, if practicable, on or before the first Monday of June, and if impracticable, as soon thereafter as it can be done, in each year, make out for each county having any railroad, telegraph, sleeping-car, palace-car, dining-car, or express company property therein an assessment-roll of such property, both real and personal, and the same shall be in such form as they may prescribe, as near in conformity to ordinary assessment-rolls as convenient and practicable, the property in cities, towns, villages, and levee districts being distinguished; and the same shall contain all the property of any such company or other railroad property in the county, and the value thereof, and the state taxes thereon, and so made that each county, levee district, and municipality shall receive its just share of such taxes proportionately to the amount of the property therein situated; and the same, when made, shall remain on deposit for one month in the office of the railroad commission, and be for said time subject to the objections thereto which may be filed; but the taxes on other real estate

belonging to railroads than that forming a part of the road, shall not be extended on the rolls.

3881. *The same; objections heard, etc.*—It shall be the duty of the railroad commissioners to meet in the capitol, at the city of Jackson, on the first Monday in July of each year, or, in case of failure, as soon thereafter as practicable, for the purpose of hearing and considering objections to assessments made by them; and they shall remain in session until all objections are heard and disposed of; and they may, if they think objections just, sustain the same and amend assessments, if necessary, accordingly.

3882. *The same; assessments sent to the counties.*—So soon as the assessment-rolls have remained subject to objection for one month, and when all objections, if any, are disposed of, the assessment-rolls shall be approved either by order of the railroad commission or by operation of law, and the same shall be sent to the clerks of the boards of supervisors of the respective counties, who shall file and preserve the same as a record.

3883. *The same; duty of the clerk.*—The clerk shall make two copies of said assessment-roll, as of other assessment-rolls, and dispose of them as provided by law in case of the general assessment-rolls, and perform all duties required of him in other cases. (See § 3794*a*.)

3884. *The same; the tax-collectors.*—The tax-collectors shall collect the railroad taxes from said rolls in all respects as he collects other taxes; but in case of a sale for delinquent railroad taxes, the collector shall first seize and sell personal property or lands other than the road-bed; and, second, rolling-stock; and, lastly, the road-bed of the railroad in his county.

3885. *Telegraph, express, sleeping-car companies, etc.*—Telegraph, express, sleeping-car, palace-car, and dining-car companies shall be assessed for ad valorem taxation in the same manner as railroads; and the railroad commissioners shall be assessors thereof, and shall perform the same duties in respect thereto as in the case of railroads, and at the same time and with like effect. The clerks and tax-collectors shall perform the like duties as required in case of railroads.

3886. *The same; schedules.*—The person or corporation owning or operating a telegraph line, or carrying on the business of an express, sleeping-car, palace-car, or dining-car company, shall file the schedules required of railroads within the time and under like penalties; and the schedules shall contain the same or such of the

particulars required of railroads as to the property and rights of the company, as the railroad commissioners shall direct, and such other particulars as they shall demand.

LAWS OF 1894, CH. 34.

An Act to provide for the election of a State Revenue Agent, to prescribe his powers and duties, and to repeal sections 4187, 4190, 4191, 4192, 4193 and 4195, in chapter 126 of the annotated code of Mississippi, approved February 7, 1894. Laws Mississippi, 1894, p. 29.

SECTION 1. *Be it enacted by the Legislature of the State of Mississippi*, That there shall be a State Revenue Agent, who shall be elected at the general election in 1895 in the same manner that other State officers are elected, and whose term of office shall be four years, and until his successor is elected and qualified. The present incumbent shall hold office for the term of his appointment, and until his successor is elected and qualified.

SEC. 2. The State Revenue Agent may appoint a sufficient number of deputies. He shall have power and it shall be his duty to proceed by suit in the proper court against all officers, county contractors, persons, corporations, companies and associations of persons for all past due and unpaid taxes of any kind whatever, for all penalties or forfeitures for all past due obligations and indebtedness of any character whatever owing to the State or any county, municipality or levee board, and for damages growing out of the violation of any contract with the State or any county, municipality or levee board. He shall have a right of action and may sue at law or in equity in all cases where the State or any county, municipality or levee board has the right of action or may sue. It is the duty of the State Revenue Agent to investigate the books, accounts and vouchers of all fiscal officers of the State, and of every county, municipality and levee board, and to sue for, collect and pay over all money improperly withheld from either, and he has the power to sue and right of action against all such officers and their sureties to collect any such moneys; but if the delinquency appear by a correct open account on the books of the proper accounting officer, the right of the Revenue Agent to sue shall arise only after he has given thirty days notice to the delinquent officer to pay over the amounts and he fails to do so.

SEC. 3. After the expiration of the fiscal year in which taxes become due should the Revenue Agent discover that any person, corporation, property, business, occupation or calling has

escaped taxation by reason of not being assessed, it shall be his duty to give notice to the tax collector in writing, and the collector shall within ten days thereafter make the proper assessment by way of an additional assessment on the roll or tax list in his hands, and give ten days notice in writing to the person or corporation whose property is assessed, and all objections to such assessments shall be heard at the next meeting of the board of supervisors of counties, or board of mayor and aldermen of municipalities. The board of supervisors or mayor and aldermen shall also be notified in writing by the collector of said assessment and the State Revenue Agent may appear at said meeting, and an appeal to the circuit court may be taken from the order of the board approving or disapproving such assessment by either party. If the assessment be approved and no appeal be taken, and the taxes shall not be paid within thirty days thereafter, the property, if it be real estate, shall be ordered sold as provided by section 3850 of the annotated code of Mississippi, and if it be personalty, the tax collector shall proceed to collect by distress or otherwise. If the tax collector shall fail or refuse to make an assessment and report the same as herein required, he shall be liable on his bond for the amount of taxes properly collectible and ten per cent. damages thereon. If the assessment rolls be in the hands of the assessor at the time the Revenue Agent makes discovery of property which has escaped taxation, he shall give the required notice to the assessor, who shall make the proper assessment, and give the required notices to the owner of the property and to the board of supervisors or mayor and aldermen, under like penalties for failure as provided against the collector, and like proceedings shall be had. When any taxes shall be collected under assessments made as herein required, the Revenue Agent shall receive therefor, at the time of collection, the same compensation allowed him by law for other collections.

SEC. 4. If the property which the Revenue Agent discovers to have escaped taxation shall belong to any railroad or other corporation which, under the law, is required to be assessed by the State railroad assessors, the Revenue Agent shall give the notice required herein to said State railroad assessors, and they shall give the required notice to the company or corporation. At their next meeting after giving the proper notice, said property shall be assessed in the same manner required by law, and placed on the proper county, municipal or levee board roll, and collected by the proper officers in the manner required by law, and the Revenue Agent shall have his compensation as in other cases.

SEC. 5. The Revenue Agent in the discharge of his official duties shall have full power and authority to examine and investi-

gate the books, records, papers, accounts and vouchers of any State, county, municipal or other officer.

SEC. 6. The Revenue Agent shall have power to sue for, collect and have assessed as herein required, delinquent taxes or taxes that have escaped the assessor and collector back to and including the year 1886, and no further.

SEC. 7. That sections 4187, 4190, 4191, 4192, 4193, and 4195, in chapter 126 of the annotated code of Mississippi, be and the same are hereby repealed.

SEC. 8. That this act take effect and be in force from and after its passage.

APPENDIX C.

List of railroad charters containing agreement for appropriation of taxes as embodied in section 21 of Act of July 20, 1870.

1870. Mobile and Northwestern Railroad Company, Laws 1870, pp. 255, 268.
" Memphis and Vicksburg Railroad Company, Laws 1870, p. 327.
" Vicksburg, Yazoo Valley and Grenada Railroad Company, *Ib.*
" Canton and Vicksburg Railroad Company, *Ib.*
" Natchez and Jackson Railroad Company, *Ib.*
" Meridian and Red River Railroad Company, *Ib.*
" Ship Island, Mississippi City and Paducah Railroad Company, *Ib.*
" Elyton and Aberdeen Railroad Company, *Ib.*
" Grenada, Louisville and Meridian Railroad Company, *Ib.*
" Greenville and Rolling Fork Railroad Company, *Ib.*
1871. Meridian, Red River and Texas Railroad Company, Laws 1871, pp. 119, 129.
" Artesia, Starkville and Grenada Railroad Company, Laws 1871, pp. 138, 147.
" Columbus, Fayette and Decatur Railroad Company, Laws 1871, pp. 187, 188.
" Lexington Branch Railroad Company, Laws 1871, pp. 189, 199.
" Elyton, Corinth and Tennessee River Railroad Company, Laws 1871, pp. 202, 218.
" Yazoo City, Raymond and Crystal Springs Railroad Company, Laws 1871, pp. 228, 236.
" Vicksburg, Pensacola and Ship Island Railroad Company, Laws 1871, pp. 237, 250.
" Ripley Railroad Company, Laws 1871, pp. 268, 279.
1872. Arkansas City and Grenada Railroad Company, Laws 1872, pp. 347, 360.
" Corinth, Kossuth and Kosciusko Railroad Company, Laws 1872, pp. 335, 346.
" Corinth and Nashville Railroad Company, Laws 1872, p. 283.
" Gibson and Rolling Fork Railroad Company, Laws 1872, pp. 294, 297.
" Grenada, Houston and Eastern Railroad Company, Laws 1872, pp. 286, 291.

1872. Helena, Water Valley and Eastern Railroad Company, Laws 1872, pp. 299, 311.
" Mississippi River and Sardis Railroad Company, Laws 1872, pp. 380, 386.
" Natchez and Brookhaven Railroad Company, Laws 1872, pp. 362, 367.
" New Orleans, Baton Rouge and Vicksburg Railroad Company, Laws 1872, pp. 246, 255.
" New Orleans and Northeastern Railroad Company, Laws 1872, p. 314.
1873. Ashland Railroad Company, Laws 1873, pp. 518, 520.
" Ashland, Holly Springs and Chulahoma Railroad Company, Laws 1873, pp. 596, 597.
" Grenada, Louisville and Meridian Railroad Company, Laws 1873, pp. 513, 514.
" Holmes County Central Railroad Company, Laws 1873, pp. 520, 530.
" Liberty and Woodville Railroad Company, Laws 1873, pp. 499, 509.
" Mississippi City and Helena Railroad Company, Laws 1873, pp. 531, 540.
" Mobile and Little Rock Railroad Company, Laws 1873, pp. 576, 579.
" West and East Railway Company, Laws 1873, pp. 479, 488.
" Yazoo Valley Railroad Company, Laws 1873, pp. 543, 553.
1878. Natchez, Jackson and Columbus Railroad Company, Laws 1878, pp. 233, 234.
1880. Jackson, Yazoo City and Arkansas City Railroad Company, Laws 1880, pp. 228, 234.
" Greenville, Columbus and Birmingham Railroad Company, Laws 1880, pp. 246, 247.
1882. Vicksburg and Mississippi Railroad Company, Laws 1882, pp. 896, 916.
" Louisville, New Orleans and Texas Railway Company, Laws 1882, pp. 1011, 1013.

LIST OF RAILROAD CHARTERS GRANTING EXEMPTIONS FROM TAXATION.

1878. Port Gibson, Utica and Crystal Springs Railroad Company, Laws 1878, pp. 463, 472.
" Street railroads in Brandon, Laws 1878, pp. 484, 487.
1880. All railroads while in process of construction, Laws 1880, pp. 19, 86.

1882. Memphis and New Orleans Railroad and Levee Company, Laws 1882, pp. 874, 883.

" Yazoo and Mississippi Valley Railroad Company, Laws 1882, pp. 838, 847.

" Canton, Aberdeen, Fulton and Nashville Railroad Company, Laws 1882, pp. 1001, 1009.

" Memphis, Selma and Brunswick Railroad Company, Laws 1882, p. 1022.

" Gulf and Ship Island Railroad Company, Laws 1882, pp. 849, 861.

" Birmingham and Northwestern Railroad Company, Laws 1882, pp. 1040, 1049.

" Tennessee and Mississippi Rivers Railroad Company, Laws 1882, pp. 989, 1000.

" Vicksburg, Canton and Yazoo City Railroad Company, Laws 1882, pp. 1015, 1018.

" Meridian, Brookhaven and Natchez Railroad Company, Laws 1882, pp. 1049, 1064.

" Helena, Sardis, Pontotoc and Birmingham Railroad Company, Laws 1882, pp. 885, 895.

" Mississippi Mexican Gulf Railroad Company, Laws 1882, pp. 961, 974.

" Alabama and Mississippi Railroad Company, Laws 1882, pp. 863, 870.

" Mississippi and Arkansaw Railroad Company, Laws 1882, pp. 933, 942.

" Meridian, Winona and Helena Railroad Company, Laws 1882, pp. 943, 959.

" Mississippi, Alabama and Georgia Railway Company, Laws 1882, pp. 975, 988.

1884. Caledonia Branch Railroad Company, Laws 1884, pp. 888, 895.

" Warrior Coal Fields Railroad Company, Laws 1884, pp. 895, 901.

" Tombigbee Railroad Company, Laws 1884, pp. 901, 907.

" Moss Point, Scranton and East Pascagoula Railroad Company, Laws 1884, pp. 911, 915.

" Macon and Tuscaloosa Railroad Company, Laws 1884, pp. 915, 916.

" Mississippi River and Deer Creek Railroad Company, Laws 1884, p. 918.

" Memphis, Oxford & Columbus Railway Company, Laws 1884, pp. 919, 920.

1884. Port Gibson and Alabama Railroad Company, Laws 1884, pp. 922, 934.

" Terry, Brandon and Northeastern Railroad Company, Laws 1884, pp. 936, 937.

" Helena, Memphis and New Orleans Railroad Company, Laws 1884, pp. 937, 938.

" Tombigbee and Grand Trunk Railroad Company, Laws 1884, p. 950.

" Natchez and Mobile Railroad Company, Laws 1884, pp. 951, 953.

" Front Street and Asylum Street Railway Company, Laws 1884, pp. 955, 956.

" Mississippi River and Mexican Gulf Railroad Company, Laws 1884, pp. 957, 963.

" Rodney, Jackson and Tuscaloosa Railroad Company, Laws 1884, pp. 968, 969.

" Mississippi River and Eastern Railroad Company, Laws 1884, pp. 975, 986.

" Tallahatchie Valley Railroad Company, Laws 1884, pp. 987, 992.

" New Orleans and Northwestern Railway Company, Laws 1884, pp. 994, 1004.

" Meridian and Brunswick Railroad Company, Laws 1884, pp. 1005, 1013.

" Helena, Water Valley, Aberdeen and Birmingham Railroad Company, Laws 1884, pp. 1014, 1023.

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No. 244. 35

IN THE

Supreme Court of the United States.

Brief of Authorities for U.S. (mo.)

OCTOBER TERM, 1899.

No. 244.

Filed Oct. 16, 1899

OFFICE OF THE CLERK U. S. SUPREME COURT
OCT 16 1899
JAMES H. McKENNEY, Clerk

YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY ET AL.,

Plaintiffs in error,

vs.

WIRT ADAMS, State Revenue Agent, &c.

In error to the Supreme Court of Mississippi.

MEMORANDUM OF PLAINTIFFS IN ERROR UPON THE DEFENDANT'S MOTION TO ADVANCE.

Although, for the reasons stated below, it would be a great convenience to have this motion denied, yet it must in candor be admitted that every case involving a large amount of state taxes ought to be advanced. Counsel for the plaintiffs in error cannot, therefore, consistently oppose the motion, although it is prayed that the argument be not assigned for an earlier date than the second Monday of January. A supersedeas bond amply protects every interest of the state.

The plea *ad misericordiam* as to the tottering condition of the state buildings and finances is quite overdone in the memorandun. submitted in support of the motion. However, no useful purpose can be served by contradiction.

I.

In the present case, the questions involved are of great importance and far-reaching consequence to the Yazoo and Mississippi Valley Railroad Company and to other

railroads and manufacturing corporations in the State of Mississippi, who have invested their capital in reliance upon the pledged faith of the State. The importance of the contract now impaired and nullified and the difficulty of the questions involved cannot be denied, for the Supreme Court of Mississippi on the first hearing of the case ordered two reargurnents and took eighteen months to reach a conclusion, and even then the decision was by a divided court, two judges to one, and necessitated the reversal of former decisions.

II.

The subscriber has been retained as counsel in this case only since the suing out of the writ of error from this court. He had expected the aid of the Hon. James Fentress of this bar as senior counsel, but Mr. Fentress has been compelled by reason of ill health to retire from the management of the litigation, and may be prevented from taking any part in the preparation of the brief or in the oral argument. Mr. Edward Mayes, of Mississippi, who conducted the litigation in that State, and who is to lead in the preparation of the brief and on the oral argument, has for several months been afflicted by the serious illness of a son, and has recently been driven from his home in Jackson on account of yellow fever, the same cause that, as the moving papers show (p. 5), has driven the defendant in error also from his home.

In view of these peculiar circumstances, as well as other professional engagements, including several important cases in this court, the undersigned ventures to ask that this case be not set down for an earlier date than January 8th, 1900. The necessary research and the careful

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preparation of the printed brief and for the oral argument, in order to assist the court by a thorough presentation of the legal points involved, will require at least until January. The ends of justice ought to be served by the delay, for the time is really necessary for adequate preparation.

There are also pending on the docket other cases from Mississippi involving practically the same questions. In these cases, motions are about to be submitted by our adversaries to dismiss or affirm, and it requires preparation to resist these applications, which have been or are about to be repeated in each case. It would undoubtedly save this court much labor if all the litigation involving practically the same questions as to these Mississippi taxes were directed to be heard in January; and the undersigned will so urge in the briefs on these motions, two of which are now returnable November 6, 1899. The practice of moving to dismiss in each one of these cases tends to impose double labor upon the court.

Washington, D. C., October 16, 1899.

WILLIAM D. GUTHRIE,
Of counsel for plaintiffs in error.

Office Supreme Court U.S.
FILED
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JAMES H. McKENNEY,
Clerk.

No. 244. 35

Brf. of Guthrie, Mayes, Fentress & Dickinson for P. E.

MISSISSIPPI TAX CASES.

Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed April 10, 1900.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY ET AL.,
Plaintiffs in error,
vs.
WIRT ADAMS, State Revenue Agent.

In error to the Supreme Court of the State of Mississippi.

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

WILLIAM D. GUTHRIE,
EDWARD MAYES,
NOEL GALE,
For Plaintiffs in error.

JAMES FENTRESS,
J. M. DICKINSON,
Of counsel.

WASHINGTON, October Term, 1899.

Supreme Court of the United States.

OCTOBER TERM, 1899.

NO. 244.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY ET AL.,
Plaintiffs in error,
vs.
WIRT ADAMS, State Revenue Agent.

In error to the Supreme Court of Mississippi.

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

This writ of error presents for review a final judgment of the Supreme Court of Mississippi (record, p. 688), which affirmed a judgment in favor of the defendant in error, Wirt Adams, as state revenue agent, against the plaintiffs in error, The Yazoo and Mississippi Valley Railroad Company and the Illinois Central Railroad Company, who were defendants in the court of original jurisdiction. Taxes imposed and levied upon a portion of the railroad of the Yazoo Company for the years 1892 to 1897, inclusive, formed the subject matter of the controversy. It was claimed that the Illinois Central Railroad Company had assumed the payment of these taxes by virtue of certain covenants in mortgages (record, p. 135); but whether or not the revenue agent could enforce the covenants is immaterial, for the real questions in dispute relate solely to the Yazoo Company and its charter rights, and there is no occasion for any detailed statement of the relation of the two companies.

The Yazoo Company, defendant below and plaintiff in error in this court, denied liability upon the ground

that, pursuant to a valid contract with the State of Mississippi, made in 1882 and still in force, although nearly expired, the amount of the taxes had already been paid in discharge of debts incurred in the construction of the railroad, and that the statutes authorizing the collection of these taxes impaired the obligation of such contract. As the judgment now sought to be reversed adjudges the right of recovery of the taxes in question, and subsequent legislation is thereby enforced, the case arises under the contract clause of the Constitution of the United States (Art. I., sec. 10).

The state revenue agent, plaintiff below and defendant here, challenges the jurisdiction of this court, and then, on the merits, contends (first) that the statutory contract relied on by the Yazoo Company was unconstitutional and void from the beginning; and (secondly) that, if valid, it was repealed or was terminated by reason of the merger or consolidation effected in 1892, after the adoption of the state constitution of 1890, as explained below.

Statement of the case.

The origin of the legislation and of the policy and form of legislative contract now in question is both interesting and instructive.[1] The legislature of Mississippi from 1870 until after 1882 deemed it necessary for the public good to invite the investment of capital in the construction of railroads. The resources of the state could not be developed without railroads, and all progress and improvement would be stayed unless means were found for this necessary public improvement. The public treasury was bank-

[1] In *Mobile & Ohio Railroad* v. *Tennessee*, 153 U. S. 486, 502, Mr. Justice Jackson, referring to an exemption from taxation in a railroad charter, said: "Legislative contracts, especially, should be read in the light of the public policy entertained, and the purposes sought to be accomplished at the time they were made, rather than at a later period when different ideas and theories may prevail."

rupt, and the public credit was shattered. The issue of state bonds in aid of public improvements undertaken by railroad corporations, even if the bonds could then have been marketed, was impracticable, for the constitution of 1869 had prohibited the pledge or loan of the credit of the state.[1] The levy of a general tax to assist in the building of railroads would have been fruitless as well as an unbearable burden upon a ruined community, for at that time the condition of Mississippi was indeed miserable. The resources of the state had been exhausted by the struggles and sacrifices of the Civil War. The great revolution in industrial, agricultural and economic conditions resulting from that terrible strife and from the emancipation of the slaves had left the community so poor that with difficulty could the inhabitants bear the burden of the taxes necessary for carrying on the local government. The public records show that millions of acres were being abandoned and forfeited to the state for non-payment of taxes.[2] Even as late as 1881, we find the state raising funds by selling nearly two million acres of forfeited lands of the levee boards, and such sales, as is matter of common knowledge in Mississippi, were made at the incredibly low figure of twelve and one-half cents per acre.[3] The distress of the community was declared in petitions from the legislature to Congress. The paramount necessity of the whole community was clearly the building of railroads, so as to afford adequate means of communication and trans-

[1] Cons'. 1869, Art. XII., Sec. 5.

[2] Appendix to Senate Journal 1870, pp. 20–25; *id.* 1871, p. 1 (Governor Alcorn's Message); *id.* (List of lands held by the State); Laws Miss. 1878, pp. 243-5; Appendix Senate Journal 1882, (Gov. Lowry's Message); Laws 1882, p. 134; *Murdock* v. *Chaffe*, 67 Miss. 740, 750; record, pp. 348, 381.

[3] Department Reports 1882, Report of Commissioner of Immigration, pp. 11, 19; *Murdock* v. *Chaffe, supra;* Laws of Miss. 1888, p. 40.

portation, and thereby develop the resources of the state. Yet the topography of the country was such that both the construction and the maintenance of railroads were unusually difficult and expensive, and railroad enterprises then and for many years promised very doubtful profit.[1] Especially in the Mississippi delta—that extensive region lying between Memphis and Vicksburg on the one hand, and the Mississippi river and the bluffs east of the Yazoo on the other—the country was a wilderness as late as 1882. Except for small areas along the fronts of the navigable rivers, the lands were waste and wild swamp, uncultivated, uncleared and unexplored, subject to annual inundations from the Mississippi. The levees had been swept away again and again, and Congress was being prayed for aid to rebuild them upon the ground that taxation for this purpose had utterly failed and been abandoned.[2]

Thus, in a memorial to Congress, the legislature which enacted the legislation under which we claim (Laws 1882, p. 134) used the following language with reference to the Gulf and Ship Island Railroad:

> "We must consider the most important practical question of the resources available for the work. It is manifest the road cannot be built by corporate or individual subscriptions in our own State. The well known pecuniary condition of our people forbids such a hope. But we have good reason to believe that if the former grant of government lands can be revived, a substantial basis of credit will be created; and with this material aid assured, there will be no difficulty in enlisting northern and foreign capital to insure the early completion and equipment of the road."

In this condition of affairs, the legislature concluded, in the exercise of what must seem to all candid minds a wise foresight, that the only chance or prospect of de-

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[1] Record, pp. 403–405.

[2] Laws of Miss., 1878, pp. 243–245; Laws of Miss., 1882, pp. 123, 124, 127.

velopment and improvement was by inducing the investment of capital belonging to the inhabitants of more prosperous states. The legislature, therefore, undertook to induce outside investors to build railroads in the state, and thus to provide the necessary means of communication and transportation upon which future progress, development and prosperity depended.[1]

The state was in the attitude of soliciting subscriptions of capital in the formation of railroad corporations, endeavoring to induce investors to undertake the risk of necessary public improvements for the benefit of the people of the whole state, with the hazard of loss and perhaps financial ruin to the promoters, and offering to vote taxes as a consideration, by way of contract, for the acceptance of its proposals. The proposals were accepted and performed in good faith, and the result of the construction of railroads has been to increase the value of property in the Delta district fully one hundredfold, and to turn the district into the garden of the state; and the state and counties now collect from this territory immensely increased revenues.

A series of acts providing for the incorporation of railroad companies was passed from 1870 to 1882 whereby the state agreed that if the incorporators would invest and risk their capital and build railroads, and thus create new facilities for transportation and new property which before did not exist, and enhance the values of the property of the whole community, the state would, during

[1] In 1860 there were 862 miles of railroad in Mississippi (Poor's Manual, 1897, p. xvi); in 1880, just before the granting of the appropriation involved in this case, the total mileage had increased to 1,127 miles (*ib.*); in 1886, after the completion of the Louisville, New Orleans and Texas Railway, the total number of miles was 2,111 (Poor's Manual, 1887, p. xi); and this was increased to 2,552 miles by the year 1896 (Poor's Manual, 1897, p. xvi). The total mileage of the L., N. O. & T. Company and the Yazoo Company, as consolidated, is 947 miles (Poor's Manual, 1899, p. 515).

a stated and limited period, appropriate and set apart from time to time an amount equal to all taxes to which the railroad companies might be subject, and would apply the amount to the payment of such debts and liabilities as the railroad companies might have to incur in the construction of their respective roads. Each charter provided for a capital stock, and the appropriation only contemplated the reimbursement of construction debts incurred in addition to the capital investment, if the capital were found insufficient. This appropriation was, however, made upon two conditions: first, that an amount equal to the taxes so appropriated and set apart should have been actually and in good faith applied by the railroad company during the preceding year in payment of debts incurred or money borrowed for construction; and, secondly, that whenever the profits of any of the companies were sufficient to pay an annual dividend of eight per cent. upon the capital stock over and above the payment of debts and liabilities, the appropriation of taxes should cease. In other words, instead of appropriating a fixed amount payable at once or in annual instalments, the legislature agreed to appropriate and set apart each year, until the construction debt should be discharged, an amount equal to the taxes which might be levied upon the railroad companies.

The extent to which this policy was adopted by the legislature may be judged from the fact that, during the session of 1870, ten railroad companies were incorporated, with each of which the same contract was made; eight companies were similarly incorporated during the session of 1871, twelve during the session of 1872 and eleven during the session of 1873. Between 1870 and 1884, inclusive, forty-four railroad companies were incorporated, with

each of which the contract now before the court was made by the legislature on behalf of the State of Mississippi substantially in the same form and to the same effect. The contract involved in this suit was made in 1882.

During the same period, the legislature granted to forty-two railroad corporations express exemptions from taxation (see appendix D). The legislature of Mississippi, therefore, constantly recognized and emphasized the difference between a contract of appropriation of taxes to reimburse payment of construction debt and an unconditional exemption from taxation.

The form of contract of appropriation now involved was first embodied in the charter of the Mobile and Northwestern Railroad Company, approved July 20, 1870 (Laws 1870, Ch. 104, Sec. 21). It is known and referred to in subsequent statutes and decisions as "section 21," and is as follows (record, p. 40) :

> "SECTION 21. Be it further enacted, That in consideration of the construction of the railroads provided for herein, and of the great benefit which the State will receive in the development of its agricultural resources by means of said railroads as works of internal improvement, and also of the increased value which will thereby be added to the property of the State, thus enabling the State to greatly increase its revenue without additional and burdensome taxation on the people, the State hereby agrees with said company (and which agreement is irrepealable), that all taxes to which said company shall be subject for the period of thirty years, are hereby appropriated and set apart, and shall be applied to the payment of the debts and liabilities which the said company may have incurred in the construction of said road, or for money borrowed by said company upon lands or otherwise, to be used in constructing said road, or paying debts incurred by said company in constructing the same; and it shall be the duty of the tax collector in every county, in each and every year, to give to said company a receipt in full for the amount of said taxes upon receiving from said company an affidavit made by the president or cashier of said company that the amount of said taxes have actually and in good faith

been paid and applied by said company during the year, in payment of the debts incurred, or money borrowed as aforesaid, and which receipt shall be in full of all taxes, county, State, and municipal, to which said company shall be subject. Provided, however, that whenever the profits of said company shall enable it to declare and pay to the stockholders an annual dividend of eight per cent. on its capital stock over and above the payment of its debts and liabilities, then the appropriation of the taxes aforesaid shall cease, and said taxes shall be paid by said company to the tax collector, to be by him paid over as required by law."

The Memphis and Vicksburg Railroad Company was incorporated in the year 1870, and by supplemental act of August 8, 1870, this provision of section 21 was expressly made applicable to it (appendix, p. iv). The New Orleans, Baton Rouge, Vicksburg and Memphis Railroad Company was incorporated in 1882 (appendix, p. v). These corporations were authorized to consolidate by the acts of March 3, 1882, and March 15, 1884 (appendix, pp. v, vii). By section 5 of the act of 1882, the provisions of section 21 above quoted were made applicable, as an independent and original grant, to the company to be formed by the consolidation thereby authorized (appendix, p. vi), as follows:

"SEC. 5. *Be it further enacted*, That the provisions of the twenty-first section of an act entitled, "an act to incorporate the Mobile and Northwestern Railroad," approved July 20, 1870, is hereby made to apply to the said consolidated company, and for that purpose the said section is hereby declared to be part of this act, and this section shall be construed as though the said twenty-first section was specially and fully set out herein; but this section shall not be in force for a longer time than twenty-five years from the approval of this act." (Laws Mississippi, 1882, p. 1013).

This is the particular contract which is now presented for adjudication on this writ of error. Under the authority of these acts of 1882 and 1884, and on the 12th of August, 1884, a corporation was formed under the name or title of the Louisville, New Orleans and Texas Railway Com-

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pany by a consolidation effected between the two companies above mentioned and a Tennessee company and a Louisiana company (record, p. 12). The capital stock issued by the Louisville, New Orleans and Texas Company was $5,000,000, and its construction debt was $35,236,000, the actual cost of the road being $28,421,115 (*id.*, pp. 293, 557). The exceptional difficulties under which the construction was prosecuted are fully explained in the testimony (*id.*, pp. 300, 305, 306, 310, 316, 403, 405, 406, 411, 420, 421, 422, 423, 427, 428, 429).

The consolidated company continued to own and operate the road until October 24, 1892, when it was merged in or consolidated with the Yazoo and Mississippi Valley Railroad Company, one of the plaintiffs in error here, by articles of agreement, which fixed the terms of the merger or consolidation.

The authority for this consolidation of 1892 will be found in the charter of the Memphis and Vicksburg Railroad Company (Laws 1870, p. 326, appendix, p. iv), which granted power "to consolidate the stock, property and franchises of the road with any other road or roads upon such terms as may be consistent with the powers conferred upon said company;" and in the charter of the New Orleans, Baton Rouge, Vicksburg and Memphis Railroad Company (Laws 1882, p. 932, appendix, p. v), which granted power and authority "to consolidate the company with any other company," and provided that when such "consolidation is effected, the said company shall be entitled to all the benefits, rights, franchises, lands and property of every description belonging to said road or roads so sold or consolidated." These powers passed to the consolidated company of 1884 by virtue of section 1 of the act of 1882 (appendix, p. v), as follows:

"The company so formed by such consolidation shall be deemed and held to be a corporation created by the laws of this State, and shall have, enjoy and possess all the rights, ways, privileges, franchises, property, grants and immunities, which are now possessed by the companies which may enter into such consolidation, as fully as though the same were conferred specially in this act, and to that end the charters of said consolidating companies shall be taken and held to be a part of this act."

The power of the Yazoo Company to consolidate was derived from section 5 of its charter (Laws 1882, p. 842, appendix, pp. vi, vii), which provided as follows:

"Said company may consolidate with any other railroad company in or out of the State of Mississippi upon such terms as the consolidating companies may agree upon; * * * and upon any such consolidation the consolidated company shall have and enjoy all the property, rights, privileges, powers, liberties and immunities and franchises herein granted."

The agreement of consolidation provided, among other things, as follows (record, p. 14):

"ARTICLE I. Such consolidation shall be effected by uniting or merging the stock, property and franchises of the party of the first part with and into the stock, property and franchises of the said The Yazoo and Mississippi Valley Railroad Company, without disturbing the corporate existence of the last-named company, or the formation of any new, distinct, corporation, unless such result shall be necessary to give legal effect to this agreement; but whatever may be the legal consequence of the consolidation herein provided for, this agreement is to stand and be effective. * * *

"ARTICLE IV. Every holder of the stock of either of the said companies now outstanding shall be entitled to cast one vote for each share of stock held by him at all stockholders' meetings of the consolidated company, which vote may be cast either in person or by proxy, and shall have all the rights of a stockholder of the consolidated company, as fully as if new shares of the consolidated company had been issued and exchanged therefor; and in case the consolidated company shall determine to issue new shares, such shares shall be exchangeable at par for the now outstanding shares of each of the constituent companies; and the remainder of the capital stock of the consolidated company shall

be issued from time to time, and upon such terms and conditions as may be prescribed by the board of directors of said company.

"ARTICLE V. All and singular the rights, powers, privileges, immunities and franchises, and all the railroads, real and personal estate, easements, fixtures, equipments, choses in action and property and assets of every kind, nature or description, belonging to either of the parties hereto, shall be vested in, and become the property of, the said consolidated company, without any further act, deed, conveyance or assurance being required in the premises."

The state constitution in force in 1882 and adopted in 1869 provided in regard to taxation as follows (appendix, p. 1):

"ARTICLE XII., SEC. 13. The property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals.

"SEC. 20. Taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value to be ascertained as directed by law."

After the passage of the various acts making appropriations of taxes in the language of section 21 and authorizing the consolidation as above recited, but before the merging of the Louisville, New Orleans and Texas Company into the Yazoo Company, the people of Mississippi, in 1890, adopted a new constitution, which enacted the provisions respecting taxation, corporations and charter rights which are quoted in the appendix, pp. i, ii.

Under the authority of certain general legislation of the State of Mississippi passed in 1892 and 1894, and which is fully set forth in the appendix[1] (pp. ix–xiv), Adams, the defendant in error, brought three suits in the Circuit Court of Hinds County, Mississippi, in December, 1893, one for the recovery of the taxes of 1892,

[1] By section 3884 of the Mississippi Code of 1892, it is made the duty of the tax-collector to "collect the railroad taxes from said rolls in all respects as he collects other taxes;" and section 3803 provides what "may be received by tax-collectors in payment of taxes;" *i. e.*, United States treasury notes and coins, national currency, and warrants drawn upon the state or county treasuries (appendix, pp. xi, ix).

another for the taxes of 1893 and 1894, and a third for the taxes of 1895, levied upon that portion of the road of the Yazoo Company which had been originally constructed by and belonged to the Louisville, New Orleans and Texas Company and its original constituents. In the first-mentioned suit, the Yazoo Company interposed a plea setting forth the charter rights of the L., N. O. & T. Company, and alleging compliance with the provisions of section 21 respecting payment of construction debt and the delivery of the affidavit showing application of the amount of the taxes (record, p. 55). A demurrer to this plea was overruled (*id.* p. 57), and replications were filed (*id.* p. 58 *et seq.*). Afterwards, these three suits were consolidated, the pleadings in the first case being made applicable to all, without waiver of any exceptions or errors (*id.* pp. 88, 106). Upon trial of the issues of fact raised by the replications, a verdict was returned in favor of the present plaintiffs in error as to the taxes of 1892, 1893 and 1894, and in favor of the state revenue agent for the taxes of 1895, upon which judgment was rendered for $84,985.63 (*id.* p. 108). Both parties appealed to the supreme court of the state, where, after one argument and two rearguments, the judgment was reversed upon both the appeal and the cross-appeal and the cause remanded for a new trial upon the issues (*id.* pp. 510–512). The Chief Justice dissented (*id.* p. 515).

After the cause had been remanded to the circuit court for a new trial, two other suits subsequently brought for the recovery of the taxes for the years 1896 and 1897, respectively, were consolidated with the original suit (*id.* p. 610), and the plaintiffs in error filed separate pleas in the consolidated suit so embracing all the suits, and by these pleas they expressly attacked the legislation under

authority of which the suits had been brought as in violation of the contract clause of the Federal Constitution (*id.* pp. 566, 594). The pleas containing this claim were, upon motion of the defendant in error, stricken out as constituting no defense (*id.* p. 608), to which exception was duly taken (*id.* p. 609). The plaintiffs in error thereupon withdrew their other pleas and declined to plead further (*id.* p. 610); and the cause having been tried, judgment was rendered for the taxes for the six years included in the consolidated suit (*id.* p. 630). The plaintiffs in error appealed to the Supreme Court of Mississippi, where this last-mentioned judgment was affirmed on February 20, 1899, and final judgment rendered against them for $548,676.99 taxes and $27,433.84 damages (*id.* p. 688). The present writ of error was thereupon sued out, being allowed by the Chief Justice of the Supreme Court of Mississippi (*id.* p. 690), who again dissented (*id.* p. 688), and who granted a certificate as to the federal question involved (*id.* p. 690), which conclusively shows that upon the argument and hearing the federal question was duly raised.

The decision of the court below was based substantially upon three propositions: (1) that the contract of appropriation was invalid when made, because in conflict with the constitution of 1869; (2) that, if valid when made, the contract had been terminated by virtue of the consolidation in 1892 and the benefit thereof had not passed to the Yazoo Company; and (3) that the provision had been duly repealed.

Specification of Errors.

The plaintiffs in error assert and intend to urge and rely upon the following errors of the court below, viz.:

1. That the court erred in holding that the provision of section 21 did not constitute a valid and irrepealable contract between the state and the railroad company under the Mississippi constitution of 1869.

2. That the court erred in holding that such a contract was prohibited by the constitution of 1890.

3. That the court erred in holding that the consolidation of 1892 had operated to terminate the existing contract.

4. That the court erred in permitting recovery of taxes under and by virtue of revenue laws passed subsequent to the charters of 1882 and 1884, and thereby giving effect to statutes which impaired the obligation of the contract in suit.

The questions involved and the points of law or fact to be discussed may be grouped for convenience under the following heads:

I. The jurisdiction of this court.

II. The nature of the contract involved in the controversy.

III. The validity of the contract under the constitutions of Mississippi.

IV. The effect of the consolidation of the railroad companies in 1892.

I.

The jurisdiction of this court.

Motions to dismiss for want of jurisdiction and to affirm were submitted on April 24, 1899, but the decision of the motions was postponed to the argument on the merits.

This court has jurisdiction under section 709 of the Revised Statutes, because a federal question was necessarily involved in the case, and the court below could not have reached its conclusion without deciding that question. Thus, in his brief on the motion to dismiss, the defendant in error stated the grounds of the decision below as follows (pp. 10, 11):

"In these consolidated causes the Supreme Court of Mississippi decided five things:

1. That the legislature could not grant an exemption to a railroad company by name as such under said Constitution of 1869.

2. That it could not grant an irrepealable exemption under said Constitution.

3. That a new company was formed by the consolidation of October 24, 1892, and no exemption passed into it.

4. That, if the consolidation was a technical merger, still Section 180 of the Constitution of 1890 prevented any exemption from passing into it.

5. That any alleged exemption was repealed by the acts of 1884, 1886 and 1890."

This statement, while not reciting the precise grounds of the decision with accuracy, nevertheless shows conclusively that each of them clearly involved a federal question, namely, (1) whether or not there was a contract entitled to protection from impairment, and (2) whether or not the obligation of that contract had been in fact impaired. The record fails to disclose any sufficient ground of decision which would not involve the federal question, for the original validity and the present existence of the legislative contract constitute the only points of law or fact in the litigation.

But as the defendant nevertheless insisted that the court has no jurisdiction, and urged at great length many grounds on the motion to dismiss, a fuller discussion is considered necessary than would otherwise be ventured, although the labors and decisions of the court ought to have settled beyond argument most of the suggestions urged to defeat the jurisdiction.

The question as to the original validity and the true construction of the contract is, of course, one for the independent judgment of this court. This question has always been determined here independently of the decisions of the state courts, and in many cases in direct opposition to the rulings of those tribunals.[1]

[1] *Ohio Life Insurance and Trust Company* v. *Debolt*, 16 How. 416, 432; *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436, 443; *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116, 145; *Delmas* v. *Insurance Company*, 14 Wall. 661, 668; *Railroad*

In a number of the contract cases cited in the margin, motions were made to dismiss upon the ground that the construction by the state court of its own constitution and laws was binding upon this court, but in every instance the motion to dismiss was denied. In *Yazoo Railroad Co.* v. *Thomas*, 132 U. S. 174, 184, a motion to dismiss was made upon the same ground as that urged in the case at bar. In overruling the motion, Mr. Chief Justice Fuller said:

> "The taxes in question were assessed under the act of 1888, and if the charter of the company, which became a law on the 17th of February, 1882, inhibited such taxation, then this court has jurisdiction to re-examine the conclusion reached. Although by the terms of the act of 1888 the taxes therein referred to were not to be levied as against a railroad exempt by law or charter, yet the Supreme Court held that this company is not exempt, and is embraced within the act; so that if a contract of exemption is contained in the company's charter, then the obligation of that contract is impaired by the act of 1888, which must be considered, under the ruling of the Supreme Court, as intended to apply to the company. The result is the same, although the act of 1888 be regarded as simply putting in force revenue laws existing at the date of the company's charter, rather than itself imposing taxes, for if the contract existed those laws became inoperative, and would be reinstated by the act of 1888. The motion to dismiss the writ of error is therefore overruled."

Companies v. *Gaines*, 97 U. S. 697, 709; *University* v. *People*, 99 U. S. 309, 321, 323; *Wright* v. *Nagle*, 101 U. S. 791, 793; *Louisville & Nashville R. R. Co.* v. *Palmes*, 109 U. S. 244, 256; *Memphis Gas Co.* v. *Shelby County*, 109 U. S. 398, 399; *Vicksburg, &c., Railroad Co.* v. *Dennis*, 116 U. S. 665, 667; *Giles* v. *Wright*, 117 U. S. 648, 655; *N. O. Water Works* v. *La. Sugar Co.* 125 U. S. 18, 38; *Yazoo Railroad Co.* v. *Thomas*, 132 U. S. 174, 184; *McGahey* v. *Virginia*, 135 U. S. 662, 669; *Wilmington & Weldon Railroad* v. *Alsbrook*, 146 U. S. 279, 293; *Bryan* v. *Board of Education*, 151 U. S. 639, 650; *Mobile & Ohio Railroad* v. *Tennessee*, 153 U. S. 486, 492; *Shelby County* v. *Union &c. Bank*, 161 U. S. 149, 151; *Phœnix Insurance Co.* v. *Tennessee*, 161 U. S. 174, 185; *Douglass* v. *Kentucky*, 168 U. S. 488, 502; *McCullough* v. *Virginia*, 172 U. S. 102, 109; *Water Power Co.* v. *Street Railway Co.* 172 U. S. 475, 487; *Citizens' Savings Bank* v. *Owensboro*, 173 U. S. 636, 644, 654; *Walsh* v. *Columbus, Hocking Valley & Athens R. R.* (decided February 26, 1900); *Houston & Texas Central Railroad* v. *Texas* (decided March 26, 1900).

To the same effect is *Wilmington & Weldon Railroad* v. *Alsbrook*, 146 U. S. 279, 293.

In *Keokuk & Western Railroad* v. *Missouri*, 152 U. S. 301, which is the latest case involving the effect of consolidation upon an antecedent right of exemption from taxation, a motion was made to dismiss upon exactly the same ground as that assigned in the case at bar, namely, that the determination of the state court as to the effect of consolidation was a construction by the state court of its local constitution and laws, and was therefore binding upon this court; yet this court denied the motion to dismiss, and considered and determined the whole question upon the merits. This case is on all fours with the case at bar, and, unless overruled, furnishes a conclusive precedent in support of jurisdiction.[1]

In no class of cases has this court oftener exercised its power to determine for itself the existence and the true nature and effect of an alleged contract than in the long line of decisions involving so-called exemptions or immunities from taxation in cases of consolidation, foreclosure or reorganization. The inquiry as to whether a consolidation has resulted in the termination of any exemption or privilege or immunity enjoyed by the prior corporations, has always been deemed by this court to be essentially a federal question. From the case of *Tomlinson* v. *Branch*, 15 Wall. 460 (1872), until the present time, this court has never considered itself bound by the construction placed by the state courts upon the statutes authorizing a consolidation. Therefore, even if the state court had only decided that the rights acquired under section 21 had been terminated or lost by the con-

[1] The disposition of the motion in the *Keokuk* case is not reported, but the records in the clerk's office show that the motion was submitted March 23 and denied March 30, 1891.

solidation and that a contract no longer existed, it would clearly have rendered a decision upon a federal question, pure and simple[1], subject to full and independent review in this court.

The fact that the prevailing opinion studiously avoids reference to the subsequent statutes to which it necessarily gave effect by allowing recovery under them is clearly immaterial (*Chapman* v. *Goodnow*, 123 U. S. 540, 548; *Houston & Texas Central Railroad* v. *Texas*, decided March 26, 1900).

It was, however, insisted in the papers on the motion to dismiss that the federal question was not raised at the proper time or in the appropriate way. The contention seemed to be that the question or point ought to have been expressly "pleaded." The case is, however, included in the second class mentioned in section 709 of the Revised Statutes; and it is well established that in cases

[1]The following cases involved the creation of an alleged contract: *East Hartford* v. *Hartford Bridge Co.*, 10 How. 511, 532; *Chesapeake, etc. R. R. Co.* v. *Virginia*, 94 U. S. 718, 722; *Railroad Companies* v. *Gaines*, 97 U. S. 697, 707; *Railroad Co.* v. *Commissioners*, 103 U. S. 1, 3; *Memphis Gas Co.* v. *Shelby County*, 109 U. S. 398, 399; *Vicksburg, &c., Railroad Co.* v. *Dennis*, 116 U. S. 665, 667; *Chicago, &c., Railroad* v. *Guffey*, 120 U. S. 569; S. C., 122 U. S. 561; *Yazoo Railroad Co.* v. *Thomas*, 132 U. S. 174, 184; *McGahey* v. *Virginia*, 135 U. S. 662, 667; *Wilmington & Weldon Railroad* v. *Alsbrook*, 146 U. S. 279, 293; *Bryan* v. *Board of Education*, 151 U. S. 639, 650; *Bank of Commerce* v. *Tennessee*, 161 U. S. 134, 139; *Phœnix Insurance Co.* v. *Tennessee*, 161 U. S. 174, 175; *Douglas* v. *Kentucky*, 168 U. S. 488, 495; *Chicago, &c. Railroad* v. *Nebraska*, 170 U. S. 57, 68; *McCullough* v. *Virginia*, 172 U. S. 102, 109.

In the following cases the court determined for itself whether or not there was still an existing contract, or whether the rights acquired thereunder had been waived, or had been lost or surrendered by consolidation, or otherwise: *Morgan* v. *Louisiana*, 93 U. S. 217, 219; *Railroad Co.* v. *County of Hamblen*, 102 U. S. 273, 275; *Wilson* v. *Gaines*, 103 U. S. 417; *Louisville & Nashville R. R. Co.* v. *Palmes*, 109 U. S. 244, 256; *Memphis Railroad Co.* v. *Commissioners*, 112 U. S. 609, 617; *St. Louis, &c., Railway Co.* v. *Berry*, 113 U. S. 465, 472; *Chesapeake & Ohio Railway Co.* v. *Miller*, 114 U. S. 176; *Given* v. *Wright*, 117 U. S. 648, 655; *Keokuk & Western Railroad* v. *Missouri*, 152 U. S. 301, 305; *Mobile & Ohio Railroad* v. *Tennessee*, 153 U. S. 486, 492; *St. L. & San Francisco Railway* v. *Gill*, 156 U. S. 649, 656; *Norfolk & Western Railroad* v. *Pendleton*, 156 U. S. 667, 673; *Mercantile Bank* v. *Tennessee*, 161 U. S. 161, 171.

belonging to that class—that is to say, where "is drawn in question the validity of a statute of, or an authority exercised under a statute of, any state, on the ground of its being repugnant to the Constitution," etc.,—it is not necessary that the federal question should be expressly set up or claimed in order to give this court jurisdiction, but it is sufficient that it appear that the federal question was involved in the case, and that the case could not have been determined without deciding it. This well-established rule of practice was most emphatically reiterated in *Water Power Co.* v. *Street Railway Co.*, 172 U. S. 475, 485, where Mr. Justice Brown, referring to a state of facts quite analogous to those now presented, used the following language:

> "While no special mention is made in the complaint of the Constitution of the United States, the whole theory of the plaintiff's case taken in connection with the answer is that the rights which it acquired to the five hundred horse power in question under the act of 1887 were impaired by the subsequent act of December 24, 1892, ratifying and approving the contract of the board of directors of the state penitentiary with the defendant. The contract of the defendant is set up in the complaint, and although the act of December, 1892, ratifying the same is not set up there, it appears in the answer and is relied upon as validating the contract; so that, reading the complaint and answer together, the question whether the contract of the plaintiff was impaired by subsequent State action appears on the face of the pleadings. * * *
>
> "While, in so holding, the court disposed of the case upon the construction of the contract under which the plaintiff asserted its right, such construction is no less a Federal question than would be the case if the construction of the contract were undisputed, and the point decided upon the ground that the subsequent act confirming the contract with the defendant did not impair it. The question in either case is whether the contract has been impaired, and that question may be answered either by holding that there is no contract at all, or that the plaintiff had no exclusive rights under its contract, or granting that it had such exclusive rights, that the subsequent legislation did not impair it. These

are rather differences in the form of expression than in the character of the question involved, and this court has so frequently decided, notably in the very recent case of *McCullough* v. *Virginia*, 172 U. S. 102, that it is the duty of this court to determine for itself the proper construction of the contract upon which the plaintiff relies, that it must be considered no longer as an open question. *N. O. Water Works* v. *La. Sugar Co.*, 125 U. S. 18; *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116.

"TO THE ARGUMENT THAT THE FEDERAL RIGHT WAS NOT 'SPECIALLY SET UP AND CLAIMED' IN THE LANGUAGE OF REVISED STATUTES, SECTION 709, IT IS REPLIED THAT THIS IS NOT ONE OF THE CASES IN WHICH IT IS NECESSARY TO DO SO."

The statutes relied upon by the railroad companies were set forth by appropriate reference in the declaration of the revenue agent (record, pp. 10, 30, 39, 40, 42, 44, 45), and it was asked that "they be considered as part of this declaration" (*id.*, p. 10). Among those statutes is the one which constitutes the contract upon which the plaintiffs in error especially rely (*id.*, p. 42). Consequently, the declaration itself brought the charter contract before the court for adjudication. The question of its validity and of the plaintiff's right to recover taxes already paid and discharged in the manner provided in the act, could, of course, have been fully raised by demurrer if the facts showing compliance with the statute had been alleged by the plaintiff. The charter being thus before the court, it was not necessary to aver it again in the defendants' plea, the only requisite allegation in defense being of those facts which brought the railroad companies within the provisions of the statute. This allegation of the plea was made in almost the very language of the statute (*id.*, p. 55). To this plea, the plaintiff demurred, and this was one of the issues presented on the first appeal. It is, therefore, evident that, upon the face of the pleadings, the valid-

ity of the statute was necessarily involved. The nature and binding effect of the contract was urged upon the identical point now submitted (*id.*, p. 676).

Even if this were not a case of the second class, but a case within the third class—that is, involving a right, title, privilege or immunity under the Federal Constitution—this court would nevertheless hold that the federal question had been duly raised, and that the right, title, privilege or immunity had been specially set up or claimed in a proper way and in ample time (*Chicago Life Ins. Co.* v. *Needles*, 113 U. S. 574, 579; *Spencer* v. *Merchant*, 125 U. S. 345, 352; *Kaukauna Co.* v. *Green Bay &c. Canal*, 142 U. S. 254, 269; *Roby* v. *Colehour*, 146 U. S. 153, 159; *Powell* v. *Brunswick County*, 150 U. S. 433, 439; *Chicago, Burlington &c. R'd* v. *Chicago*, 166 U. S. 226, 231; *Green Bay &c. Canal Co.* v. *Patten Paper Co.*, 172 U. S. 58, 66).

When, upon the first appeal, the Supreme Court of Mississippi overruled its prior decisions and announced a new construction of its constitution, the plaintiffs in error at once filed a suggestion of specific errors before final judgment was entered (record, p. 518), specially setting up and claiming the contract right under the Federal Constitution.[1] They were entitled as of right to have these suggestions considered and determined before the issuance of a mandate. The practice is not at all similar to an application for a rehearing, the grant of which is discretionary; but the right to have an adjudication upon the suggestion of errors is absolute. The difference

[1] The suggestion of errors was filed June 27, 1898, and the full opinion of the Supreme Court of Mississippi was not filed until November 22, 1898. Thus the court below had the suggestion of errors before it for five months and undoubtedly considered it in preparing the definite opinion on the first appeal.

is distinctly recognized in the rule printed in the margin.[1]

Moreover, in all cases which hold that it is too late to raise the federal question on an application for a rehearing, it appeared that such an application was made after the very decision sought to be reviewed and not after a decision on a first appeal upon which no final judgment could be rendered and which could not be brought to this court for review. The result of the first appeal in this case was not a final judgment, or even a mandate directing specific further proceedings, such as an accounting. The language was: "The judgment is reversed both on appeal and the cross-appeal, and verdict set aside, and the cause remanded for a new trial" (record, p. 676). Either party on such new trial could interpose any evidence and advance any argument within the pleadings. Upon the new trial, the plaintiffs in error attempted specially to set up and claim the protection of the Federal Constitution, although it was really sufficiently raised under the pleadings as they stood. This attempt was made out of extreme prudence and in order to narrow the real issues. The court struck out the pleas *as presenting no defense*, and this ruling was sustained by the Supreme Court of the state.

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[1] Under the practice in the Supreme Court of Mississippi, there is a clear distinction between a petition for a reargument and a suggestion of error, the latter being presented to and considered by the court as of right. Rule 10 of the Supreme Court of Mississippi is as follows: "Petition for reargument—suggestion of error. Applications for reargument shall be presented in open court by petition, and noted on the minutes of the court on or before the Monday succeeding the delivery of the opinion; and no reargument shall be granted upon any point or question not distinctly made and insisted upon at the original hearing or submission of the cause. No extension of the time for making such application will be granted except on account of sickness or other extreme cause. The court will, at any time during the term at which a judgment is rendered, consider a written suggestion of error of law or fact therein, and will take such action as may seem proper" (70 Miss. XXII.).

But whether or not an amended answer or plea could properly have been set up then is immaterial. The question is whether this court will consider that the federal question has been duly set up or claimed when, as in this case, upon a new trial on the issues and merits, the party specially sets up and claims the right, and his pleas are stricken out by the trial court as presenting no defense, which ruling is duly excepted to and is subsequently affirmed by the highest state court on the same ground. Of course, no particular form of words need be used in order to raise the federal question; nor is it necessary that it should be raised in the original pleading or in any pleadings at any particular time. All that is necessary is that before final judgment below, there shall be "something in the case before the state court which at least would call its attention to the federal question as one that was relied on by the party" (*Dewey* v. *Des Moines*, 173 U. S., 193, 199). It affirmatively appears by the record before this court, as well as by the certificate of the Chief Justice of Mississippi (record, p. 690), that the federal question was raised before final judgment in the appellate court on the first appeal, and months before its final opinion thereon was delivered; that it was specially set up and claimed in the court of original jurisdiction on the new trial, and that it was likewise before the Supreme Court of the state on the appeal which resulted in the judgment now before this court for review.

It was also urged on the motion to dismiss that, as this is a writ of error from a judgment rendered on a second appeal, the rule is that what could have been examined and decided on the first appeal is *res adjudicata* and cannot be examined and decided on a second trial or on a second appeal. It is quite

true that the federal question could have been examined and decided on the first appeal, and that, as matter of fact, it was actually examined and decided. But, even if this were not so, it does not in any way affect the question here. It is the statutory right of a defendant in Mississippi to amend his pleadings and set up new defenses at any time before verdict (*Railroad Co.* v. *King*, 69 Miss., 852; *Millsapps* v. *Bank*, 71 Miss., 361, 378; *Taylor* v. *Chickasaw Co.*, 74 Miss., 23).

The rule is well established that where a new trial is ordered upon the merits—not, as in *Mutual Life Insurance Co.* v. *Kirchoff*, 169 U. S. 103, simply to take an accounting—the whole case is open to a party to make any point that may properly be presented under the original or amended pleadings.

Moreover, this entire argument as to the effect of the judgment on the first appeal as *res adjudicata* is somewhat difficult to follow. It seems to lose sight of the fact that no writ of error could have been issued from this court to review the first judgment because it was not final. If the theory of the defendant in error be correct, the result would be to deprive a litigant of relief in this court in every case in which a first appeal results in a reversal and new trial, upon which, of course, no writ of error would lie from this court, and the second appeal is decided against him on the ground that the law has been settled on the first appeal and is practically *res adjudicata.* In *Great Western Telegraph Co.* v. *Burnham*, 162 U. S. 339, 343, the misconception of the decisions of this court upon this point is explained and cleared by Mr. Justice Gray.

But the point is certainly without force as respects the taxes of 1896 and 1897. As to these taxes, the railroad companies had but one hearing in the circuit court and

but one appeal to the state supreme court. When the suits were consolidated on July 4, 1898 (record, p. 610), after the reversal of the original judgment, there had been no trial in the circuit court and no adjudication by the appellate court respecting these taxes. It was, therefore, the duty of the circuit court to receive and consider any defense which might be interposed to these taxes, irrespective of the action of the appellate court in other cases. The consolidation order expressly preserved all rights. Thus (*id.* p. 610):

> "This order is made to save the expenses and inconvenience of separate pleadings and trials in each case, and is not to be construed to the prejudice of either party, and all objections and exceptions are reserved which could be reserved if said orders, proceedings, and pleadings were all separate."

The defendant in error, nevertheless, now asks this court to hold that the practical effect of the consolidation order was to deprive the defendants of an existing ground of defense, because that point was not made on the trial of the first three cases. This suggestion hardly needs further comment.

The case of *Mutual Life Insurance Co.* v. *Kirchoff*, 169 U. S. 103, is not in point. In that case it was claimed that a right or title under the Constitution of the United States was involved, which, however, was not set up or claimed until after a decision in the highest court of the state on the merits settling all the questions. There was no new trial directed, but simply an accounting, and, as this court pointed out (at p. 112), "there was no contention that any federal question arose on the accounting itself." In the case at bar, the federal question was necessarily involved in the new trial on the merits.

It was further contended on the motion to dismiss that the federal question was waived by the withdrawal of certain pleas and the entry of judgment *nil dicit*. This position is

untenable. Immediately upon the filing of the mandate ordering a new trial, plaintiffs in error asked for time in which to prepare additional pleas, and the court granted the application (record, p. 608). The pleas were prepared and were actually filed in open court in the presence of counsel for the defendant in error and without objection (*ib.*). The pleas thus appear, as stated in the transcript (p. 551), to have been filed, "leave of court having been first obtained." These pleas set forth in full detail the federal questions involved (pp. 566, 567, 594). The defendant in error—*i. e.*, the plaintiff below—thereupon moved to strike out the pleas upon grounds set forth at pages 606 and 607 of the record, and the court granted the motion, "to which the defendants then and there excepted and the exception was allowed" (p. 608). The motion was granted upon the ground that these pleas presented no defense; and this ruling was sustained on appeal by the Supreme Court of Mississippi upon that ground, as follows (record, p. 685):

> "The court's action in striking out the special pleas stricken out was correct, *for the obvious reason that they presented no defense to the action, in whole or in part.*"

Among these pleas thus stricken out was the fourth plea, which fully and distinctly alleged a compliance with the requirements of the charter (*id.* p. 568). The appellate court did not hold or intimate that the effect of these pleas was lost or given away by the judgment *nil dicit.* An examination of the pleas will show that they covered the whole case and the federal question in all aspects; and, when they were stricken out as presenting no defense to the action in whole or in part, there was no issue left to try. There can be no doubt whatever upon this point.

The trial court having decided that the plea of the

charter agreement and its impairment in violation of the contract clause of the Federal Constitution presented no defense, the plaintiffs in error, in accordance with the local practice, withdrew their remaining pleas and appealed upon a special bill of exceptions (*id.* pp. 608, 609), which presented the question of law whether or not the special pleas so setting up the federal question did or did not present a defense to the action. The judgment below clearly shows that the pleas involving the federal question were not withdrawn, for it says (*id.* p. 630) "not including, however, the pleas which have been stricken out by the court," and those pleas were stricken out because they presented no defense to the action in whole or in part. It would, of course, have been futile to continue litigating the fundamental federal question in the face of a ruling by the court that as matter of law the defense was unavailing.

To say, as defendant urged on the motion to dismiss, that the judgment in this case is the equivalent of a default or consent judgment is unwarranted and unreasonable. It is no more than if these plaintiffs in error had demurred to a declaration which properly set forth all the facts and the court had overruled the demurrer with leave to answer or to go to trial upon the merits. The defendant, of course, would have a perfect right to appeal from the judgment rendered upon the trial of the issue of law.[1]

What was done in this case was practically the same

[1] In *Ker* v. *Illinois* 119 U. S. 436 (a criminal case) it appeared that the defendant during the trial presented a plea in abatement which was overruled, and, "the defendant refusing to plead further, a plea of not guilty was entered for him, according to the statute of that State, by order of the court, on which the trial and conviction took place." The plea in abatement set forth the alleged Federal right claimed to be involved. This question was held to be preserved by these proceedings, and the judgment of the Supreme Court of Illinois was considered and affirmed upon the merits. See also, *Argentine Co.* v. *Terrible Co.* 122 U. S. 478, 479; *Coburn* v. *Cedar Valley Land Co.*, 138 U. S. 196, 221; *Clyde Mattox* v. *United States*, 146 U. S. 140, 147; *Perego* v. *Dodge*, 163 U. S. 160, 164.

as resting on a demurrer; and that was what the trial court understood was being done, and what the appellate court in affirming the judgment understood had been done when it sustained the ruling below on the ground that the pleas "presented no defense to the action, in whole or in part." Had the court not so ruled, the plaintiffs in error would have gone to trial on the merits. It would indeed tend to introduce most unfair practice, in cases where a defensive pleading has been stricken out on the ground that it presents no defense, if this court should uphold a claim that the pleading might have been stricken out upon technical points of local practice which the court below did not assign in depriving the party of his rights, but on the contrary held to be untenable. This is, moreover, a mere question of practice. It cannot be urged here for the first time; and it is perfectly manifest that it was either not urged in the state appellate court on appeal there, or else, if urged, was denied. The appellate court stated its reasons in full for the affirmance, and no such ground is even alluded to (record, p. 638).

It has also been claimed that the case should be dismissed because a citation was not issued to certain assessors and tax collectors who were not parties to the judgment appealed from. It should hardly lie in the mouth of the defendant in error to assert in this court that the proceedings instituted and conducted by him below were not effective for want of necessary parties; for, if the parties were necessary here, *a fortiori*, they were necessary below.

But these assessors and tax collectors were not parties to the original suits. The only persons named as parties in the declarations were Adams, state revenue agent, plain-

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tiff, and The Yazoo and Mississippi Valley Railroad Company and the Illinois Central Railroad Company, defendants (record, pp. 2, 70, 99, 611, 622). It is true that the declarations concluded with a formal allegation that the assessors and tax collectors are made parties, and with a prayer "that they and said defendants be summoned, &c." (*id.* pp. 11, 83, 106, 618, 629). But the record does not show that these officials were ever actually summoned, and none of them appeared or was represented upon the trial of the action. No evidence affecting them was adduced. No relief was asked against them. None of them joined in the appeal to the state appellate court, nor was made a party appellee therein. On the first appeal, when the revenue agent was himself an appellant, he did not make any of them parties to his appeal (*id.*, p. 506). The final judgment of the circuit court, entered July 8, 1898, is in form a common-law judgment in favor of Adams against the two railroad companies and no others (*id.*, pp. 629-632); and the final judgment of the Supreme Court of the state now under review is also in form a common-law judgment in his favor against the two railroad companies and the sureties upon the appeal bond, and no others (*id.*, p. 688).

It will also be observed that the question affecting the assessors and tax collectors involves nothing which could be the subject of discussion or decision in this court (*Murdock* v. *City of Memphis*, 20 Wall. 590, 615). No possible judgment could under the law have been rendered in their favor, and the only relief possible against them is upon a collateral point, namely: "If it shall appear that the failure of the tax-payer to properly pay his taxes was caused by any willful default or negligence of the assessor or tax-collector, judgment shall be rendered against the

defaulter or defaulters for the amount of compensation of the revenue agent" (appendix, p. xii).

The court has recently settled this question upon very similar facts in *Central Loan & Trust Co.* v. *Campbell*, 173 U. S. 84, 90, where Mr. Justice White said:

> "On the threshold it is necessary to dispose of a suggestion of want of jurisdiction made by the appellee. It is based on the proposition that as the intervenors in the trial court are not made parties to this appeal, we are without jurisdiction, since the judgment to be rendered may materially prejudice their rights. *But the intervenors did not except* to the action of the trial court in vacating the attachment and dismissing the action. *They were not made parties to the proceedings in error* prosecuted from the judgment of the trial court to the Supreme Court of the Territory. In that court the cause was determined without any suggestion, so far as the record discloses, that the questions arising on the record could not be decided in the absence of the intervenors, and the Supreme Court of the Territory manifestly assumed that the intervenors were not essential parties to a determination of the controversy before it, since it passed on the case as presented without their presence. *If their absence was treated by the parties to the proceedings in the Supreme Court of the Territory as not affecting the right to a review of the judgment of the trial court, there can be no reason why we should now hold that the presence of such intervenors is necessary on this appeal, which has solely for its object a review of the judgment rendered by the Supreme Court of the Territory.* Considering the facts just stated, and the further fact that it is obvious that the rights of the intervenors cannot be prejudiced by a review of the action of the Supreme Court of the Territory in dismissing the cause for want of jurisdiction, the motion to dismiss is overruled."

See, also, *Cox and Dick* v. *United States*, 6 Pet. 172, 182; *Forgay et al.* v. *Conrad*, 6 How. 201, 203; *Payne et al.* v. *Niles et al.* 20 How. 219; *Brewster* v. *Wakefield*, 22 How. 118, 129; *Germain* v. *Mason*, 12 Wall. 259, 261; *Simpson* v. *Greeley*, 20 Wall. 152, 157; *Basket* v. *Hassell*, 107 U. S. 602, 608; *Hanrick* v. *Patrick*, 119 U. S. 156, 164; *Gilfillan* v. *McKee*, 159 U. S. 303, 312.

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The federal question was, therefore, duly raised, and the jurisdiction of this court to review the final judgment is clear.

II.

The nature of the contract involved in this controversy.

In the case at bar, the Yazoo Company does not deny liability to pay taxes upon the portion of its railroad formerly belonging to the Louisville, New Orleans and Texas Company. Far from it. Nor does the provision under consideration purport to exempt the railroad company from taxation. On the contrary, the railroad company is left subject to all manner of taxes, which, to the amount of hundreds of thousands of dollars, have been year after year actually assessed. Some of these taxes have been paid in cash (record, pp. 90, 107, 179), and part of them are now sought to be collected in this consolidated suit. The defense is that the amount of these taxes has been duly and actually paid and discharged by payments on account of construction debt. The contract relied on, far from exempting, simply provides that all the taxes to which the railroad might be subjected for twenty-five years shall be appropriated and applied to the repayment or reimbursement of such part of the cost of building as the company might have to borrow or become indebted for. The right to tax is preserved unimpaired and unlimited. The act contemplates a regular assessment and levy of all taxes. When it has been proved that an equivalent amount has been theretofore applied in actual payment of construction debt, as directed by the statute, then and only then is the appropriation made and the receipt or credit given. The railroad company is not relieved or exempted from paying any of its taxes; it is merely permitted to pay them in a particular

way by applying the amount to the payment of its construction debt, in which construction the state and its inhabitants have a very direct and tangible interest and which construction the state might itself have directly undertaken and paid for. The amount to be specified in the affidavit can not be known until the tax has been imposed. The amount of the taxes must be paid in one form or another either to the state or to construction-debt creditors. The act plainly contemplates the direct payment of the taxes assessed, in the usual and ordinary course, *unless* the company shall have been compelled, in addition to its capital stock investment, to create indebtedness for construction, and shall do two things—viz., (1) pay during the preceding year an amount equal to the taxes in discharge of its construction debts, and (2) prove such payment by making the statutory affidavit. There is nothing in this transaction to show a surrender by the state of its taxing powers. This is evident from the fact that if the company should not be burdened with a construction debt to which the taxes might be applied in good faith, or if it should fail to apply the amount of the taxes to the payment of such an existing construction debt, or even if, after the prescribed payment on account of construction debt, it should fail to make and deliver the statutory affidavit, the taxes would still be enforceable. No element of exemption would then exist or now exists. The effect of the contract is merely to appropriate the amount of a tax for certain purposes which are undoubtedly public in character. The legislature could with perfect propriety have granted aid for these purposes to any given amount and for any specified term, and could have provided that a certain amount should be paid each year. The effect

would have been exactly the same as that accomplished by this act. To paraphrase the language of Mr. Justice Strong hereafter quoted (p. 56), if the legislature can aid a railroad in its construction because it is a public use, "what difference can it make in what mode the aid be extended?" And as the Supreme Court of Mississippi itself has said (*infra*, p. 54):

> "The end to be accomplished, and not the means of its accomplishment by assistance from the municipality, is the matter to be considered; and, this being the case, it matters not what is the particular form in which the legislature authorizes the assistance to be given."

The practical effect of the contract of appropriation was not only to confer a present benefit upon the state through the general increase of property and values flowing from the construction of the road and the creation of a public improvement without cost to the state or the people, but also to confer a future benefit by adding to the taxable wealth of the state this new property, which otherwise would not have existed. Necessarily, the net earnings of such a company would be increased by the payment of so much of its debt, and the reimbursement of the construction debt would put it in the power of the state to compel lower rates of carriage (*Smyth* v. *Ames*, 169 U. S. 466, 546), and would appreciably increase the taxable value of the franchise and capital stock of the railroad company. Surely it must be evident that a railroad company whose construction debt or investment has been partly repaid by the state should be subject to lower rates of transportation than a company whose investment for construction has not been reimbursed; and likewise that the value of the franchise and capital stock to the stockholders for purposes of taxation must appreciate as the construction debt is repaid. The stock of the railroad

company in the hands of investors remained taxable during the whole period in question in this suit.[1]

In other words, the state, by the contract under consideration, undertook to aid in the repayment of the construction debt, and this undertaking tended directly to induce and secure the actual construction of the road. In fact, the builders of the railroad were advancing the amount of the taxes in order to construct a public improvement, for the construction of which the whole community might properly have been taxed. The owners of the railroad clearly remained liable for taxes to the full amount and probably to an increased amount, because of the increased value of their property resulting from the gradual payment of the construction debt. Not a dollar of taxation was exempted or remitted. The state did nothing to impair or diminish its resources or funds. The only sum appropriated consisted of taxes thereafter to be levied upon property which, but for the appropriation, might, and humanly speaking would, never have existed. In this indirect way, there was accomplished what no one can doubt might have been effected by a direct and undisguised donation or grant of state funds.[2]

The legislature of Mississippi could indisputably have appropriated or donated, or agreed to appropriate or donate, any taxes in a lump sum or in annual instalments to reimburse and pay for the cost of constructing a railroad as a public work of internal improvement, or the legislature could have provided that construction bonds should be receivable for taxes. Instead of adopting this course, a contract was made with the creditors, bondholders and stockholders of these railroads, that, if they would advance the

[1] Code 1892, sec. 3744.

[2] The state legislature in 1871 passed a subsidy act (ch. 359) donating $4,000 per mile to any railroad building in the state.

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money necessary for making the improvement and risk it in the enterprise, and if they found it necessary to incur construction debt, such construction debt would be repaid to them gradually out of a special fund made up of taxes on the new property they themselves were creating, and in an annual amount equal to the taxes actually imposed until the construction debt was discharged. The state thus risked absolutely nothing; it retained unimpaired its full powers of taxation; it exempted or released from taxation no existing or future property; it simply agreed to appropriate a sum annually to pay off the construction debt of a necessary public improvement.

Nor is the argument affected by the circumstance that the result of such an appropriation and application of the taxes may be to reduce the railroad company's construction debt, for which it is primarily liable. This court has decided the contrary. In *Pacific Railroad Company* v. *Maguire*, 20 Wall. 36, 44, an absolute exemption from taxation for a limited period had been conferred upon a railroad company. Subsequently, the people of the state adopted, as part of the state constitution, an ordinance taxing the gross receipts of the company, and providing that the proceeds of the tax should be appropriated to the payment of certain bonds of the state lent by it to the company, and upon which, as between the state and itself the company was liable. It was claimed that this legislation did not impose a tax, as such, since it merely applied the income of the company to the payment of debts which were alike debts of the state and of the company (argument for defendant in error, 20 Wall. 41). The court held that the ordinance in question clearly imposed a tax, and that the contract of exemption relieved the company

therefrom. This case is express authority for the proposition that, in the case at bar, section 21 in fact provides for taxation as such and for nothing else, and does not exempt the railroad company from taxation notwithstanding the appropriation of the tax to the payment of its construction debt.

When, in 1882, the appropriation of taxes now sought to be enforced was made, similar appropriations had been granted to at least forty-four railroad companies, and such a contract of appropriation had been repeatedly upheld as valid by the highest court of the state. It is true that the court, in reasoning upon the question, had expressed the idea that the provision constituted a repealable exemption; but whatever may have been the reasons assigned, the fact is indisputable that the court had held such contracts to be valid. It is perfectly well settled in this court that the reasons assigned for an opinion are not controlling, but that the touchstone is rather to be found in the exact point decided. In these Mississippi cases the exact point decided was that such a contract was valid under the constitution of Mississippi.

In *Mississippi Mills* v. *Cook*, 56 Miss. 40, 50 (decided in 1878), the Supreme Court of Mississippi, construing the state constitution of 1869, decided that a statute providing in terms similar to those employed in section 21 for the appropriation of taxes against manufacturing corporations to the payment of their construction debt was valid. This case was followed in *Vicksburg Bank* v. *Worrell*, 67 Miss. 47, 58 (decided in 1889), and *Attala County* v. *Kelly*, 68 Miss. 40, 44 (decided in 1890). In *L., N. O. & T. Ry. Co.* v. *Taylor*, 68 Miss. 361, 365 (decided in 1890), the company formed by the consolidation of 1884 was held entitled to the advantages of section 21. In *McCulloch*

et al. v. *Stone*, 64 Miss. 378, 393 (decided in 1886), the court had under consideration the same provision for appropriation of taxes in the charter of the Louisville, New Orleans and Texas Railway Company as that now involved, and, while in effect conceding the general validity of the agreement, held that it did not apply to taxes upon lands disconnected from the business of the company.

But the court will observe that the ruling below does not give the railroad company the benefit of the grounds of decision assigned by the Supreme Court of Mississippi for upholding the validity of such legislation as constituting a repealable exemption. On the contrary, the very grounds assigned in the prior opinions are repudiated and the decisions overruled. The reason why the court below was urged to overrule its prior decisions as to the validity of exemptions under the old constitution was to enable the recovery of taxes for the ten years prior to the consolidation. This recovery required the rooting out of every ground of decision which would uphold the validity of these contracts. There is pending in the Supreme Court of Mississippi, as appears from cases now on the calendar of this court and to be argued immediately after the case at bar, litigation in which the state revenue agent is seeking to recover taxes for many years prior to the consolidation on the ground that all exemptions were invalid and not merely repealable.

From 1870 until 1884, covering the whole period of the state's necessity for the building of railroads, we find the legislature constantly drawing and emphasizing the distinction between an appropriation or donation of taxes and an exemption from taxation. Thus during these fourteen years we find forty-four distinct and separate railroad charters containing a contract in the form of section

21 for an appropriation of taxes, and, during the same period, forty-two distinct and separate railroad charters granting exemptions.

Conclusive evidence of the distinction observed by the legislature between a contract of appropriation, such as is contained in section 21, and an exemption from taxation, such as is contained in the many charters cited in the appendix, is found in chapter 37 of the laws of 1880 (p. 177), where the legislature, referring to the statute under consideration in *Mississippi Mills* v. *Cook*, as amended, expressly repealed the requirement of an *assessment* of taxes and the making of an affidavit showing the application of taxes, and in terms declared that the property of the corporation should be "exempt from taxation," thus evincing a clear recognition that the contract of appropriation did not operate as an absolute exemption, but, on the contrary, left the corporations concerned subject to burdens of such a character in respect of taxes as to cause applications to the legislature for relief. The same legislature of 1880, referring to the charter of the Mobile and Northwestern Railroad Company in which section 21 originally appeared, used the following language:

> "Whereas, the charter of the Mobile and Northwestern Railroad Company . . . *donated* to said company all taxes to which said company might become liable,"

and proceeded to "release" to the company taxes for certain years (appendix, p. xxi).

The fundamental inquiry in this case is, of course, to ascertain the intention of the legislature, and this court will ascertain and determine that intention for itself, to be gathered from the unambiguous language used in the various statutes. Did the legislature consider the

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contract of appropriation or donation to be the equivalent in substance and effect of an absolute exemption, or did it consider and intend an essential and distinct difference? Was it the intention of the legislature to exempt from taxation, or was it its intention to appropriate or donate taxes or public funds conditionally to reimburse construction debt? These are the controlling questions. There might have been some necessity for disguise before 1878, but after the highest court of the state had declared that the constitution of 1869 did not prohibit exemptions, there was no longer any necessity for disguise or subterfuge. Prior to that decision, there might have been some reason for attempting to circumvent or nullify a constitutional inhibition against exemptions; but when the highest court of the state had declared the existence of the power to exempt, the legislature had no longer any conceivable necessity for attempting to hide its true purpose. Yet, at every session from 1878 to 1884, the legislature exempted from taxation in many cases, as will be seen by the statutes cited in the appendix at pp. xvii to xx, and at the very same sessions while granting exemptions it also enacted provisions for the appropriation or donation of taxes, and thus repeatedly declared and emphasized its understanding of the essential difference between the two forms or methods of legislation. Every presumption then must be in support of the view that the legislature honestly and truthfully intended a difference between an appropriation of taxes and an exemption.

In view of the reasonable certainty that the legislature did contemplate and intend a difference between an exemption on the one hand and an appropriation or donation of taxes on the other hand, it cannot be within the judicial

province to disregard that difference or to refuse to effectuate the purpose which the legislature saw fit to attempt to accomplish. As Mr. Justice Peckham said in *McHenry* v. *Alford*, 168 U. S. 651, 664:

> "Does not this different language import, clearly and plainly, a different intention?"

And speaking of the effect to be given by the judiciary to legislative provisions which differ in form and of the inferences or deductions to be drawn from such difference, Chief Justice Marshall, in *Pennington* v. *Coxe*, 2 Cranch 33, 59, said:

> "Those political motives which induce the legislature to select objects of revenue, and to tax them under particular circumstances, are not for judicial consideration. Where the legislature distinguishes between different objects, and in imposing a duty on them evidences a will to charge them in different situations, it is not for the courts to beat down these distinctions on the allegation that they are capriciously made, and therefore to be disregarded. It is the duty of the court to discover the intention of the legislature, and to respect that intention. Where the provisions of two acts are so unlike each other, that the comparison exhibits only a contrast, instead of saying that their opposing regulations were designed to be similar, it would seem much more reasonable to say that the one act exhibits a legislative mind materially variant in the particulars where the difference exists from what is exhibited by the other."

The chief contention of the defendant in error is that the contract of appropriation was equivalent in all respects to an exemption for a stated period, or as long within the period as might be necessary to pay and discharge the construction debt; in other words, that the provision was merely an exemption from taxation. This contention would lead to the conclusion that the state legislature deliberately, session after session, set traps for investors, most of them citizens of other states, by inducing them to rely upon its promise to appropriate and set apart taxes as a fund to pay some part of the construction debt

necessarily incurred in providing the state with a much-needed public property, while all the time its purpose was to fraudulently circumvent the state constitution and ultimately to repudiate the obligation. In view of the long-continued practice of the Mississippi legislature, it should truly require most conclusive evidence of such an illegal and unconstitutional purpose, and such a conclusion should only be adopted when no other is open. The argument seems to be that the form of the provision of section 21, first enacted in 1870 and re-enacted by almost every legislature in at least forty-four railroad charters between that time and the grant in suit, was from the beginning a mere sham or disguise for the purpose of evading the constitution of 1869. In support of this view, some language from the opinions of the Supreme Court of Mississippi is quoted. But, of course, the questions whether or not there is a distinction between a contract of appropriation of taxes and an exemption from taxation, and whether or not the provision was a sham or subterfuge, a fraud and a snare, constitute the very matter which this court is bound to determine for itself. The duty imposed upon this court to enforce contracts honestly and legally made would be vain and nugatory if in these contract cases it were bound to adopt the views of the state judiciary or to follow the changes in judicial decisions or state policy, or to be guided by speculations as to possible fraud or illegal intention on the part of the legislature. On the contrary, this court considers itself precluded from any such investigation of legislative motives, and forms its own independent judgment as to the true scope and purpose of a statute and the legal effect of its provisions from the language used, and nothing else when the language is unambiguous.

Moreover, when the constitution of 1890 was adopted the framers were well aware that for twenty years the legislature of the state, as an inducement to securing the investment of capital in railroad enterprises, had frequently made appropriations of taxes in aid of the construction of railroads, and that the legislature had also granted numerous exemptions to railroad corporations. The subject of the various forms of aids or grants to private corporations was particularly before the framers, and was debated at length. They knew, what was notorious, that certain railroad companies were then and for years had been paying their taxes by applying the amount to the payment of construction debt, and that other railroad companies were enjoying out and out exemptions from taxation. Nevertheless, in framing the constitution of 1890, it was seen fit to curtail the power of exemption, but leave untouched and unimpaired the power of the legislature to vote taxes in aid of public improvements just as it had been doing in the past.

In the new constitution we find many express provisions covering numerous aspects of aids or grants or donations by state or municipalities to corporations; but we find nothing in restriction of grants by the legislature of state taxes, which every one knew it had been the custom of the legislature to grant. The fact that this power of the legislature was not attempted to be restricted must strike the court as significant and persuasive in the extreme. The principal sections of the constitution showing that the legislature had this subject in mind are quoted at length in the appendix. It will be seen that the subject of donations was provided for in section 66 and distinctly sanctioned. Among all the express prohibitions contained in sections 91 to 101, the only prohibition of grants is

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that "lands belonging to, or under the control of, the state, shall never be donated directly, or indirectly, to private corporations or individuals, or to railroad companies." Section 183 provides that no *municipal corporation* "shall hereafter become a subscriber to the capital stock of any railroad or other corporation or association, *or make appropriation* or loan its credit in aid of such corporation or association," but the state legislature is not inhibited from making such appropriations excepting that *continuing appropriations* may not exceed four years and six months, under section 64.

By section 258 the credit of the state was not to be pledged or loaned in aid of any person, association or corporation, which was a re-adoption of a similar provision in the constitution of 1869, but the power to grant or appropriate taxes in aid of the building of railroads was left unimpaired and unchallenged, except as to continuing appropriations thereafter made.

It cannot be reasonably doubted that, if it was the purpose of the framers of the constitution of 1890 to challenge the validity of or to prevent appropriations of taxes in the future, as had been the long-continued practice under the constitution of 1869, some provision would have been inserted in the new constitution covering that point and putting an end to the practice. The framers knew that the legislature had repeatedly declared a difference between an appropriation of taxes and an exemption. If it was not intended to acquiesce in this legislative practice of appropriating taxes, a provision changing or prohibiting the practice would certainly have been inserted. The effect of the practical construction under the constitution of 1869 and the clear evidence of acquiescence in such construction

must lead to the conclusion not only that appropriations of taxes were authorized under the old, but that they might be continued under the new constitution. No rule of interpretation is better settled in this court. In *The Laura*, 114 U. S. 411, 416, Mr. Justice Harlan, citing *Stuart* v. *Laird*, 1 Cranch, 299, 308, said:

> "Touching the objection now raised as to the constitutionality of the legislation in question, it is sufficient to say, as was said in an early case, that the practice and acquiescence under it, 'commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction.'"

And in *Ogden* v. *Saunders* 12 Wheat. 213, 290, Mr. Justice Washington said that the doctrine

> "proceeds upon the presumption, that the contemporaries of the constitution have claims to our deference on the question of right, because they had the best opportunities of informing themselves of the understanding of the framers of the constitution, and of the sense put upon it by the people when it was adopted by them."

See, also, *Briscoe* v. *The Bank of the Commonwealth of Kentucky*, 11 Pet. 257, 318; *Auffmordt* v. *Hedden*, 137 U. S. 310, 329; *Schell's Executors* v. *Fauché*, 138 U. S. 562, 572; *McPherson* v. *Blacker*, 146 U. S. 1, 27. Practical legislative construction is given great weight: *Prigg* v. *The Commonwealth of Pennsylvania*, 16 Pet. 539, 619; *Cooley* v. *Board of Wardens of Port of Philadelphia*, 12 How. 299, 315; *Field* v. *Clark*, 143 U. S. 649, 691; *Kennedy* v. *Gies*, 25 Mich. 83, 92. The Mississippi authorities are to the same effect: *Daily* v. *Swope, Guardian, etc.*, 47 Miss., 367, 383; *French* v. *The State*, 52 Miss., 759, 762; *Shotwell* v. *Covington*, 69 Miss., 735, 738; *Chrisman* v. *Brookhaven*, 70 Miss., 477, 483.

As Simrall, J., said in *Hawkins et al.* v. *Carroll Co.*, 50 Miss. 735, 752:

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"At the time of the adoption of the constitution, the power of the legislature to authorize municipal aid to these enterprises, coupled with the delegated authority of taxation, was well established, both by legislative precedents and judicial decisions in this and the other states."

And Mitchell, J., said in *State* v. *Luther*, 56 Minn. 156, 162–165:

"This amounted to a legislative construction of the constitution, which of itself would be entitled to great weight."

As was said by the Supreme Court of California in *Emery* v. *Reed*, 65 Cal. 351:

"We have frequently said that, with respect to laws passed under the late Constitution, the construction put upon them by the highest court in existence under it, would be accepted by us without regard to our own views in respect to the correctness or incorrectness of that construction."

Notwithstanding these considerations, the court below has now decided that the contract of appropriation constituted in effect and substance nothing more nor less than an absolute exemption, and that such an exemption was in conflict with the constitution of 1869. Indeed, the earnest insistence of the Yazoo Company as to the true nature of the contract in suit as a grant or appropriation of taxes, and its essential difference from an exemption, was brushed aside with only the following scanty notice in the long opinion delivered on the first appeal (record, p. 676):

"There is a rather curious proposition of counsel for the railroad companies in his brief at pp. 118 *et seq.* The argument is that what was provided by the 21st section of the Northwestern charter was not an *ordinary exemption* at all, although counsel admits that the Lambert case expressly so decided, but that it was a *contract of appropriation irrepealable* in its nature, and not an exemption at all. If counsel's contention as to this is sound, then it is perfectly plain that the claim of rule of property and vested right under former decisions of this court falls at once to the ground, for no one will contend that this court has ever treated the said 21st section as an appropriation by contract irrepealable in its nature. Counsel's construc-

> tion is therefore utterly inconsistent with the reiterated claim that the view we take is trenching upon any rule of property laid down in any previous decision rendered by this court. This is the first time that such a construction was ever presented to this court or asserted in any form."

It is a significant circumstance that the opinion of the majority below, although of great length and marked by an extraordinary warmth of argument, attempts no discussion of what is undoubtedly the vital inquiry in this controversy, namely, whether section 21 created an exemption from taxation or made a lawful appropriation of taxes for the purpose of discharging obligations which the state could have incurred if it had itself undertaken the construction of railroads as necessary public improvements. To say either that counsel in suggesting this important and controlling consideration abandoned all they had previously contended for, or that no such construction of the statute in question was ever before presented, is quite inaccurate. The point was reserved in the *Lambert* case. The failure or refusal to meet the point, when taken in connection with the court's eagerness upon all other branches of the case, suggests an inability to meet it. It is, of course, possible for any tribunal dogmatically to assert that the language of a statute, however plain, does not mean what its words fairly import, and thus resting on its own *dixit* defy all argument; but that position should not be the refuge of courts administering justice under the system of jurisprudence which obtains in this country.

If the statute be approached in a judicial spirit rather than with the assumption that it is a "thin disguise" for a tax exemption, there is no difficulty in perceiving that it is exactly what its language declares it to be, that is an appropriation of taxes to the discharge of existing

obligations, and not in any sense a statute conferring immunity from taxation.

There is no ambiguity in the language employed. Consequently, the language used by the legislature is binding upon the courts and their only guide to the true solution of intention. "'*Index animi sermo.*' 'The court knows nothing of the intention of an act, except from the words in which it is expressed.' . . . It is upon this ground that the rule must have its rational foundation, which, where the words can bear but one meaning, declares that there is no room for interpretation" (Endlich on Interpretation of Statutes, sec. 8). As Chief Justice Marshall said in *Sturges* v. *Crowninshield*, 4 Wheat. 122, 202:

> "But if, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application."

In *Lake County* v. *Rollins*, 130 U. S. 662, 670, Mr. Justice Lamar said:

> "To get at the thought or meaning expressed in a statute, a contract or a constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it. . . . So, also, where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction."

In *St. Paul, &c. Railway Co.* v. *Phelps*, 137 U. S. 528, 536, Mr. Justice Lamar again said:

> "Where a statute, as in this case, is free and clear from all ambiguity, we think the letter of it is not to be disregarded *in favor of a mere presumption as to what is termed the policy of the government.*"

The act declares that the railroad shall be subject to taxation; and it expressly provides that the taxes accruing thereon may be applied by the railroad company upon obligations which the state could have paid or appropriated public funds to pay. Now, is it within the province of any court to reverse the terms of this statute in order to bring the law within the inhibition of a constitutional provision which would otherwise not apply, because of a supposed intention of the legislature to grant the equivalent of an exemption and thus to circumvent the constitution? The fair proposition to consider—the only one the courts can properly consider—is: Admitting that the statute authorizes an appropriation or commutation of taxes, as it purports to do, is the act in that aspect a lawful statute? If so, then did its benefits pass to the new company by virtue of the consolidation of 1892? The motive of the legislature, even though it were to grant the equivalent of an exemption, is immaterial. That it did not deem the provision the equivalent of an exemption is clear beyond reasonable doubt.

Looking merely to the legislative declaration as the only safe guide or evidence of intention, it must be conceded that the statute is not in terms or essence an exemption statute. It is argued, however, that, as its ultimate *effect* is practically to exempt the road from paying taxes, it therefore should be subject to the same constitutional inhibitions as an exemption statute and may be nullified as such. This objection, evading, as it does, the primary and fundamental question, is not well taken, because the *effect* of the statute, either in its bearing

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upon the railroad company or upon the state, is not, in any true sense, the same as that of an exemption statute. It is true that section 21 is beneficial to the railroad company and its creditors. That much it has in common with an exemption statute. But the same would be true of any statute which conferred a bounty upon or subsidized the road or gave it any other peculiar advantage; and it has not been contended that this element could render any such statute unconstitutional.

The differences between a statute appropriating or commuting taxes and a statute exempting from taxation are marked; and it will be seen at once that the benefits conferred by the former method, while considerable, are by no means commensurate with those of an outright exemption statute. Thus, as to the company, the amount that would be annually saved by an exemption statute would increase the net earnings proportionately and would be distributable to stockholders as dividends; but in the case of this appropriation of taxes, the amount of taxes goes to the company's creditors and not to the company, and does not go to swell the net earnings in any proper sense. While the payment of the company's debts, of course, ultimately redounds to the company's benefit, that result is never considered to be as advantageous as, or the practical equivalent of, an exemption. The construction debts of railroads are usually funded or re-funded in long-time bonds because large sinking-fund provisions for the annual discharge of debts necessarily imply increased annual obligations to be met out of income and consequently diminished dividends. The payment of part of the construction debt would not directly relieve the pressure of current and operating expenses.

Moreover, upon the payment of the company's con-

struction debt, which might occur within the twenty-five years, or in the contingency that the capital of the road might alone prove sufficient for its construction, the benefits of the act would terminate, while in the event of an exemption law, so long as the act remained unrepealed, the benefits must last the full term. This was a contingency that the legislature undoubtedly took into consideration when it elected to make an appropriation in this form and not to grant any exemption.

The advantages to the state of the present law over an exemption act were, however, much more obvious and important than the corresponding disadvantages to the company. The increased latitude in the matter of regulating rates arrived at by a cancellation of the company's construction indebtedness is self-evident, and has already been adverted to. It was and is undoubtedly a matter of some interest to the public that public corporations organized under domestic charters should pay their debts and thus render remote the possibility of bankruptcy. Where the stocks or bonds of the corporation are held by local investors, this is a consideration of very great importance; and, even though they be held abroad, the interest of the state would naturally be on the side of greater solvency as well as increased value of the stock for purposes of taxation. As matter of fact several counties and towns in Mississippi still own stock of the Louisville, New Orleans and Texas Railway Company (now the Yazoo Company), and this fact evinces the public policy which the state sought to forward and the local interests intended to be subserved in making the appropriations.

But these are small considerations compared with the really great object of the legislature in securing the construction of railroads, the urgent necessity for which can-

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not be disputed, and which could not be secured without outside capital. The state desired to accomplish this without taxing the community. The legislature proposed to capitalists and contractors and material-men and all others who might assist in the construction of the road and receive in return the company's promise of payment that, to the extent of the taxes receivable from the new property created with their funds, it would appropriate those taxes for the repayment of their advances. It was on the faith of this promise not only that the railroad corporation itself undertook the construction of the road and invested its capital, but that its creditors risked their funds, their materials and their labor, and it is simply common honesty, as it is to the true interests of the state, to perform the obligation in good faith. No state has ever profited by the repudiation of its plighted faith. As Mr. Justice Field said in *Hartman* v. *Greenhow*, 102 U. S. 672, 682:

> "There is no wealth or power equal to that which ultimately comes to a State when in all her engagements she keeps her faith unbroken."

III.

The validity of the contract of appropriation.

It must be very clear that considered in itself and in connection with the subject-matter of the enactment, the provision in question for the appropriation of taxes constituted a valid contract between the state and the railroad company, if not prohibited by the state constitution. The consideration is ample, and the terms of the agreement are plain and enforceable. In the absence of any limitations imposed by the state constitution then in force, there was no restraint upon the power of the state legislature to make the contract, nor upon the right of the incorporators of the railroad company to accept and insist upon its benefits. And if

the contract was valid and has not been waived or terminated, its obligation is protected by the Federal Constitution from impairment. It is, of course, now a settled rule of constitutional law that any stipulation in the charter of a corporation respecting taxation, whether constituting a grant of state or municipal funds, or providing for an appropriation or commutation of taxes, or for an entire exemption of the corporate property or stock, will be construed as an inviolable contract under the protection of the Constitution of the United States, if not in conflict with the existing state constitution, and that it will be irrevocable by any subsequent legislation, or even by an amendment of the state constitution. *State Bank of Ohio* v. *Knoop*, 16 How. 369, 378; *Home of the Friendless* v. *Rouse*, 8 Wall. 430, 435; *Wilmington Railroad* v. *Reid*, 13 Wall. 264, 266; *Humphrey* v. *Pegues*, 16 Wall. 244, 249; *Trask* v. *Maguire*, 18 Wall. 391, 401; *Pacific Railroad Company* v. *Maguire*, 20 Wall. 36, 43; *Erie Railway Company* v. *Pennsylvania*, 21 Wall. 492, 498; *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 664; *Grand Lodge* v. *New Orleans*, 166 U. S. 143, 146.

If instead of this form of contract, the state had agreed to accept in payment of taxes upon this railroad for a certain period and upon certain conditions bonds or coupons issued by the railroad company for the purpose of securing additional funds to complete the construction of this public improvement, there could be little question that this would constitute a valid contract and that the railroad company or the bondholder could enforce it. Similar provisions in bank charters that their notes shall be receivable in payment of taxes have been held to constitute valid and irrepealable contracts with the holders

of such notes, and the doctrine is now well settled (*Woodruff* v. *Trapnall*, 10 How. 190, 205; *Furman* v. *Nichol*, 8 Wall. 44, 59; *Keith* v. *Clark*, 97 U. S. 454; *Virginia Coupon Cases*, 114 U. S. 270, 279).

A broad distinction must be observed between an exemption from taxation and a contract by which the state appropriates or donates, in aid of public improvements, the proceeds of a tax regularly levied and collected; or, to put it in other terms, a contract whereby the state commutes taxes by authorizing the payment of an equivalent amount in discharge of the cost of constructing a public improvement. Unless restrained by some specific inhibition of the state constitution, the legislature had full power to grant moneys or taxes for any public improvement and especially for railroads. There was no inhibition of such grants in the Mississippi constitution of 1869, nor is there in that of 1890. The Supreme Court of Mississippi has repeatedly declared the doctrine that the building of a railroad is a public use, and that taxes may be voted and levied in aid of such a public improvement (*Brown* v. *Beatty*, 5 George 227, 240; *Hawkins et al.* v. *Carroll Co.*, 50 Miss. 735, 757; *New Orleans, &c., R. R. Co.* v. *McDonald*, 53 Miss. 240, 245; *Miss. Const.* 1869, Art. 12, Sec. 14.) The same rule has always been held in this court, and prevails throughout this country (*Rogers* v. *Burlington*, 3 Wall. 654, 663; *Thomson* v. *Lee County*, 3 Wall. 327, 330; *Mitchell* v. *Burlington*, 4 Wall. 270, 273; *Railroad Company* v. *County of Otoe*, 16 Wall. 667, 672; *Olcott* v. *The Supervisors*, 16 Wall 678, 694; *Sharpless* v. *Mayor of Philadelphia*, 21 Pa. St. 147, 169; *Thomas* v. *Leland*, 24 Wend. 65, 68; *Napa Valley R. R. Co.* v. *Napa Co.* 30 Cal. 435, 436; *Stein* v. *Mayor of Mobile* 24 Ala. 591, 614).

In 1876, in the case of *New Orleans, &c., R. R. Co.* v. *McDonald*, 53 Miss. 240, 245, the question was before the Supreme Court of Mississippi as to the power of the legislature to authorize the donation of taxes to a railroad company, and it was contended that no such donation could be made under the constitution of 1869. The unanimous opinion of the court, delivered by Campbell, J., contained the following:

> "There is no just distinction between a donation and a subscription for stock in such an enterprise. To recognize such a distinction is to disregard the fundamental theory of aid to railroads; that is, not to make the municipality a stockholder for dividends on stock, or direct returns from an investment for profit, but to aid the enterprise for expected benefits to result to the public from its success. The end to be accomplished, and not the means of its accomplishment by assistance from the municipality, is the matter to be considered; and, this being the case, it matters not what is the particular form in which the legislature authorizes the assistance to be given."

The power of the state to contribute from its resources to the construction of railroads surely cannot, at this late day, be questioned. It may be safely said that every legislative body in this country has so contributed in one form or another, without which aid the development of the country would have been retarded at least half a century. Nor can it be said that the continuing form of the contribution renders it objectionable. Appropriation acts are constantly passed by Congress and other legislatures involving the future credit and revenues of the country and contemplating future appropriations.

In *Hartman* v. *Greenhow*, 120 U. S. 672, 681 (a Virginia coupon case), the identical objection here suggested was raised, taking the form that it was not within the legitimate power of one legislature "to embarrass the action of subsequent legislatures by depriving them of

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the proper control of the annual revenue;" but the court said, through Mr. Justice Field, that "the act only made provision for an annual appropriation of a portion of the revenue, derived from taxation, to the payment of existing debts; and such legislation could not be deemed a great stretch of power." It was therefore competent, for the public purposes set forth in section 21, to appropriate towards the construction of this road the future revenues of the state.

Since the case of *Olcott* v. *The Supervisors*, 16 Wall. 678, 696, it has not been doubted that taxes levied to aid in the construction of a railroad are levied for a public use and purpose. In delivering the opinion of the court, Mr. Justice Strong used language quite applicable to the present issue, as follows:

> "If there be any purpose for which taxation would seem to be legitimate it is the making and maintenance of highways. They have always been governmental affairs, and it has ever been recognized as one of the most important duties of the State to provide and care for them. Taxation for such uses has been immemorially imposed. When, therefore, it is settled that a railroad is a highway for public uses, there can be no substantial reason why the power of the State to tax may not be exerted in its behalf. It is said that railroads are not public highways per se; that they are only declared such by the decisions of the courts, and that they have been declared public only with respect to the power of eminent domain. This is a mistake. In their very nature they are public highways. It needed no decision of courts to make them such. True they must be used in a peculiar manner, and under certain restrictions, but they are facilities for passage and transportation afforded to the public, of which the public has a right to avail itself. As well might it be said a turnpike is a highway, only because declared such by judicial decision. A railroad built by a State no one claims would be anything else than a public highway, justifying taxation for its construction and maintenance, though it could be no more open to public use than is a road built and owned by a corporation. Yet it is the purpose and the uses of a work which determine its character. And if the purpose is

one for which the State may properly levy a tax upon its citizens at large, its legislature has the power to apportion and impose the duty, or confer the power of assuming it upon the municipal divisions of the State. And surely it cannot be maintained that ownership by the public, or by the State, of the thing in behalf of which taxation is imposed, is necessary to justify the imposition. There are many acknowledged public uses that have no relation to ownership. Indeed, most public expenditures are for purposes apart from any proprietorship of the State. A public use may, indeed, consist in the possession, occupation, and enjoyment of property by the public, or agents of the public, but it is not necessarily so. Even in regard to common roads, generally, the public has no ownership of the soil, no right of possession, or occupation. It has a mere right of passage. While, then, it may be true that ownership of property may sometimes bear upon the question whether the uses of the property are public, it is not the test.

"The argument most earnestly urged against the constitutionality of the act is that it attempted to authorize Fond du Lac County to assist the railroad company by a donation. It is stoutly contended that the legislature could not authorize the county to impose taxes to enable it to make a donation in aid of the construction of the railroad, even if its ultimate uses are public. But why not? If the county can be empowered to aid the work because it is a public use, what difference can it make in what mode the aid be extended?"

So, contracts commuting or releasing taxes have been sustained under constitutions expressly forbidding exemptions. In *Bartholomew* v. *City of Austin*, 52 U. S. App. 512, 530, the Circuit Court of Appeals in the Fifth Circuit held that a provision in a contract between a city and a water company, whereby the property of the latter was exempted from taxation for a term of years in consideration of the furnishing of a certain water supply, was not really an exemption, and so not violative of a provision of a provision of the Texas constitution similar in this respect to the Mississippi constitution of 1869. Pardee, C. J., said:

"We do not construe the contract as granting an exemption from taxation. Exemption means free from liability, from

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duty, from service. It is a grace, a favor, an immunity; taken out from under the general rule not to be like others who are not exempt; to receive and not make a return. This being the meaning of the term, the transaction presented in section 11 is not an exemption from taxation. The city needed the water for the several purposes named. To supply it required time, expense, and labor. These things were of value. The taxes to be levied were to be legal obligations for money. The obligations were of value. On a comparing of values, the parties being competent to contract, it was concluded that the values were equal, and the one should be set off by the other. There is no claim that the one value was not as great as the other. No imposition on the one hand or favoritism on the other, can be inferred."

In *Grant* v. *The City of Davenport*, 36 Iowa, 396, 406, a similar contract was attacked as obnoxious to a constitutional provision identical with that under consideration. The court said:

"It, in effect, applies the taxes as they would otherwise become due, in part payment or in part consideration of the water rent. The city pays the amount of money specified and the taxes on the franchise, and the property required for the management of the works, as water rent. *It might have required the payment of the taxes, and then returned the amount as part pay for water rent. The manner of doing it cannot defeat the power to do it.*"

In *Portland* v. *Water Company*, 67 Me. 135, 136, Peters, J., said, respecting a similar contract:

"Here, the action of the legislature, with the vote of the city in pursuance of it, partakes the character of a contract with the defendant corporation. The consideration for a contract on the part of the city is palpable."

The validity of a commutation of taxes was expressly sustained in *Vicksburg Bank* v. *Worrell*, 67 Miss. 47, 58, where it was assailed as violating section 13 of article xii of the Constitution of 1869, Campbell, J., saying:

"Where the particular arrangement of taxation provided by legislative wisdom may be accounted for on the assumption of compounding or commuting for a just equivalent, according to

> the determination of the legislature, in the general scheme of taxation, it will not be condemned by the courts as violative of the constitution."

The same rule was announced in *Le Blanc* v. *Railroad Co.*, 72 Miss. 669.

This court has recognized that the commutation of railroad taxes by payment of a percentage of earnings is not a release or exemption, but only a substitution of method, and that the rule of construction in cases of exemption is not applicable where that element is not found. *Northern Pacific Railroad* v. *Clark*, 153 U. S. 252, 271; *McHenry* v. *Alford*, 168 U. S. 651, 662. In referring to this point, Mr. Justice Nelson in *Chicago* v. *Sheldon*, 9 Wall. 50, 55, said:

> "We are not concerned to deal with these provisions, as it is perfectly settled by the decisions of the Supreme Court of the State that, according to the true construction of them, they do not forbid the legislature commuting with individuals or corporate bodies the burdens of general or specific taxes or assessments, of the character of those in question, for what they may deem an equivalent. This has been so frequently decided that we need only refer to the cases. (*Illinois Central Railroad* v. *County of McLean*, 17 Illinois, 291; *Hunsaker* v. *Wright*, 30 *id.* 146; *Neustadt* v. *Illinois Central Railroad*, 31 *id.*, 484)."

For the foregoing reasons, it is submitted that the provision originally embodied in section 21 of the charter of 1870 and re-enacted in 1882 for the benefit of the Louisville, New Orleans and Texas Railway Company did not constitute an exemption, but was a valid contract between the state and the incorporators which was not in conflict with any provision of the state constitution of 1869, or with any provision of the constitution of 1890. Even if it were an exemption, it would nevertheless be valid for the reasons discussed in the brief filed in No. 324, to which reference is prayed.

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IV.

The effect of the consolidation of 1892.

The effect of section 21 has been shown to be a valid grant or contract of appropriation securing to the railroad company the right to apply taxes levied upon its property during a limited period to the payment of its construction debt. This contract was not an immunity or an exemption from taxation, nor was it one of the franchises of the corporation. Technically it was not a privilege so much as a property right securing by contract the advantage of payment of the taxes in a certain way instead of directly to the state. Such a contract was not in conflict with any provision of the constitution of 1869 in force when the contract was made, nor with any provision of the constitution of 1890 in force when the consolidation or merger was effected. The further question is presented whether such a contract right can be transferred or is terminated and forfeited upon consolidation or merger. The contract was essentially a property right appurtenant to the Louisville, New Orleans and Texas Railway, and passed to the consolidated Yazoo Company just as any other property or contract right would pass. It is submitted that the benefit of the contract of appropriation vested in the consolidated company, whether the consolidation be deemed a mere merger or as the creation of a new consolidated company, and that, therefore, the effect of the consolidation upon the existence of the original corporations is immaterial.

In *Railroad Co.* v. *Lambert*, 70 Miss. 779, 790 (decided in 1893), a case involving the charter of the Natchez, Jackson and Columbus Railroad Company, which also contained section 21, it was held that the right to appropriate and apply taxes thereunder was

not lost by the sale of that company's property to the Louisville, New Orleans and Texas Company, in 1890, nor by the subsequent merger of the latter in the Yazoo Company. The court said:

> "By their charters, the Louisville, New Orleans and Texas Railway Company and the Yazoo and Mississippi Valley Railroad Company were empowered to consolidate, and the immunity claimed by the Louisville, New Orleans and Texas Railway Company, for the right to pay taxes on what was the Natchez, Jackson and Columbus Railroad Company, *was not lost by its merger* in the Yazoo and Mississippi Valley Railway Company, but *it went into that company* with all its rights, privileges and immunities as far as could be in the *merger*, and nothing was lost thereby except as necessarily resulted from the union.
>
> "Section 181 of the Constitution of 1890 has no effect as to the exemption claimed. It left the matter as if the Constitution had not been adopted. It left it alone, to rest upon legislation, unaffected by the fundamental law."

The Supreme Court of Mississippi has twice held that the consolidation of 1884 vested in the Louisville, New Orleans and Texas Railway Company all the properties of the constituent companies: *L., N. O. & T. Ry. Co.* v. *Taylor*, 68 Miss. 361, 365; *Railway Co.* v. *Blythe*, 69 Miss. 939, 945.

The authorities seem decisive that such contract rights can be transferred and will vest in the consolidated company. Since the case of *Philadelphia and Wilmington Railroad Co.* v. *Maryland*, 10 How. 376, 393, it has been the settled law in this court that, upon a consolidation of corporations, the contracts, property rights, privileges and advantages of each of the constituent companies are possessed by the new company to the extent of the road the constituent company had before occupied. Chief Justice Taney said in that case:

> "The law which authorizes these two companies to unite themselves with the plaintiff in error declares that this new corporation . . . shall be entitled within this State to all the

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powers and privileges and advantages at that time belonging to these two companies. It grants it nothing more.

"Now, as these companies held their corporate privileges under different charters, the evident meaning of this provision is, that whatever privileges and advantages either of them possessed should in like manner be held and possessed by the new company, to the extent of the road they had respectively occupied before the union; that it should stand in their place, and possess the power, rights, and privileges they had severally enjoyed in the portions of the road which had previously belonged to them. And this intention is made still more evident by the fourth section of the law, which makes the new corporation responsible for the contracts, debts, obligations, engagements, and liabilities at law or in equity of the several companies, and declares that it shall hold and be entitled to all the estate, real, personal, and mixed, choses in action, &c., belonging to or due to the several companies."

In *Tomlinson* v. *Branch*, 15 Wall. 460, 465, Mr. Justice Bradley said:

"The keeping alive of the rights and privileges of the old company, and transferring them to the new company in connection with the property, indicates the legislative intent, that such property was to be holden in the same manner and subject to the same rights as before. The owners of the property were to lose no rights by the transfer, nor was the public to lose any rights thereby. Of course, these remarks do not apply to those corporate rights and franchises of the old company, which appertain to its existence and functions as a corporation. These became merged and extinct. But all its rights and duties, its privileges and obligations, as related to the public, or to third persons, remain, and devolve upon the new company."

The rule was again recognized and applied in *Tennessee* v. *Whitworth*, 117 U. S. 139, 145, where Chief Justice Waite said:

"As early as 1850, before either the charter of the Tennessee and Alabama Company or that of the Central Southern Company was granted, this court said in *Philadelphia, Wilmington & Baltimore Railroad Co.* v. *Maryland*, 10 How. 376, 393, speaking by Mr. Chief Justice Taney, that a statute which authorized the union of two railroad companies, and secured to the united company the 'property, rights and privileges which that law, or other laws, conferred on them [the separate companies], or

either of them,' extended to the united company an exemption from taxation in the charter of one of the uniting companies, and this although it was at the same time said that 'the taxing power of the State is never presumed to be relinquished, unless the intention to relinquish is declared in clear and unambiguous terms.' This has been expressly reaffirmed in *Tomlinson* v. *Branch*, 15 Wall. 460; *Humphrey* v. *Pegues*, 16 Wall. 244; *Southwestern Railroad* v. *Georgia*, 92 U. S. 676; and the correctness of the decision was recognized in *Central Railroad & Banking Co.* v. *Georgia*, 92 U. S. 665; *Morgan* v. *Louisiana*, 93 U. S. 217; *Railroad Companies* v. *Gaines*, 97 U. S. 697, 711; *Railroad Co.* v. *Georgia*, 98 U. S. 359, 360; *Railroad Co.* v. *Hamblen*, 102 U. S. 273, 277; *Railroad Co.* v. *Commissioners*, 103 U. S. 1, 4; *Wilson* v. *Gaines*, 103 U. S. 417; *Louisville & Nashville Railroad Co.* v. *Palmes*, 109 U. S. 244, 253, and *Chesapeake & Ohio Railroad Co.* v. *Miller*, 114 U. S. 176, 185.

"From this it is clear that, under the settled rule of decision in this court, the exemption from taxation, which was one of the 'rights and privileges' of the Nashville and Chattanooga Company, formed part of the charters of the Tennessee and Alabama Company and the Central Southern Company, unless a different rule is to be applied in Tennessee, because of a supposed limitation on the popular meaning of the words 'rights,' 'powers' and 'privileges' when used in statutes, on account of a peculiar provision of the constitution of that State."

Other authorities to the same effect are: *Humphrey* v. *Pegues*, 16 Wall. 244, 248; *The Delaware Railroad Tax*, 18 Wall. 206, 227; *Central Railroad, etc., Co.* v. *Georgia*, 92 U. S. 665, 674; *Branch et al.* v. *City of Charleston et al.* 92 U. S. 677, 682; *County of Scotland* v. *Thomas*, 94 U. S. 682, 690; *Chesapeake, etc. R. R. Co.* v. *Virginia*, 94 U. S. 718, 725; *Green County* v. *Conness*, 109 U. S. 104, 106; *Wabash, St. Louis & Pac. Railway Co.* v. *Ham.* 114 U. S. 587, 595. There is nothing in these cases to indicate that the continued existence of the contract or privilege depends in any degree upon the question whether the company originally possessing

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it has become extinct or not.[1] As Chief Justice Waite said in *Tennessee* v. *Whitworth*, 117 U. S. 139, 149:

> "The question is not as to a grant of new powers, but as to the taking away of old ones."

It has already been shown that, even in the case of an absolute exemption from taxation, the rule is thoroughly settled that, the immunity having been once established, it is presumed to pass to the consolidated company, and to apply to so much of its property as comes from the constituent company possessing the immunity, provided that the consolidated company is capable of being exempted. By much stronger reasoning can the claim be supported that a property right, vested by contract, although technically neither a franchise nor an immunity, passes with the property of the company possessing it, and becomes vested with that property in the consolidated company, whether the existence of the company originally entitled to the right has been terminated or not. Such a right would no more be lost upon a merger or a consolidation than would the tangible property of the old company be destroyed.

The right to receive taxes voted in aid of a railroad passes by consolidation to the consolidated company, whether or not the proceedings have resulted in the dissolution of the corporation for whose benefit the appropriation was originally made. This is quite analogous to the point at bar. The precise question arose in *Scott et al.* v. *Hansheer, Treasurer, et al.* 94 Ind. 1, 13, where the court said:

> "In such an obligation of the township, we are of opinion that the railroad company to which the appropriation has been

[1] In *Southwestern Railroad Co.* v. *Georgia*, 92 U. S. 676, it was expressly stated that one of the consolidating companies had been extinguished, but nevertheless the exemption was held to vest in the consolidated company.

lawfully made acquires such a right and interest as, upon its future consolidation with other railroad corporations, will pass to and vest in the consolidated company. This is so, we think, whether the railroad company to which the appropriation was voted did or did not, by force of the consolidation, cease to exist as a corporation for every purpose."

To the same effect is *Pittsburgh, Cincinnati, Chicago and St. Louis Ry. Co.* v. *Harden et al.* 137 Ind. 486, 492. Lands granted by the Government to one of the constituent companies were held to pass in *Tarpey* v. *Salt Company*, 5 Utah, 494, 500. Even an apparently personal exemption of employees from military, road and jury duty has been decided to pass as a privilege to the consolidated company. *Zimmer* v. *The State*, 30 Ark. 677, 679.

So, in the case of statutes authorizing subscriptions by municipalities to the stock of railroad companies, this court has uniformly held that the interest of the corporation in the subscription and its right to receive and benefit by it are not forfeited by, but survive, a consolidation and become part of the rights and privileges of the consolidated company. In *County of Scotland* v. *Thomas*, 94 U. S. 682, 693, it was held, following certain decisions of the Supreme Court of Missouri, from which state the case came, that a charter of a railroad company giving counties the right to subscribe for stock of the company, conferred a right and privilege upon the railroad company which passed upon consolidation to the consolidated company. A subsequent constitution of the state had declared that no county should become a stockholder in, or loan its credit to, any corporation without the assent of two-thirds of the voters, but it was held that this language was prospective, and that the right and privilege of the existing company to receive such subscriptions was not affected by it. The

case is particularly in point because the new constitution, as in the case at bar, was adopted after the granting of the charter and before the consolidation; that is to say, the charter was granted in 1857, the new constitution was adopted in 1865 and the consolidation was authorized in 1869. In delivering the opinion of the court Mr. Justice Bradley said:

> "If we look at the subject in a broad and general view, it will be still more manifest that the power in question was intended to exist, notwithstanding the consolidation. The project of the railroad promised a great public improvement, conducive to the interests of Alexandria and the counties through which it would pass. Its construction, however, would greatly depend upon the local aid and encouragement it might receive. The interests of its projectors and of the country it was to traverse were regarded as mutual. The power of the adjacent counties and towns to subscribe to its stock, as a means of securing its construction, was desired not only by the company, but by the inhabitants. Whether the policy was a wise one or not is not now the question. It was in accordance with the public sentiment of that period. The power was sought at the hands of the legislature, and was given. It was relied on by those who subscribed their private funds to the enterprise. It was involved in the general scheme as an integral part of it, and as much contributory and necessary to its success as the prospective right to take tolls. Why it should not still attach to this portion of the road, as one of the rights and privileges belonging to it, into whose hands soever it comes, by consolidation or otherwise, it is difficult to see. . . . Subscription to the stock was not only a power of the county, but a privilege of the company,—being a portion of the rights and privileges which it obtained by translation from the charter of the North Missouri Railroad Company. . . . The power of the counties to subscribe being thus held to be a right and privilege of the company, in our opinion, passed with its other rights and privileges into the new conditions of existence which the company assumed under the consolidation."

In *Livingston County* v. *Portsmouth Bank*, 128 U. S. 102, 114, the court reviewed all the cases and reaffirmed

the doctrine of the last case, and quoted with approval much of the language above repeated. To the same effect see: *Town of East Lincoln* v. *Davenport*, 94 U. S. 801, 805; *County of Henry* v. *Nicolay*, 95 U. S. 619, 626; *County of Schuyler* v. *Thomas*, 98 U. S. 169, 173; *Wilson* v. *Salamanca*, 99 U. S. 499, 504; *Empire* v. *Darlington*, 101 U. S. 87, 91; *Menasha* v. *Hazard*, 102 U. S. 81, 95; *County of Tipton* v. *Locomotive Works*, 103 U. S. 523, 537; *Harter* v. *Kernochan*, 103 U. S. 562, 574; *New Buffalo* v. *Iron Co.*, 105 U. S. 73, 76; *Denison* v. *Mayor, etc., of City of Columbus* (Northern District of Mississippi), 62 Fed. Rep. 775, 777; s. c., affirmed in Circuit Court of Appeals, 69 Fed. Rep. 58, 60.

In *Green County* v. *Conness*, 109 U. S. 104, 106, it was held that where the act authorizing consolidation did not expressly declare that the rights, privileges and franchises of the consolidating company should pass over to the company with which it might become consolidated, but only that it might consolidate "with any other company upon such terms as may be deemed just and proper," the new company, nevertheless, acquired the right to receive subscriptions belonging to the consolidating company. Mr. Justice Bradley said:

> "When two companies are authorized to consolidate their roads, IT IS TO BE PRESUMED THAT THE FRANCHISES AND PRIVILEGES OF EACH CONTINUE TO EXIST IN RESPECT TO THE SEVERAL ROADS SO CONSOLIDATED. This point was considered in the case of *Tomlinson* v. *Branch*, 15 Wall. 460, and *Branch* v. *City of Charleston*, 92 U. S. 677, and was decided in accordance with this view. This being so, the authority given to consolidate, 'upon such terms as may be deemed just and proper,' would include the power to transfer to the consolidated company the franchises and privileges connected with the road, if the law itself did not have that effect."

So it has been held in the state courts as to sub-

scriptions. *Musgrove* v. *Vicksburg, etc., R. R. Co.*, 50 Miss. 677, 680, 684, 685; *Hanna* v. *The Cincinnati and Fort Wayne R. R. Co.* 20 Ind. 30; *Cantillon* v. *The Dubuque & N. W. Ry. Co.*, 78 Iowa, 48, 51; *C. K. & W. Rld. Co.* v. *Comm'rs of Stafford Co.*, 36 Kan. 121, 127; *John Hancock Mutual Life Ins. Co.* v. *Worcester, Nashua, &c., Railroad*, 149 Mass. 214, 219; *Day* v. *Worcester, &c. Railroad*, 151 Mass. 302, 308; *Swartwout* v. *Michigan Air Line R. R. Co.* 24 Mich. 389, 404; *Mansfield, Coldwater and Lake Michigan R. R. Co.* v. *Brown et al.* 26 Ohio St. 223, 238; *Hamilton* v. *Railroad Co.* 144 Penn. St. 34, 59.

There is a radical distinction between the effect of a consolidation upon the existing rights, privileges, etc., of the consolidating companies, and the power of a consolidated company to receive these rights and privileges as a new grant or as a renewal of an existing privilege or immunity. This distinction is nowhere more apparent than in the long line of decisions in this court which deal with rights or immunities claimed to have passed by a consolidation. It has been repeatedly held that a consolidation effects a union in the consolidated company of all the rights, privileges and franchises possessed by the constituent companies. But, where the consolidation has been found to result in a new corporation, the inquiry has been as to what rights and powers could constitutionally or lawfully be conferred upon the new company—just as if the state were granting a *new* charter or creating a *new* corporation in the light of the constitution and statutes as they existed at the date of the consolidation or organization of the new company. In every case in this court where it has been held that the exemption from taxation did not accrue to a consolidated company, there was an intervening constitutional or statutory provision which

either forbade a present grant of exemption or rendered the corporation subject to a general legislative power of amendment or repeal of charters by which the subsequent imposition of taxes and implied repeal of the exemption could be supported and maintained in its application to the corporation newly created. But where the original grant was valid in itself at the time of its making, and where it would be valid under the existing constitution at the time of the consolidation, there is nothing in the decisions of this court to prevent its transmission to and enjoyment by the consolidated company. The situation is the same as if one consolidating company had a claim against the state for an earned bonus. This would pass to the consolidated company, like any other chose in action. In the cases which have denied the survival or continuance of the exemption, the immunity has been forfeited, not because of the dissolution of the old company, but because of the limitations upon the powers of the new company. Therefore, the controlling question is whether the provisions of section 21 are in conflict with any part of the constitution of 1890, irrespective of the effect of the consolidation to merge the old or to create a new corporation.

The question of the effect of the dissolution or extinction of the constituent companies was not necessarily involved in *Keokuk & Western Railroad* v. *Missouri*, 152 U. S. 301, 305. The ground upon which the decision in that case rested was that the consolidated company was such a new corporation or organization as required a fresh grant of corporate powers and that it came into being subject to existing constitutional limitations. There is nothing in that case to require a decision that an exemption would necessarily cease to exist and be forfeited on con-

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solidation and the creation of a new corporation, irrespective of an intervening constitutional inhibition. It was not the intention of the court in the point actually decided to enunciate a new rule fundamentally inconsistent with the other decisions of this court. The case turned upon the inquiry whether a practically new exemption could have been constitutionally granted under the existing constitution, and not whether the old exemption had terminated or been forfeited by force of the consolidation alone.

Thus, in *Shields* v. *Ohio*, 95 U. S. 319, 324; *Railroad Co.* v. *Maine*, 96 U. S. 499, 510; and *Railroad Co.* v. *Georgia*, 98 U. S. 359, 365 (all consolidation cases), there was an intervening constitutional or statutory provision for the amendment or repeal of corporate charters, which was held to apply to the consolidated company; and in *St. Louis, &c., Railway Co.* v. *Berry*, 113 U. S. 465, 475, and *Keokuk & Western Railroad* v. *Missouri*, 152 U. S. 301, 305, (also consolidation cases) an intervening constitution prohibited a new grant of exemption from taxation. The decisions in *Louisville & Nashville R. R. Co.* v. *Palmes*, 109 U. S. 244, 253; *Memphis Railroad Co.* v. *Commissioners*, 112 U. S. 609, 617; *Chesapeake & Ohio Railway Co.* v. *Miller*, 114 U. S. 176, 187, and *Norfolk & Western Railroad* v. *Pendleton*, 156 U. S. 667, 671, (foreclosure cases) also illustrate the effect of such an intervening constitutional or statutory provision upon the power of the successor or purchasing corporation to receive an exemption. The cases of *Morgan* v. *Louisiana*, 93 U. S. 217, 221; *Railroad Companies* v. *Gaines*, 97 U. S. 697, 711; *Railroad Co.* v. *County of Hamblen*, 102 U. S. 273; *Railroad Co.* v. *Commissioners*, 103 U. S. 1, 4; *Wilson* v. *Gaines*, 103 U. S. 417, 420; *Picard* v. *Tennessee &c. Railroad Co.* 130 U. S. 637, 640; *Wil-*

mington & Weldon Railroad v. *Alsbrook*, 146 U. S. 279, 294; *Phoenix Insurance Co.* v. *Tennessee*, 161 U. S. 174, 176; *Home Insurance Company* v. *Tennessee*, 161 U. S. 198, and *Covington &c. Turnpike Co.* v. *Sandford*, 164 U. S. 578, 586, did not involve any question of consolidation or of constitutional restriction, but turned upon the construction of charters which were claimed to grant exemptions, or upon the effect of an attempted transfer of such exemptions.

No one claims that a consolidation, "upon such terms as the consolidating companies may agree upon," can properly include any powers or rights or privileges not authorized by the charters of the consolidating companies or in direct conflict with an existing constitution. But when a contract right is found in one of those charters, and is germane to the purposes of the corporation, and can be exercised by the consolidated company as appurtenant to the property of the company upon which it was originally conferred, and there is no constitutional inhibition then obtaining, what is there in the character and purpose of the transaction or in the words of the grant of power to prevent the transmission of this right to the consolidated company or to require its forfeiture on consolidation? Every presumption favors the continuance of such a contract right where its continued exercise is not forbidden, and where it is clearly valuable and beneficial in the ownership and operation of the property to which it adheres. The decision in *Green County* v. *Conness*, 109 U. S. 104, 106, is express authority that power to consolidate "upon such terms as may be deemed just and proper" includes power to transfer such rights to the new company, there being no intervening constitutional inhibition

In this view, the precise effect of the consolidation pro-

ceedings is not important. In either event, merger or consolidation, the immunity or right would not be forfeited and would pass to a new company. It is only when the present power of the legislature to vest this immunity or franchise in a new company comes in question that the character of the consolidation is decisive. If, at that time, a constitution or statute has intervened, and the effect of the consolidation is the creation of a new corporation, the immunity may be incapable of being conferred or transmitted or renewed. But if, on the other hand, the right of appropriation is a mere contract right, an existing chose in action, passing to the consolidated company by virtue of the merger or consolidation, and not forbidden by the constitution and laws then in force, no reason is perceived why the new company should not possess and exercise it.

CONCLUSION.

It is, therefore, submitted that the provision appropriating taxes to pay part of the cost of constructing the railroad in question constituted a contract which was not in conflict with the constitutions of Mississippi of 1869 or 1890; that this contract right passed to the Yazoo and Mississippi Valley Railroad Company by the consolidation or merger of 1892; that the statutes under which it was adjudged below that the state revenue agent was entitled to recover impaired such contract in violation of the Constitution of the United States; and that the judgment of the Supreme Court of Mississippi should be reversed.

Washington, October Term, 1899.

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APPENDIX A.

Constitutional provisions involved.

CONSTITUTION OF 1869.

ARTICLE XII., SEC. 13. The property of all corporations for pecuniary profits shall be subject to taxation the same as that of individuals.

SEC. 20. Taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value, to be ascertained as directed by law.

CONSTITUTION OF 1890.

SECTION 66. No law granting a donation, or gratuity, in favor of any person or object shall be enacted, except by the concurrence of two-thirds of each branch of the legislature, nor by any vote for a sectarian purpose or use.

SECTION 181. The property of all private corporations for pecuniary gain shall be taxed in the same way and to the same extent as the property of individuals, but the legislature may provide for the taxation of banks and banking capital, by taxing the shares according to the value thereof (augmented by the accumulations, surplus, and unpaid dividends), exclusive of real estate, which shall be taxed as other real estate. Exemptions from taxation to which corporations are legally entitled at the adoption of this constitution, shall remain in full force and effect for the time of such exemptions as expressed in their respective charters, or by general laws, unless sooner repealed by the legislature. And domestic insurance companies shall not be required to pay a greater tax in the aggregate than is required to be paid by foreign insurance companies doing business in this state, except to the extent of the excess of their ad valorem tax over the privilege tax imposed upon such foreign companies; and the legislature may impose privilege taxes on building and loan associations in lieu of all other taxes except on their real estate.

SECTION 182. The power to tax corporations and their property shall never be surrendered or abridged by any contract or grant to which the state or any political subdivision thereof may be a party, except that the legislature may grant exemption from taxation in the encouragement of manufactures and other new enterprises of public utility extending for a period not exceeding five years, the time of such exemptions to commence from date of charter, if to a corporation; and if to an individual enterprise, then from the com-

mencement of work; but when the legislature grants such exemptions for a period of five years or less, it shall be done by general laws, which shall distinctly enumerate the classes of manufactures and other new enterprises of public utility entitled to such exemptions, and shall prescribe the mode and manner in which the right to such exemptions shall be determined.

SECTION 183. No county, city, town, or other municipal corporation shall hereafter become a subscriber to the capital stock of any railroad or other corporation or association, or make appropriation, or loan its credit in aid of such corporation or association. All authority heretofore conferred for any of the purposes aforesaid by the legislature or by the charter of any corporation, is hereby repealed. Nothing in this section contained shall affect the right of any such corporation, municipality, or county to make such subscription where the same has been authorized under laws existing at the time of the adoption of this constitution, and by a vote of the people thereof, had prior to its adoption, and where the terms of submission and subscription have been or shall be complied with, or to prevent the issue of renewal bonds, or the use of such other means as are or may be prescribed by law for the payment or liquidation of such subscription or of any existing indebtedness.

SEC. 192. Provision shall be made by general laws whereby cities and towns may be authorized to aid and encourage the establishment of manufactories, gas-works, water-works, and other enterprises of public utility other than railroads, within the limits of said cities or towns, by exempting all property used for such purposes, from municipal taxation for a period not longer than ten years.

SEC. 258. The credit of the state shall not be pledged or loaned in aid of any person, association, or corporation; and the state shall not become a stockholder in any corporation or association, nor assume, redeem, secure, or pay any indebtedness or pretended indebtedness alleged to be due by the state of Mississippi to any person, association, or corporation whatsoever, claiming the same as owners, holders, or assignees of any bond or bonds, now generally known as "Union Bank" bonds and "Planters' Bank" bonds.

SEC. 279. All writs, actions, causes of action, proceedings, prosecutions, and rights of individuals and bodies corporate, and of the state, and charters of incorporation shall continue.

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APPENDIX B.

Laws creating the contract in question.

ORIGINAL CONTRACT FOR APPROPRIATION.

An Act to incorporate the Mobile and Northwestern Railroad Company, approved July 20, 1870.

SECTION 21. *Be it further enacted*, that in consideration of the construction of the Railroads provided for herein, and of the great benefit which the State will receive in the development of its agricultural resources by means of said Railroads as works of internal improvement, and also of the increased value which will thereby be added to the property of the State, thus enabling the State to greatly increase its revenue without additional and burdensome taxation upon the people, the State hereby agrees with said Company (and which agreement is irrepealable), that all taxes to which said Company shall be subject for the period of thirty years, are hereby appropriated and set apart, and shall be applied to the payment of the debts and liabilities which the said Company may have incurred in the construction of said road, or for money borrowed by said Company upon lands or otherwise, to be used in constructing said road, or paying debts incurred by said Company in constructing the same; and it shall be the duty of the Tax Collector in every county in each and every year, to give to said Company a receipt in full for the amount of said taxes upon receiving from said Company an affidavit made by the President or Cashier of said Company, that the amount of said taxes have actually and in good faith been paid and applied by said Company during the year, in payment of the debts incurred, or money borrowed as aforesaid, and which receipt so given shall be in full of all taxes, county, State, and municipal, to which said Company shall be subject; *Provided, however*, That whenever the profits of said Company shall enable it to declare and pay to the stockholders an annual dividend of eight per cent. upon its capital stock over and above the payment of its debts and liabilities, then the appropriation of the taxes aforesaid shall cease, and said taxes shall be paid by said Company to the Tax Collector, to be by him paid over as required by law. Laws Mississippi, 1870, p. 268.

Act Applying Section 21 to the Memphis and Vicksburg Railroad Company and Others.

An Act supplemental to the Acts of incorporation of certain Railroad Companies, approved August 8, 1870.

Section 1. *Be it enacted by the Legislature of the State of Mississippi*, That the provisions of the twenty-first section of an Act entitled, "An Act to incorporate the Mobile and Northwestern Railroad," be, and they are hereby made to apply to the following Railroad Companies: the Memphis and Vicksburg Railroad; the Vicksburg, Yazoo Valley, and Grenada Railroad; the Canton and Vicksburg Railroad; the Natchez and Jackson Railroad; the Meridian and Red River Railroad; the Ship Island, Mississippi City, and Paducah Railroad; the Elyton and Aberdeen Railroad; the Grenada, Louisville, and Meridian Railroad; the Greenville and Rolling Fork Railroad; and the charters of said Companies are hereby amended so as to confer upon said Companies all the rights, privileges, immunities, and franchises granted by the Act of incorporation of the said Mobile and Northwestern, embraced in the twenty-first section thereof.

Sec. 2. *Be it further enacted*, That this Act take effect and be in force from and after its passage. Laws Mississippi, 1870, p. 327.

Charter of the Memphis and Vicksburg Railroad Company.

An Act to incorporate the Memphis and Vicksburg Railroad Company, approved August 8, 1870.

(Authority to consolidate was conferred by this act upon the Memphis and Vicksburg Railroad Company.)

Sec. 16. *Be it further enacted*, That said Company shall have the right and power to consolidate the stock, property, and franchises of the road with any other road or roads, in or out of this State, at any time that the President and Directors of the road may deem proper, and upon such terms as may be consistent with the powers conferred upon said Company. Laws Mississippi, 1870, p. 326.

Charter of the New Orleans, Baton Rouge, Vicksburg and Memphis Railroad Company.

An Act to incorporate the New Orleans, Baton Rouge, Vicksburg and Memphis Short Line Railroad Company, approved March 9, 1882.

(Authority to consolidate was conferred by this act upon the "Baton Rouge" Company.)

Sec. 25. *Be it further enacted*, That the company shall have power and authority to purchase and hold any connecting railroad, and operate the same or to consolidate the company with any other company, under the name of one or both; but when such purchase is made or consolidation is effected, the said company shall be entitled to all the benefits, rights, franchises, lands and property of every description belonging to said road or roads so sold or consolidated. Laws Mississippi, 1882, p. 932.

Charter of the Louisville, New Orleans and Texas Railway Company.

(By this act the power to consolidate already conferred upon the Memphis and Vicksburg Railroad Company and the "Baton Rouge" Company was extended to the company to be formed; and the provisions of section 21 were also made applicable to such Company.)

An Act to authorize the Memphis and Vicksburg Railroad Company and the Mississippi Valley and Ship Island Railroad Company to effect a consolidation, approved March 3, 1882.

Section 1. *Be it enacted by the Legislature of the State of Mississippi*, That the Memphis and Vicksburg Railroad Company and the Mississippi Valley and Ship Island Railroad Company, be and they are hereby authorized and empowered to consolidate with each other, or with each other and any other railroad company or companies, whether such company or companies have been incorporated under the laws of this State or of any other State, so that all of the companies so consolidating shall be merged into and become one company; and the company so formed by such consolidation shall be deemed and held to be a corporation created by the laws of this State, and shall have, enjoy and possess all the rights, ways, privileges, franchises, property, grants and immunities, which are now possessed by the companies which may enter into such consolidation, as fully as though the same were conferred specially in this

act, and to that end the charters of said consolidating companies shall be taken and held to be a part of this act. Laws Mississippi, 1882, p. 1011.

SEC. 5. *Be it further enacted*, That the provisions of the twenty-first section of an act entitled, "an act to incorporate the Mobile and Northwestern Railroad," approved July 20, 1870, is hereby made to apply to the said consolidated company, and for that purpose the said section is hereby declared to be part of this act, and this section shall be construed as though the said twenty-first section was specially and fully set out herein; but this section shall not be in force for a longer time than twenty-five years from the approval of this act. *Id.*, p. 1013.

CHARTER OF YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY.

An Act incorporating the Yazoo and Mississippi Valley Railroad Company, and declaring its powers, approved February 17, 1882.

SEC. 5. *Be it further enacted*, That said company may, from time to time, mortgage or convey in trust any or all of its property, real, personal or mixed, of any and every description whatsoever, then owned or thereafter to be acquired, and also all or any of its rights, powers, privileges, liabilities, immunities and franchises whether then owned, possessed and enjoyed or thereafter to be acquired, including its rights to be a corporation; and under such deed or deeds of trust or mortgage secure, execute and dispose of the mortgage bonds of said company, to such amounts and maturing at such times and bearing such interest as it may deem best; said company may also execute a mortgage or mortgages and trusts as aforesaid, to secure bonds or obligations of other railroad companies, or may endorse the bonds of any other railroad company or companies; or in any other manner guarantee such bonds and secure the same by a mortgage or mortgages on its own property and franchises, then owned or thereafter to be acquired, as fully as it could do if the bonds were issued by it as aforesaid; said company may consolidate with any other railroad company in or out of the State of Mississippi upon such terms as the consolidating companies may agree upon; and it may lease its railroads and all its property and franchises, rights, powers, privileges and immunities then owned or thereafter to be acquired, or lease other railroads in or out of this State, for a term of years or in perpetuity, and upon any such consolidation, the consolidated company shall have and enjoy all the property, rights, privileges,

powers, liberties and immunities and franchises herein granted; but such consolidation shall not have the effect of exempting from taxation the railroad or property owned by such other consolidating company prior to its consolidation with the company hereby chartered; nor of exempting from taxation any property which the consolidated company may, after such consolidation acquire under the provisions of the charter of such other consolidating company; and in case of a lease, the lease (lessee) shall, so far as the terms of the lease may allow, enjoy and possess all the property, rights, powers, privileges, liberties, immunities and franchises which the lessor had as to the leased premises; the said company is also authorized to do an express business over its own and other lines of railroad and steamboats or other conveyances in and out of this State; and to acquire or put up, use and operate a line or lines of telegraph in this and other State or States, and to acquire, hold and enjoy all such property as may be proper, necessary or convenient in doing the said express or telegraph business *provided*, that by such consolidation the maximum in section six applies only to roads hereafter built. Laws Mississippi, 1882, p. 842.

AMENDATORY ACT OF MARCH 15, 1884 (CH. 593).

(This act, supplemented by the consolidation agreement, operated to confer upon the Louisville, New Orleans and Texas Railway Company the power to consolidate already possessed by the Memphis and Vicksburg and the "Baton Rouge" Railroad Companies. The consolidation agreement expressly covered "*franchises, grants, * * * privileges*," thus including the existing right to consolidate.)

An Act to amend an act entitled "an Act to authorize the Memphis and Vicksburg Railroad Company and the Mississippi Valley and Ship Island Railroad Company to effect a consolidation," approved March 3, 1882.

SECTION 1. *Be it enacted by the Legislature of the State of Mississippi*, That the act entitled "an act to authorize the Memphis and Vicksburg Railroad Company and the Mississippi Valley and Ship Island Railroad Company to effect a consolidation," approved March 3, 1882, be and the same is hereby so amended as to authorize and empower the Memphis and Vicksburg Railroad Company and any other railroad company or companies incorporated under the laws of this State, to consolidate, in the manner and upon the terms and conditions, and with the rights, privileges and immunities in said act mentioned, with each other and any railroad company or companies incorporated or organized under the laws of

any other State or States, and that such consolidation may be so effected whether the Mississippi Valley and Ship Island Railroad Company becomes a party to such consolidation or not.

SEC. 2. Be it further enacted, That this act take effect and be in force from and after its passage. Laws Mississippi, 1884, p. 936.

ACT AUTHORIZING CONSOLIDATION BY NATCHEZ, JACKSON AND COLUMBUS RAILROAD COMPANY.

An Act to authorize the Natchez, Jackson and Columbus Railroad Company to sell its railroad, situated in this State, or to consolidate the same, approved February 19, 1890.

SECTION 1. *Be it enacted by the Legislature of the State of Mississippi*, That the Natchez, Jackson and Columbus Railroad Company, incorporated on the 21st day of July, 1870, under the laws of this State, be and it is hereby authorized and empowered to sell absolutely all or any part of its railroad and other property, lying, being and situated in the State of Mississippi, together with all franchises, rights, powers, privileges and immunities, unto the said Natchez, Jackson and Columbus Railroad Company appertaining and belonging.

SEC. 2. That the Louisville, New Orleans and Texas Railway Company, and the Natchez, Jackson and Columbus Railroad Company are hereby authorized to consolidate with each other, under the name of the Louisville, New Orleans and Texas Railway Company, and upon such terms as may be agreed upon by said companies.

SEC. 2. (3). That this act take effect and be in force from and after its passage. Laws Mississippi, 1890, p. 675.

APPENDIX C.

Laws impairing the obligation of the contract.

ANNOTATED CODE OF MISSISSIPPI, 1892, p. 860.
CHAPTER 116—REVENUE.

3803 (512.) *What receivable for taxes.*—All coins made current by the laws of the United States, United States treasury notes, and national currency, and all warrants drawn by the auditor on the state treasurer during the fiscal year for which the taxes are due, shall be received by tax-collectors in payment of taxes due to the state; and, in addition to such current coins and currency, all warrants drawn on the county treasury according to law shall be received in payment of county taxes, unless, otherwise provided by law.

3875 (597.) *Assessment and taxation of railroads; each company to file schedule.*—Each railroad company owning and operating a railroad, shall, on or before the first Monday in April in each year, file with the railroad commission a complete schedule, under oath, of all its property, real or personal, taxable and non-taxable, setting forth therein the length in miles or fractions thereof of its entire road-bed, switches, and side tracks, and showing how many miles or fractions thereof lie in this state, and in each county of the state, and in each city, town, or village, and the value of the whole and each part thereof, as subdivided herein; the total amount of capital stock, its par value and its actual value, and the value of its franchise; the number of engines and their respective values; the gross amount of receipts in the year preceding; the number of cars of all kinds, their classes and value; the number of depot-buildings and warehouses and other buildings; in what county and city, town, village, or levee district located, and the value of each, including the lands and lots upon which the same are built; the value of all machine and car shops and stationary machinery and tools therein, and in what county and city, town, village, or levee district located, including the land upon which the same are built; all real, personal, or mixed property belonging to the company within the state, not enumerated, with its value; the number of bridges and ferries in this state, in what county and city, town, village, or levee district situated, and the value of each, and specifying whether such value is or is not included in the value of the road-bed; a list of all lands in this state owned, describing the same, and giving the location and value thereof, the quantity of land used for depots and machine-

shops, and its value aside from the buildings thereon; the gross amount of receipts the year preceding from passengers and freights separately, and the proportion thereof earned within and from this state; and if any of said property is claimed to be exempt from taxation, it shall be separately stated, and the law cited under which the claim is made.

3876. *The same; penalty for failure.*—If any company, corporation, or person who should do so, shall fail, neglect, or refuse to render the schedule required by the last section, such company, corporation, or person shall forfeit and pay to the state, for every such failure, neglect, or refusal, the sum of five thousand dollars, to be recovered by action, which shall be instituted and prosecuted under the direction of the railroad commission; and, in case of such failure, neglect, or refusal, the commission shall make out such schedule from the best information obtainable.

3877. *The same; state railroad assessors.*—The members of the railroad commission are constituted state railroad assessors, and they shall, upon the receipt or making and completion of the schedules provided for in the last two sections, assess all railroads, telegraph, sleeping-car, and express company property liable to taxation in the state, affixing its true value, so that such property shall bear its just proportion of taxation, taking into consideration the value of the franchise, the capital stock engaged in the business in this state; and the railroad assessors may adopt other and further rules necessary and proper to ascertain the value of property to be assessed by them, including the amount of capital engaged in the business in this state.

3878. *The same; not bound by schedules rendered.*—If in any case the state railroad assessors have reason to believe that any railroad company, or person owning or operating a railroad, has rendered a false or fraudulent schedule, and that an assessment predicated thereon will relieve such company or person of a just share of taxation, they shall not, in making the assessment, be bound thereby, but they shall make out a proper schedule as if none had been rendered, first giving such person or company five days' notice to come forward at a time and place to be named, and show cause why such a course should not be pursued. Such notice shall be served and returned as a summons from a court.

3879. *The same; records to be kept and preserved.*—Complete and full records shall be kept by the railroad commission of all things done under the authority conferred upon it and on its members by the provisions of this chapter.

3880. *The same; assessments to be made by the counties, etc.*—The state railroad assessors shall, if practicable, on or before the first Monday of June, and if impracticable, as soon thereafter as it can be done, in each year, make out for each county having any railroad, telegraph, sleeping-car, palace-car, dining-car, or express company property therein an assessment-roll of such property, both real and personal, and the same shall be in such form as they may prescribe, as near in conformity to ordinary assessment-rolls as convenient and practicable, the property in cities, towns, villages, and levee districts being distinguished; and the same shall contain all the property of any such company or other railroad property in the county, and the value thereof, and the state taxes thereon, and so made that each county, levee district, and municipality shall receive its just share of such taxes proportionately to the amount of the property therein situated; and the same, when made, shall remain on deposit for one month in the office of the railroad commission, and be for said time subject to the objections thereto which may be filed; but the taxes on other real estate belonging to railroads than that forming a part of the road, shall not be extended on the rolls.

3881. *The same; objections heard, etc.*—It shall be the duty of the railroad commissioners to meet in the capitol, at the city of Jackson, on the first Monday in July of each year, or, in case of failure, as soon thereafter as practicable, for the purpose of hearing and considering objections to assessments made by them; and they shall remain in session until all objections are heard and disposed of; and they may, if they think objections just, sustain the same and amend assessments, if necessary, accordingly.

3882. *The same; assessments sent to the counties.*—So soon as the assessment-rolls have remained subject to objection for one month, and when all objections, if any, are disposed of, the assessment-rolls shall be approved either by order of the railroad commission or by operation of law, and the same shall be sent to the clerks of the boards of supervisors of the respective counties, who shall file and preserve the same as a record.

3883. *The same; duty of the clerk.*—The clerk shall make two copies of said assessment-roll as of other assessment-rolls, and dispose of them as provided by law in case of the general assessment-rolls, and perform all duties required of him in other cases. (See § 3794*a*.)

3884. *The same; the tax-collectors.*—The tax-collectors shall collect the railroad taxes from said rolls in all respects as he collects other taxes; but in case of a sale for delinquent railroad taxes, the

collector shall first seize and sell personal property or lands other than the road-bed, and, second, rolling-stook; and, lastly, the road-bed of the railroad in his county.

3885. *Telegraph, express, sleeping-car companies, etc.*—Telegraph, express, sleeping-car, palace-car, and dining-car companies shall be assessed for ad valorem taxation in the same manner as railroads; and the railroad commissioners shall be assessors thereof, and shall perform the same duties in respect thereto as in the case of railroads, and at the same time and with like effect. The clerks and tax-collectors shall perform the like duties as required in case of railroads.

3886. *The same; schedules.*—The person or corporation owning or operating a telegraph line, or carrying on the business of an express, sleeping-car, palace-car, or dining-car company, shall file the schedules required of railroads within the time and under like penalties; and the schedules shall contain the same or such of the particulars required of railroads as to the property and rights of the company, as the railroad commissioners shall direct, and such other particulars as they shall demand.

4199. *Compensation.*—Neither the state nor any county, municipality, or levee board shall be chargeable with any fees or expenses on account of any investigation or suit made or instituted by the state revenue agent; and he shall not receive any salary; but he shall be entitled to retain as full compensation for his services and expenses, twenty per centum on all amounts collected and paid over by him, and of the purchase-money of all lands bid in for the state by him and sold by the land-commissioner.

4200. *Parties to suits by.*—In all suits against delinquent tax-payers, the assessor and tax-collector shall be made parties; and if it shall appear that the failure of the tax-payer to properly pay his taxes was caused by any willful default or negligence of the assessor or tax-collector, judgment shall be rendered against the defaulter or defaulters for the amount of compensation of the revenue agent.

Laws of 1894, Ch. 34.

An Act to provide for the election of a State Revenue Agent, to prescribe his powers and duties, and to repeal sections 4187, 4190, 4191, 4192, 4193 and 4195, in chapter 126 of the annotated code of Mississippi, approved February 7, 1894. Laws Mississippi, 1894, p. 29.

Section 1. *Be it enacted by the Legislature of the State of Mississippi,* That there shall be a State Revenue Agent, who shall be elected at the general election in 1895 in the same manner that other

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State officers are elected, and whose term of office shall be four years, and until his successor is elected and qualified. The present incumbent shall hold office for the term of his appointment, and until his successor is elected and qualified.

SEC. 2. The State Revenue Agent may appoint a sufficient number of deputies. He shall have power and it shall be his duty to proceed by suit in the proper court against all officers, county contractors, persons, corporations, companies and associations of persons for all past due and unpaid taxes of any kind whatever, for all penalties or forfeitures for all past due obligations and indebtedness of any character whatever owing to the State or any county, municipality or levee board, and for damages growing out of the violation of any contract with the State or any county, municipality or levee board. He shall have a right of action and may sue at law or in equity in all cases where the State or any county, municipality or levee board has the right of action or may sue. It is the duty of the State Revenue Agent to investigate the books, accounts and vouchers of all fiscal officers of the State, and of every county, municipality and levee board, and to sue for, collect and pay over all money improperly withheld from either, and he has the power to sue and right of action against all such officers and their sureties to collect any such moneys; but if the delinquency appear by a correct open account on the books of the proper accounting officer, the right of the Revenue Agent to sue shall arise only after he has given thirty days notice to the delinquent officer to pay over the amounts and he fails to do so.

SEC. 3. After the expiration of the fiscal year in which taxes become due should the Revenue Agent discover that any person, corporation, property, business, occupation or calling has escaped taxation by reason of not being assessed, it shall be his duty to give notice to the tax collector in writing, and the collector shall within ten days thereafter make the proper assessment by way of an additional assessment on the roll or tax list in his hands, and give ten days notice in writing to the person or corporation whose property is assessed, and all objections to such assessments shall be heard at the next meeting of the board of supervisors of counties, or board of mayor and aldermen of municipalities. The board of supervisors or mayor and aldermen shall also be notified in writing by the collector of said assessment and the State Revenue Agent may appear at said meeting, and an appeal to the circuit court may be taken from the order of the board approving or disapproving such assessment by either party. If the assessment be approved and no appeal be taken, and the taxes shall not be paid within thirty days thereafter, the property, if it be real estate, shall be ordered sold as provided by

section 3850 of the annotated code of Mississippi, and if it be personalty, the tax collector shall proceed to collect by distress or otherwise. If the tax collector shall fail or refuse to make an assessment and report the same as herein required, he shall be liable on his bond for the amount of taxes properly collectible and ten per cent. damages thereon. If the assessment rolls be in the hands of the assessor at the time the Revenue Agent makes discovery of property which has escaped taxation, he shall give the required notice to the assessor, who shall make the proper assessment, and give the required notices to the owner of the property and to the board of supervisors or mayor and aldermen, under like penalties for failure as provided against the collector, and like proceedings shall be had. When any taxes shall be collected under assessments made as herein required, the Revenue Agent shall receive therefor, at the time of collection, the same compensation allowed him by law for other collections.

SEC. 4. If the property which the Revenue Agent discovers to have escaped taxation shall belong to any railroad or other corporation which, under the law, is required to be assessed by the State railroad assessors, the Revenue Agent shall give the notice required herein to said State railroad assessors, and they shall give the required notice to the company or corporation. At their next meeting after giving the proper notice, said property shall be assessed in the same manner required by law, and placed on the proper county, municipal or levee board roll, and collected by the proper officers in the manner required by law, and the Revenue Agent shall have his compensation as in other cases.

SEC. 5. The Revenue Agent in the discharge of his official duties shall have full power and authority to examine and investigate the books, records, papers, accounts and vouchers of any State, county, municipal or other officer.

SEC. 6. The Revenue Agent shall have power to sue for, collect and have assessed as herein required, delinquent taxes or taxes that have escaped the assessor and collector back to and including the year 1886, and no further.

SEC. 7. That sections 4187, 4190, 4191, 4192, 4193, and 4195, in chapter 126 of the annotated code of Mississippi, be and the same are hereby repealed.

SEC. 8. That this act take effect and be in force from and after its passage.

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APPENDIX D.[1]

I. List of charters containing agreement for appropriation of taxes as embodied in section 21 of Act of July 20, 1870.

1870. Mobile and Northwestern Railroad Company, Laws 1870, 255, 268.
" Memphis and Vicksburg Railroad Company, Laws 1870, p. 327.
" Vicksburg, Yazoo Valley, and Grenada Railroad Company, *Ib.*
" Canton and Vicksburg Railroad Company, *Ib.*
" Natchez and Jackson Railroad Company, *Ib.*
" Meridian and Red River Railroad Company, *Ib.*
" Ship Island, Mississippi City, and Paducah Railroad Company, *Ib.*
" Elyton and Aberdeen Railroad Company, *Ib.*
" Grenada, Louisville, and Meridian Railroad Company, *Ib.*
" Greenville and Rolling Fork Railroad Company, *Ib.*
1871. Meridian, Red River and Texas Railroad Company, Laws 1871, pp. 119, 129.
" Artesia, Starkville and Grenada Railroad Company, Laws 1871, pp. 138, 147.
" Columbus, Fayette and Decatur Railroad Company, Laws 1871, pp. 187, 188.
" Lexington Branch Railroad Company, Laws 1871, pp. 189, 199.
" Elyton, Corinth and Tennessee River Railroad Company, Laws 1871, pp. 202, 218.
" Yazoo City, Raymond and Crystal Springs Railroad Company, Laws 1871, pp. 228, 236.
" Vicksburg, Pensacola and Ship Island Railroad Company, Laws 1871, pp. 237, 250.
" Ripley Railroad Company, Laws 1871, pp. 268, 279.
1872. An Act to encourage the introduction of Machinery and the establishment of Factories, etc., Laws 1872, p. 65.
" Arkansas City and Grenada Railroad Company, Laws 1872, pp. 347, 360.
" Corinth, Kossuth, and Kosciusko Railroad Company, Laws 1872, pp. 335, 346.
" Corinth and Nashville Railroad Company, Laws 1872, p. 283.
" Gibson and Rolling Fork Railroad Company, Laws 1872, pp. 294, 297.

[1] Regular sessions of the Legislature of Mississippi were held annually between 1870 and 1878, inclusive, and thereafter beginning with the year 1880 were held biennially.

1872. Grenada, Houston, and Eastern Railroad Company, Laws 1872, pp. 286, 291.
" Helena, Water Valley, and Eastern Railroad Company, Laws 1872, pp. 299, 311.
" Mississippi River and Sardis Railroad Company, Laws 1872, pp. 380, 386.
" Memphis, Oxford, and Meridian Railroad Company, Laws 1872, pp. 369, 379.
" Natchez and Brookhaven Railroad Company, Laws 1872, pp. 362, 367.
" New Orleans, Baton Rouge, and Vicksburg Railroad Company, Laws 1872, pp. 246, 255.
" New Orleans and Northeastern Railroad Company, Laws 1872, p. 314.
" Vicksburg, Yazoo Valley, and Grenada Railroad Company, Laws 1872, pp. 319, 335.
1873. Mississippi Mills, Laws 1873, p. 212.
" Stonewall Cotton Factory, Laws 1873, p. 212.
" Perkinsville Manufacturing Company, Laws 1873, p. 303.
" Wanneeta Mills and Magnolia Mills, Laws 1873, p. 367.
" Ashland Railroad Company, Laws 1873, pp. 518, 520.
" Ashland, Holly Springs and Chulahoma Railroad Company, Laws 1873, pp. 596, 597.
" Grenada, Louisville, and Meridian Railroad Company, Laws 1873, pp. 513, 514.
" Holmes County Central Railroad Company, Laws 1873, pp. 520, 530.
" Liberty and Woodville Railroad Company, Laws 1873, pp. 499, 509.
" Mississippi City and Helena Railroad Company, Laws 1873, pp. 531, 540.
" Mobile and Little Rock Railroad Company, Laws 1873, pp. 576, 579.
" Pascagoula and Jackson Railroad Company, Laws 1873, pp. 496, 499.
" Savannah and Memphis Railroad Company, Laws 1873, pp. 594, 595.
" West and East Railroad Company, Laws 1873, pp. 479, 488.
" Yazoo City, Yazoo Valley Railroad Company, Laws 1873, pp. 543, 553.
1878. Natchez, Jackson and Columbus Railroad Company, Laws 1878, pp. 233, 234.
1880. Jackson, Yazoo City and Arkansas City Railroad Company, Laws, 1880, pp. 228, 234.

1880. Greenville, Columbus and Birmingham Railroad Company, Laws 1880, pp. 246, 247.
1882. Gordon Cotton Mills Company, Laws 1882, pp. 574, 576.
" Port Gibson Cotton Mills, Laws 1882, pp. 591, 596.
" Vicksburg and Mississippi Railroad Company, Laws 1882, pp. 896, 916.
" Louisville, New Orleans and Texas Railway Company, Laws 1882, pp. 1011, 1013.
1884. Louisville, New Orleans and Texas Railway Company, Laws 1884, p. 936.

II. List of charters granting exemptions from taxation.

1870. Whitworth Female College, Laws 1870, pp. 380, 381.
" Macon Male School, Laws 1870, pp. 401, 402.
" Attala County Agricultural and Mechanical Association, Laws 1870, pp. 457, 459.
1873. Educational Society of South Mississippi and East Louisiana, Laws 1873, pp. 429, 433.
" Baldwyn Female College, Laws 1873, p. 435.
" University of Columbus, Laws 1873, pp. 438, 439.
" Plowman and Agricultural Society, Laws 1873, p. 462.
1874. Abbeville Female College, Laws 1874, p. 158.
1877. Manufacturing Companies, Laws 1877, p. 72.
1878. Port Gibson, Utica and Crystal Springs Railroad Company, Laws 1878, pp. 463, 472.
" Brandon Street Railroad Company, Laws 1878, pp. 484, 487.
1880. All railroads while in process of construction, Laws 1880, pp. 19, 86.
" Lea Female College, Laws 1880, pp. 291, 293.
" Meridian and Aberdeen Fair Grounds, Laws 1880, p. 633.
1882. Purchasers of railroads at foreclosure, on incorporation, Laws 1882, pp. 47, 48.
" Delta Land and Manufacturing Company, Laws 1882, pp. 533, 537.
" Mississippi Improvement and Manufacturing Company, etc., Laws 1882, pp. 545, 550.
" Mississippi Mining, Milling, etc., Company, Laws 1882, pp. 555, 558.
" Star Mining, Milling and Manufacturing Company, Laws 1882, pp. 559, 561.
" Marshall Mills, Laws 1882, pp. 561, 564.

1882. D. Mayer Agricultural and Manufacturing Company, Laws 1882, pp. 564, 565.
" Hope Oil Mill, etc., Company, Laws 1882, pp. 570, 573.
" Warren Cotton Mills Company, Laws 1882, pp. 587, 588.
" Luxapalila Manufacturing and Mining Company, Laws 1882, pp. 588, 591.
" Cooper's Wells Company, Laws 1882, pp. 599, 602.
" Meridian Mills, Laws 1882, pp. 606, 608.
" Blue Mountain Academy, Laws 1882, pp. 667, 668.
" Louisville Male and Female Seminary, Laws 1882, p. 670.
" Palo Alto Academy, Laws 1882, pp. 675, 676.
" Yazoo and Mississippi Valley Railroad Company, Laws 1882, pp. 838, 847.
" Memphis and New Orleans Railroad and Levee Company, Laws 1882, pp. 874, 883.
" Canton, Aberdeen and Nashville Railroad Company, Laws 1882, pp. 1001, 1009.
" Memphis, Selma and Brunswick Railroad Company, Laws 1882, p. 1022.
" Gulf and Ship Island Railroad Company, Laws 1882, pp. 849, 861.
" Birmingham and North-Western Railroad Company, Laws 1882, pp. 1040, 1049.
" Tennessee and Mississippi Rivers Railroad Company, Laws 1882, pp. 989, 1000.
" Vicksburg and North-Eastern Railroad Company, Laws 1882, pp. 1015, 1018.
" Meridian, Brookhaven and Natchez Railroad Company, Laws 1882, pp. 1049, 1064.
" Helena, Sardis, Pontotoc and Birmingham Railroad Company, Laws 1882, pp. 885, 895.
" Mississippi Mexican Gulf Railroad Company, Laws 1882, pp. 961, 974.
" Alabama and Mississippi Railroad Company, Laws 1882, pp. 863, 870.
" Mississippi and Arkansaw Railroad Company, Laws 1882, pp. 933, 942.
" Meridian, Winona and Helena Railroad Company, Laws 1882, pp. 943, 959.
" Mississippi, Alabama and Georgia Railway Company, Laws 1882, pp. 975, 988.
" Pass Christian City Railroad Company, Laws 1882, pp. 818, 821.

1882. City Railroad of Columbus, Laws 1882, pp. 822, 824.
" Georgia Pacific Railway Company, Laws 1882, pp. 824, 826, 834, 837.
1884. Mississippi State Fair Association, Laws 1884, pp. 827, 829.
" Sunflower Navigation Company, Laws 1884, pp. 859, 862.
" Hunt and Huddleston College Faculty Association, Laws 1884, pp. 874, 876.
" Lea Female College, Laws 1884, pp. 878, 879.
" Maury Institute, Laws 1884, pp. 880, 881.
" Grenada Collegiate Institute, Laws 1884, pp. 881, 883.
" Caledonia Branch Railroad Company, Laws 1884, pp. 888,895.
" Warrior Coal Fields Railroad Company, Laws 1884, pp. 895, 901.
" Tombigbee Railroad Company, Laws 1884, pp. 901, 907.
" Moss Point, Scranton and East Pascagoula Railroad Company, Laws 1884, pp. 911, 915.
" Macon and Tuscaloosa Railroad Company, Laws 1884, pp. 915, 916.
" Mississippi River and Deer Creek Railroad Company, Laws 1884, p. 918.
" Memphis, Oxford and Columbus Railway Company, Laws 1884, pp. 919, 920.
" Port Gibson & Alabama Railroad Company, Laws 1884, pp. 922, 934.
" Terry, Brandon and Northeastern Railroad Company, Laws 1884, pp. 936, 937.
" Helena, Memphis and New Orleans Railroad Company, Laws 1884, pp. 937, 938.
" West Point Street Railway Company, Laws 1884, pp. 941, 944.
" Tombigbee and Grand Trunk Railroad Company, Laws 1884, p. 950.
" Natchez and Mobile Railroad Company, Laws 1884, pp. 951, 953.
" Front and Asylum Street Railway Company, Laws 1884, pp. 955, 956.
" Mississippi River and Mexican Gulf Railroad Company, Laws 1884, pp. 957, 963.
" Rodney, Jackson and Tuscaloosa Railroad Company, Laws 1884, pp. 968, 969.
" Arkansas City, Winona and Eastern Railway Company, Laws 1884, pp. 969, 971.
" Mississippi River and Eastern Railroad Company, Laws 1884, pp. 975, 986.

1884. Tallahatchie Valley Railroad Company, Laws 1884, pp. 987, 992.
" New Orleans and Northwestern Railway Company, Laws 1884, pp. 994, 1004.
" Meridian and Brunswick Railroad Company, Laws 1884, pp. 1005, 1013.
" Helena, Water Valley, Aberdeen and Birmingham Railroad Company, Laws 1884, pp. 1014, 1023.
1886. Kansas City, Memphis and Birmingham Railroad Company, Laws 1886, pp. 191, 200.
" Memphis, Birmingham and Atlantic Railroad Company, Laws 1886, pp. 203, 207.
" Pensacola and Memphis Railroad Company of Mississippi, Laws 1886, pp. 209, 221.
" Vicksburg, Yazoo-Delta and North Eastern Railway Company, Laws 1886, pp. 222, 227.
" Hill City Street Railway Company, Laws 1886, pp. 232, 235.
" Mississippi and Louisiana Bridge and Railroad Company, of Natchez, Mississippi, Laws 1886, pp. 237, 244.
" Port Gibson Female College, Laws 1886, p. 634.
" Cooper Normal College, Laws 1886, pp. 726, 727.
" Pittsboro Male and Female College, Laws 1886, pp. 734, 735.
1888. Macon, Tuscaloosa and Birmingham Railroad Company, Laws 1888, pp. 490, 499.
" Helena, Tupelo and Decatur Railroad Company, Laws 1888, pp. 500, 508.
" Brookhaven, Columbia and Mobile Railroad Company, Laws 1888, pp. 508, 509.
" Enterprise Street Railway Company, Laws 1888, p. 518.
" Vicksburg Electric Street Railway Company, Laws 1888, pp. 522, 523.
" Mississippi and Gulf Railroad Company, Laws 1888, pp. 542, 546.
" Mississippi Southern Railway Company, Laws 1888, pp. 548, 557.
" Columbus, Fulton and Eastport Railroad Company, Laws 1888, pp. 558, 563.
" Greenville and Durant Railroad Company, Laws 1888, pp. 563, 569.
" Waynesboro, Pascagoula and Gulf Coast Railroad Company, Laws 1888, pp. 570, 575.
" Greenville, Egypt Ridge and Bogue Phaliah Railway Company, Laws 1888, pp. 584, 591.
" Meridian Cotton Mills, Laws 1888, pp. 595, 596.

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1888. Natchez Hotel, Laws 1888, p. 614.
" Deasonville High School, Laws 1888, p. 628.
" Liberty Male and Female College, Laws 1888, pp. 630, 631.
" Tombigbee Normal Institute, Laws 1888, p. 632.
" Montrose High School, Laws 1888, pp. 635, 636.
" Gulf Port Dental College, Laws 1888, p. 638.
" Mt. Carmel Normal College, Laws 1888, pp. 639, 640.
1890. Millsaps College, Laws 1890, pp. 553, 555.
" Pickens High School, Laws 1890, p. 561.
" Harper's Baptist College, Laws 1890, pp. 563, 564.
" Pleasant Hill High School, Laws 1890, pp. 569, 570.
" Hebron High School, Laws 1890, pp. 570, 571.
" Bellefontaine Male and Female High School, Laws 1890, p. 574.
" Saltillo High School, Laws 1890, p. 577.
" Waynesboro Normal Institute and College, Laws 1890, pp. 581, 582.
" Old Myrtle Normal College, Laws 1890, pp. 583, 584.
" Starkville Street Railway Company, Laws 1890, pp. 655, 660.
" Nashville and Mississippi Delta Railroad Company, Laws 1890, pp. 682, 687.
" Mississippi River, Alabama and Chattanooga Railroad Company, Laws 1890, pp. 703, 713.
" Greenville Nashville and Chattanooga Railway Company, Laws 1890, pp. 732, 741.
" Columbus and Fulton Railroad Company, Laws 1890, pp. 743, 751.
" Alabama, Mississippi and Western Railroad Company, Laws 1890, pp. 751, 756.
" South Mississippi Railroad Company, Laws 1890, pp. 759, 767.
" Yazoo Delta Central Railway Company, Laws 1890, pp. 769, 778.

An Act for the relief of the Mobile and Northwestern Railroad Company, approved February 28, 1880.

SECTION 1. *Be it enacted by the Legislature of the State of Mississippi*, That the said sum of three thousand six hundred and sixteen 06-100 dollars is hereby released to the said Mobile and Northwestern Railroad Company.

SEC. 2. *Be it further enacted*, That this act shall take effect and be in force from and after its passage.

FILED
APR 12 1900
JAMES H. McKENNEY,
Clerk

No. 244. 35

Reply Brf. of Guthrie, Mayes, Fentress & Dickinson for P. Es.

MISSISSIPPI TAX CASES.

Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed April 12, 1900.

No. 244.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY ET AL.,
Plaintiffs in error,
vs.
WIRT ADAMS, State Revenue Agent.

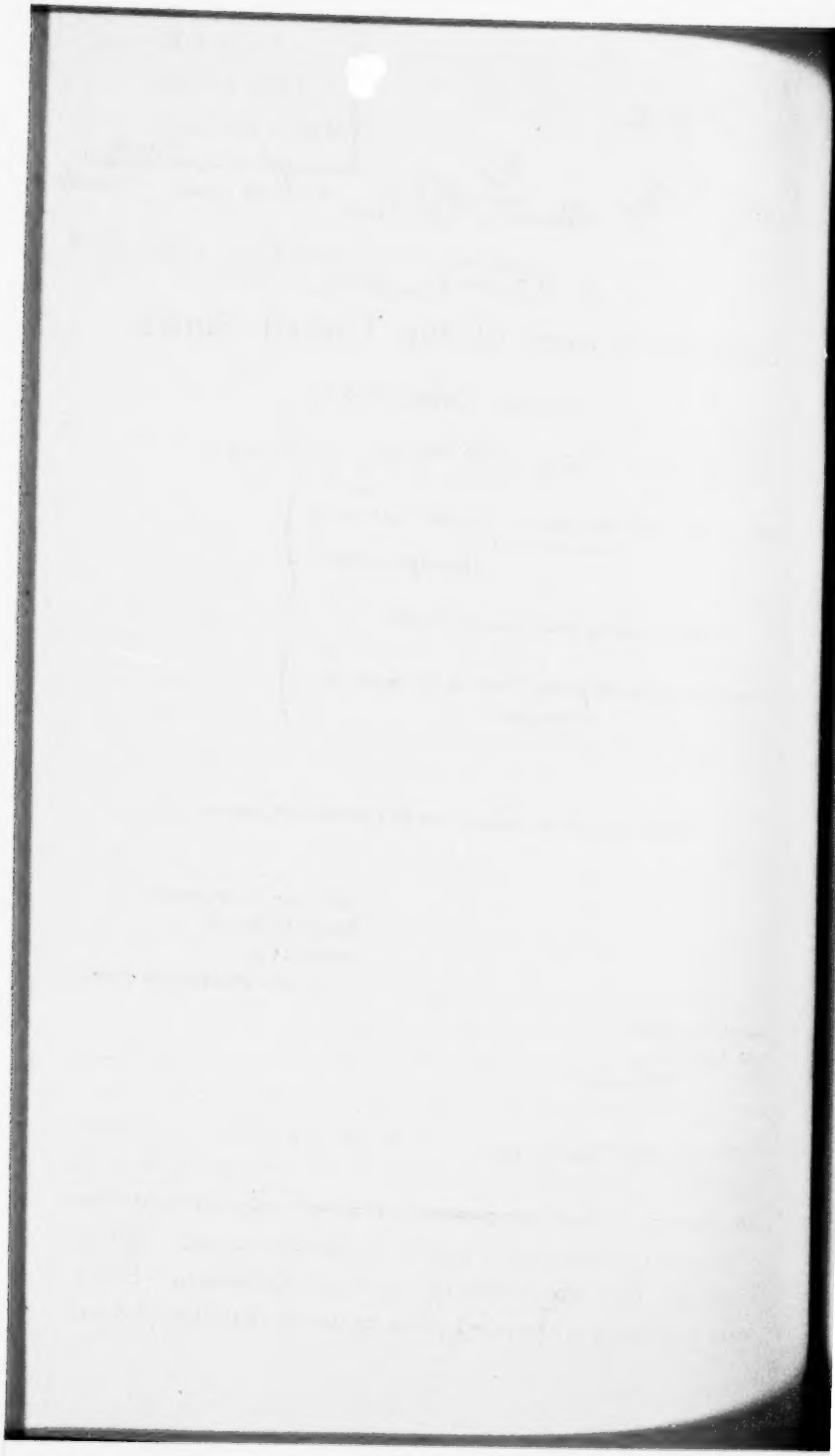
In error to the Supreme Court of the State of Mississippi.

REPLY BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

WILLIAM D. GUTHRIE,
EDWARD MAYES,
NOEL GALE,
For Plaintiffs in error.

JAMES FENTRESS,
J. M. DICKINSON,
Of counsel.

WASHINGTON, April 11, 1900.



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In error to the Supreme Court of the State of Mississippi.

REPLY BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

I.

Four briefs have so far been filed on behalf of the defendant in error, and one pamphlet, in addition to the briefs filed on the motion to dismiss. The principal points made in these new briefs bear upon the question of jurisdiction, which, it is considered, are sufficiently discussed in the original brief filed on behalf of the plaintiffs in error. In one of the briefs, however, an elaborate argument is presented to establish a possible non-federal ground of decision by showing what the actual cost of construction was and that the company was no longer entitled to the appropriation of taxes because its profits enabled the declaration and payment to the stockholders of an annual dividend of eight per cent. on its capital stock over and above the payment of its debts and liabilities, although concededly no such dividend has ever been paid. In answer to this suggestion, it need only be said that this question was not litigated on the second trial, and, as matter of fact, the plaintiffs in error, defendants below, were expressly precluded from showing that they did not

come within the scope of the eight per cent. proviso when their pleas setting forth the contract under section 21 were stricken out as constituting no defense. The testimony to which reference is made in the principal brief now filed on behalf of the defendant in error in this court was taken on the first trial, where this issue was litigated at length; but on the second trial no evidence whatever was taken upon the question of the amount of the profits, nor was any such point then litigated or considered either in the court of original jurisdiction or on the appeal to the Supreme Court of Mississippi. Moreover, as matter of fact, on the first trial the jury found in favor of the railroad company on this question of the profits for the years 1892, 1893 and 1894, and for the revenue agent for the year 1895. The Supreme Court of Mississippi set those findings aside on the ground that they were inconsistent (record, p. 680), ordered a new trial, and declined to consider the eight per cent. clause because it had decided that the whole of section 21 was invalid, which, of course, rendered the eight per cent. proviso entirely immaterial.

II.

In the briefs filed on behalf of the defendant in error, it is still insisted that it was the intention of the legislature in and by the provision for the appropriation of taxes to create an exemption in violation of the constitution of 1869. The opinion in *Houston & Texas Central Railroad* v. *Texas*, just filed in this court (March 26, 1900), but not yet published, ought to be a sufficient answer to this contention. In that case, as in the case at bar, the court was asked to find that the wording of the statute was a mere cover for an intention to effectuate what was pro-

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hibited by the state constitution. The court held this contention to be unsound in language which is equally applicable to the present case. Thus, among other things, Mr. Justice Peckham said:

> "The question whether the legislature so intended is one to be decided by an inspection of the act under which they were issued, and possibly by reference to the text of other acts of the legislature enacted at or about the same time. . . . If any fair doubt could arise, it should be solved in favor of the validity of the paper. There must be an intention on the part of the legislature that the paper should circulate as money. *There must, in other words, be an intention to violate the constitution.*
>
> "A deliberate intention on the part of a legislative body to violate the organic law of the State under which it exists and to which the members have sworn obedience, is not to be lightly indulged. The existence of such intention should be proved beyond doubt or cavil from the very acts themselves which are under discussion, and if it be reasonably possible to so construe them as to render them valid, a proper respect for the legislative department calls for such construction rather than one which invalidates them, because they were enacted with a direct purpose to violate the state constitution."

This authority is almost on all fours in favor of the contention of the plaintiffs in error that, if the fair and reasonable import of the language used in section 21 is not to create an exemption in violation of the state constitution, the court will not assume the existence of any such unlawful intention, but will uphold the legislation as intended to accomplish in good faith what it purports to enact, namely, an appropriation of taxes in aid of a necessary public improvement.

The argument is also advanced that, because the charter of 1882 was enacted and accepted after the decision in the *Mississippi Mills* case (1878), it must be interpreted as if that decision were part of the charter itself; and that, as that decision held a somewhat similar form of legislative contract to constitute or be equivalent to a repealable

exemption, the charter now before the court must also be conclusively assumed to constitute a repealable exemption. This is hardly a candid argument. The revenue agent has entirely repudiated the *Mississippi Mills* case and the court below has completely overruled it (record, pp. 662, 681). The state revenue agent cannot in one breath repudiate a prior decision and have it overruled so far as it stands in the way of a recovery against the railroad companies or tends to uphold their position, and in the very next breath insist that the decision is to be given full faith and credit in so far as it militates against the railroad companies. In a word, it cannot be that the decision is to stand so far as it is against the railroad companies, but is to be set aside and disregarded so far as it is inconsistent with the revenue agent's present argument. If the revenue agent had been willing to concede that the legislature in 1882 had constitutional power to exempt, and that the taxes prior to 1892 were, therefore, validly released, there would be some justice and fairness in his present argument; but we know that he is suing for taxes prior to 1892 on the ground that the decisions in the *Mississippi Mills* and cognate cases were wholly erroneous and that the legislature had no power to grant any exemption. Having succeeded in his contention that the prior decisions were erroneous, and the court below having in the case at bar expressly overruled them, the case comes before this court as if no such decisions had been rendered. It would indeed be an astonishing feature on the oral argument of these cases if the revenue agent should now concede that there was full power to exempt under the constitution of 1869, as decided in the *Mississippi Mills* case, and that that decision was after all correct. But this court

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would even then undoubtedly say that a litigant cannot thus blow hot and cold at the same time, and that it is too late to take any such stand. A party cannot thus change his ground and put his case upon another and different consideration. He cannot be permitted thus to mend his hold, but is estopped from doing so by all the principles and considerations which make an argument in this court a frank and fair struggle after the truth.

Moreover, section 21 differs in a very material respect from the provision before the state court in the *Mississippi Mills* case, which was there held to be repealable. In section 21 it is expressly provided that the "*agreement is irrepealable*," while no such irrepealable agreement was in the statute before the court in the prior case.

III.

The present action, it is important to bear in mind, is for back taxes, and not for taxes for current years as they accrued. The contract as between the state and the railroad company was executed and not still executory when these suits were brought. Such contract having been executed and the state officers having given the receipt for taxes directed by the statute, the state cannot now repudiate the transaction and recover again. In the case at bar, this point was distinctly raised, in one of the special pleas which were stricken out, in respect of the taxes of 1892, 1893, 1894 and 1895 (record, *e. g.*, p. 568). This special plea, setting forth that the contract was no longer executory, but executed as to the taxes for 1892 to 1895, inclusive, was with the other pleas made applicable to the taxes for the subsequent years, by the stipulation and order made when the suits were consolidated (*id.*, p. 610). The plea is as follows:

"That, proceeding under said section five, adopting said section twenty one, and in conformity thereto, as to all of the railroads and property in said declaration mentioned (except as to the said special charter and Helena branch and Bayou Sara branch) and all of the taxes payable thereon, as set forth in said declaration, during the said year 1892, the said Louisville, New Orleans & Texas Railway Company and the Yazoo & Mississippi Valley Railroad Company, in due and proper time during the years 1893, 1894, and 1895, *and in due and proper time the said last-named company paid said taxes to the full extent thereof* in the payment of debts and liabilities which the said Louisville, New Orleans & Texas Railway Company had incurred in the construction of said road and in payment of money borrowed by said last-named company to be used in such construction and so used and in payment of debts incurred by said last-named company in such construction, and also on due and proper time in each of said years respectively the Yazoo & Mississippi Valley Railroad Company delivered to the tax collector of each and every of said counties an affidavit, made by the president of said company or by the cashier thereof, that the amount of said taxes had actually and in good faith been paid and applied by said company (or as to the year 1892 by said Louisville, New Orleans & Texas Railway Company) during said years 1892, 1893, 1894, and 1895 in payment of debts incurred by the said Louisville, New Orleans & Texas Railway Company in the construction of its railroad or money borrowed by said last-named company upon lands or otherwise to be used in constructing said road or paying debts incurred by said last-named company in constructing the same, *whereupon the said several tax collectors did, each and every one, give to defendant a receipt in full for the amount of said taxes respectively, excepting as aforesaid.*" [1]

The striking out of this plea, of course, prevented proof as to its allegations.

The fact that the contract was thus executed brings the case clearly within the decision in *Houston & Texas Central Railroad* v. *Texas*, to the effect that, although the original contract of appropriation by the state may have been unconstitutional, yet if that contract has been

[1] The exception was as to certain branch roads, the taxes on which had been paid in cash and are not in controversy.

performed in good faith by the railroad company and the state and municipal officers have given receipts for taxes, this is a good defense, and a recovery cannot again be had for the same taxes.

IV.

One of the briefs filed makes the point that the Louisville, New Orleans and Texas Railway Company had no independent authority to consolidate, and that the only authority for the merger or consolidation of 1892 must be deemed to spring from the charter of the Yazoo Company. This, it is submitted, is quite incorrect, as will be seen by reference to the statement of facts in the original brief and appendix filed on behalf of the plaintiffs in error.

The defendant's proposition seems to be that, by the consolidation of 1884 resulting in the Louisville, New Orleans and Texas Company, the pre-existing authority to consolidate was exhausted; that the consolidated company did not acquire the rights and powers of consolidation vested in its constituent companies, and that it was consequently without power to consolidate anew. It is only necessary to say that this proposition contradicts the express provision of the authorizing statute. That statute provides in express terms (appendix to original brief, pp. v and vi):

> "That the company so formed by such consolidation . . . . shall have, enjoy and possess all the rights, ways, privileges, franchises, property, grants and immunities which are now possessed by the companies which may enter into such consolidation, as fully as though the same were conferred specially in this act, and to that end the charters of said consolidating companies shall be taken and held to be a part of this act."

It is further contended by the defendant in error that under the authority to consolidate conferred by section 25 of the Baton Rouge charter, which was imported into the charter of the Louisville, New Orleans and Texas Com-

pany by the language last above quoted, there was no authority to consolidate except with a connecting line. To this contention there are two complete answers: First, the argument confines itself to the authority to consolidate derived through section 25 of the Baton Rouge charter, and wholly ignores the authority conferred by section 16 of the Memphis and Vicksburg charter, in which there is no such restriction. Secondly, in the charter of the Baton Rouge Company the limitation, if it be such, in respect to a connecting railroad is clearly a limitation of authority to *purchase*, and there is no such restriction in connection with the power to consolidate, as will appear on reading the consolidation section, which confers a different authority altogether.

V.

The provision of the charter of the Yazoo and Mississippi Valley Company, which granted the power on its part to consolidate, contained, among other things, the following (appendix to original brief, pp. vi, vii):

> "Upon any such consolidation, the consolidated company shall have and enjoy all the property, rights, privileges, powers, liberties and immunities and franchises *herein granted;* but such consolidation shall not have the effect of exempting from taxation the railroad or property owned by such other consolidating company prior to its consolidation with the company hereby chartered; nor of exempting from taxation any property which the consolidated company may, after such consolidation acquire under the provisions of the charter of such other consolidating company."

It is now contended by the defendant in error that the effect of the words "herein granted" is to limit the rights of the consolidated company to the rights belonging to the Yazoo Company in exclusion of any rights belonging to any other constituent company, and therefore to exclude the transfer of the contract right to the appropriation of

taxes belonging to the Louisville, New Orleans and Texas Company. As well might it be argued—for it is in exactly the same words and sentence—that this language was intended to exclude from the consolidated company the property of the other constituent company or companies and all the rights and franchises which are essential to the operation of their roads. Thus, we would have a *reductio ad absurdum*. It must be perfectly obvious that the fair import of the provision above quoted, as well as the clear intention evidenced by the language used, is to provide for a transfer to the consolidated company of all the "property, rights, privileges," etc., existing in the Yazoo and Mississippi Valley Company at the time of the consolidation and that it could not have been the intention to exclude the consolidated company from the power to acquire and enjoy any "property, rights, privileges," etc., which the other constituent companies might possess at the time of the consolidation. Otherwise, of what use or sense would a consolidation be? If it had been the intention of the legislature that the consolidated company should only have the "property, rights, privileges," etc., then belonging to the Yazoo Company and that the "property, rights, privileges," etc., of any other constituent company should not pass, surely apt language expressing such an extraordinary intention and such an unheard of and incomprehensible provision would have been used.

Washington, April 11, 1900.

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No. 35.

FILED
OCT 13 1900
JAMES H. McKENNEY,
Clerk.

Sup. Reply Br. of Guthrie, Mayes & Gale for P. C.

Supreme Court of the United States.

OCTOBER TERM, 1900.

Filed Oct. No. 35. 1900.

(No. 244, October Term, 1899.)

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY ET AL.,
Plaintiffs in error,

vs.

WIRT ADAMS, State Revenue Agent.

In error to the Supreme Court of Mississippi.

SUPPLEMENTAL REPLY BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

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Washington, October 9, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1900, No. 35.

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In error to the Supreme Court of Mississippi.

SUPPLEMENTAL REPLY BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

It is believed that a supplemental brief upon the point of jurisdiction may tend to simplify the issues and to save unnecessary labor on the part of the court.

Three questions arising under this point will be discussed, the remaining questions being covered by the brief already filed, viz.:

(1) Whether the language used in the fourth plea filed by the railroad companies, defendants below, was sufficient to raise the federal question under the contract clause.

(2) Whether the fourth plea raising the federal question was before the court below as presenting an issue of law and defense on the merits.

(3) Whether it was too late to set up the federal question on the second trial.

The action above entitled is a consolidated suit of five separate and distinct actions instituted by the state revenue agent, as plaintiff below, against the railroad companies, as defendants below, the first suit being for the

taxes of 1892, brought December 7, 1893; the second suit for the taxes of 1893 and 1894, brought December 18, 1894; the third suit for the taxes of 1895, brought January 1, 1896; the fourth suit for the taxes of 1896, brought December 18, 1896, and the fifth suit for the taxes of 1897, brought December 24, 1897 (record, pp. 1, 83, 106, 618, 629). The first three suits were by a consent order consolidated on July 21, 1896 (record, p. 106), and it was this consolidated suit which was tried on the first hearing in the inferior court and which was before the Supreme Court of Mississippi on the first appeal. The last two suits, for the taxes of 1896 and 1897, respectively, were not brought until after the first trial and the first appeal (record, pp. 504, 505). The judgment upon the first trial was in favor of the defendant railroad companies for the taxes of 1892, 1893 and 1894, and in favor of the state revenue agent, plaintiff below, only for the taxes of 1895 (record, pp. 107, 108). From this judgment there was an appeal taken by both parties—that is to say, a direct appeal by the revenue agent and a cross-appeal by the railroad companies—and the appellate court reversed the judgment on both appeals on the ground, among other things, that the verdict upon which it was based was inconsistent (record, p. 513). It also decided on the merits (1) that the charter contract was void because in conflict with the constitution of 1869; (2) that, if valid, it had been waived or lost by virtue of the consolidation of 1892; and (3) that it had been repealed by the laws of 1886, 1890 and 1892 (record, p. 671). As the court held that no contract existed, there was obviously no occasion to decide whether or not such a contract had been impaired by subsequent legislation. So far as the record shows, the federal question was not raised or decided on the first appeal.

When the consolidated suit, comprising only the first three suits above mentioned, came on for the second trial, the defendant railroad companies filed new pleas, of which the principal object was to specially set up the federal question. These pleas were stricken out by the court. The defendants thereupon excepted, and, withdrawing their other pleas, went to the state appellate court upon a bill of exceptions based upon the exception to the action of the court in striking out the pleas. After the pleas had been stricken out, the two new suits for the taxes of 1896 and 1897 were consolidated with the other suits, the order which was entered by consent stating (p. 610):

> "This order is made to save the expenses and inconvenience of separate pleadings and trials in each case, and is not to be construed to the prejudice of either party, and all objections and exceptions are reserved which could be reserved if said orders, proceedings, and pleadings were all separate."

I.

AS TO WHETHER THE LANGUAGE USED IN THE FOURTH PLEA FILED BY THE RAILROAD COMPANIES, DEFENDANTS BELOW, WAS SUFFICIENT TO RAISE THE FEDERAL QUESTION UNDER THE CONTRACT CLAUSE.

The language used in the plea filed in the state court was sufficient to raise the federal question and to entitle the defendant railroad companies to the protection of the contract clause of the Constitution of the United States.

The language in question will be found in the record at page 566 and is as follows:

> "That this suit by the plaintiff and the said decision of June 20th, 1898, are violative of section 10, article 1, of the Constitution of the United States, which forbids any State to pass any law impairing the obligation of a contract, and do impair the obligation of contracts."

Prior to this statement in the same plea, specific men-

tion had been made of statutes given effect by the suit and enacted after the charter contract of 1882. The defendant railroad companies thus clearly and unmistakably brought to the attention of the courts and of their adversary the fact that they relied on the protection of the contract clause, and there is no reasonable ground for suggesting that the language used tended to mislead, or failed to indicate the constitutional point clearly and unmistakably to court and counsel. The only plausible suggestion that can now be made is that, instead of the words "this suit by the plaintiff," the defendant railroad companies should have referred to the subsequent acts under and by virtue of which the suit was instituted and which were claimed to impair the contract. It is submitted that the expression used, taken in connection with the other portions of the same plea and the distinct statement of a violation of the contract clause of the Constitution of the United States, was sufficient. It certainly apprised the court of the point relied upon, and nothing more is necessary. Thus, in *Green Bay &c. Canal Co.* v. *Patten Paper Co.*, 172 U. S. 58, 67, Mr. Justice Shiras said:

> "But no particular form of words or phrases has ever been declared necessary in which the claim of federal rights must be asserted. It is sufficient if it appears from the record that such rights were specially set up or claimed in the state court in such manner as to bring it to the attention of that court."

Particularly is this so where the case is included in the second class mentioned in section 709 of the Revised Statutes, where it is well settled that it is sufficient if it appear that the federal question was involved in the case. *Water Power Co.* v. *Street Railway Co.*, 172 U. S. 475, 485.

In addition to this wording of the plea, we have the

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certificate of the Chief Justice of Mississippi to the effect (record, p. 690):

> "That upon the said argument and hearing the validity of legislation . . subsequent to the statute of Mississippi of March 3rd, 1882 was drawn in question . . on the ground of such legislation being repugnant to section 10 of article 1 of the Constitution of the United States, . . and that the decision of the said supreme court of Mississippi was in favor of the validity of such legislation."

This certificate would have made certain and specific what at most could be claimed to be indefinite. It conclusively shows that the exact constitutional point was raised, considered and decided. In *Roby* v. *Colehour*, 146 U. S. 153, 160, Mr. Justice Harlan, speaking of the effect to be given a similar certificate, said:

> "In view of the certificate by the Chief Justice of the state court, the office of which, as said in *Parmelee* v. *Lawrence* [11 Wall. 36, 39], was, as respects the Federal question, 'to make more certain and specific what is too general and indefinite in the record,' we are not disposed to construe the pleadings so strictly as to hold that they did not sufficiently set up and claim the Federal rights which that certificate states were claimed by Roby, but were withheld, and were intended to be withheld, from him by the court below."

II.

AS TO WHETHER THE FOURTH PLEA RAISING THE FEDERAL QUESTION WAS BEFORE THE COURT BELOW AS PRESENTING AN ISSUE OF LAW AND DEFENSE ON THE MERITS.

The fourth plea raising the federal question (record, p. 566) was treated by the Supreme Court of Mississippi, whose judgment is now under review, as in the case and as presenting an issue of law upon the merits. If the state supreme court considered the plea as a sufficient basis for its consideration of the merits, it is submitted that this court will follow the same course.

The judgment of the appellate court on the first appeal was not final in any sense; it could not have been reviewed in this court by writ of error; it did not order the entry of a judgment with directions to carry its terms into execution; on the contrary, it sustained the appeal of both parties, reversed the judgment and ordered a new trial on the merits. As was said by Chief Justice Waite in *McComb, Ex'r*, v. *Knox County Commissioners*, 91 U.S. 1, 2 (cited with approval in *Great Western Telegraph Co.* v. *Burnham*, 162 U. S. 339, 342):

> "The Supreme Court, so far from putting an end to the litigation, purposely left it open. The law of the case upon the pleadings as they stood was settled; but ample power was left in the Common Pleas to permit the parties to make a new case by amendment."

When the consolidated case came before the inferior court of original jurisdiction on the second trial, time was granted to the defendant railroad companies to prepare new pleas to meet the new aspect of the case arising under the decision of the appellate court, which reversed its previous decisions (record, p. 608). These pleas sought—particularly the fourth plea—to specially set up a federal defense under the contract clause of the Constitution of the United States, which question had not been decided by the state court on the first appeal. After the pleas had been filed, the plaintiff below moved to strike them from the files of the court upon various grounds, including the ground that they had been "improperly filed" and also the ground that "said pleas are no defense to the cause of action as it now stands before the court, and no one of them is any defense" (record, p. 606). This last ground of motion obviously went to the substantive merits of the pleas and

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not to any question of practice or leave to file or time or manner of filing.

The defendant in error here, plaintiff below, now contends that the motion to strike the pleas from the files was granted upon all the grounds specified in the notice of motion, and that those grounds included mere matters of practice involving no federal questions and not reviewable here. The certificate of the trial judge in the inferior court is printed in one of the briefs of counsel to the effect that he decided upon all the grounds; but this certificate and this alleged and disputed fact do not appear in the record. The attempt to add to the record in this mode is, of course, irregular, and will not be sanctioned. This court will look only to the decision of the state supreme court (*Allen* v. *Southern Pacific Railroad Co.*, 173 U. S. 479, 489; *San Pedro &c. Company* v. *United States*, 146 U. S. 120, 136). Confining ourselves, as we must, to the record, the question is whether it appears that the striking out of the pleas was upheld by the court below on the merits or on grounds of practice which precluded it from considering the merits.

The proceedings in the state appellate court, whose judgment is now under review, are most persuasive upon this point. Among other things, the court below, speaking of the action of the trial court, said that "the court's action in striking out the special pleas stricken out was correct, for the obvious reason that they presented no defense to the action, in whole or in part" (record, p. 685). Had the state appellate court considered that the pleas were not before it because they had been properly stricken out on points of practice, and that there was, therefore, no defensive pleading raising any question on the merits and only a judgment *nil dicit*, equivalent

to a default, surely the court would not have discussed the points of law and the merits and have filed the opinion which we find in the record at pages 685–687. In addition to the evidence contained in this opinion showing that the state supreme court did consider that the pleas were before it on the merits, under the defendants' exception to the striking from the files, we have the certificate of the Chief Justice of the Supreme Court of Mississippi to the effect (record, p. 690) that "upon the argument and hearing the validity of legislation . . was drawn in question . . on the ground of such legislation being repugnant to section 10 of article 1 of the Constitution of the United States in that such legislation and constitutional provisions impaired the obligation of a contract, . . and that the decision of the said supreme court of Mississippi was in favor of the validity of such legislation and such constitutional provisions," thus clearly showing that the case was argued and decided upon the merits. The fact that the opinion does not mention the federal question is quite immaterial; for, having decided that there was no existing contract, the court was not called upon to discuss the impairment of an alleged invalid contract. Nor has it yet been suggested that on the second appeal the court did not entertain and consider arguments on the merits, or that the railroad companies did not then most emphatically and unmistakably rely on the federal constitution and call the contract clause to the attention of the court. Indeed, the court, as the opinion shows, discussed at length points on the merits not disposed of in the former opinion (pp. 685 and 686).

The state supreme court had nothing before it on the second appeal except the pleas which had been stricken out. The other pleas had been withdrawn. It

must, therefore, of necessity have deemed that the exception of the defendant railroad companies to the striking out of the pleas properly presented for its consideration the question of law in the case. If, on the contrary, the court below had considered that the pleas were not before it because properly stricken out as filed without leave or otherwise improperly filed, or on any other ground of practice, then it would have had nothing before it raising the merits in any aspect, and it would, of course, not have considered and discussed the judgment on the merits.

But whatever may be said as to the original consolidated suit involving the taxes of 1892 to 1895, the new suits for the taxes of 1896 and 1897, were in an entirely different position. So far as these new suits were concerned, it was the first trial, and the pleas were in ample time and did not constitute in any sense an amendment of pleadings, as the pleas did in the prior suits. The consolidated order distinctly preserved all the rights which the defendant railroad companies would have had in the two new suits if there had been no consolidation, and the suits were all separate (record, p. 610). As to the new suits, therefore, the pleas must have been stricken out by the inferior court on the merits. The revenue agent seems to be in the extreme position of asserting that, although the pleas may have been stricken out on the merits as to the two new suits, the same decision struck out the same pleas on grounds of practice as to the three prior suits, with nothing in the record to indicate that there was any difference in the ruling with respect to any particular branches of the consolidated suit.

The consolidation order shows on its face that it was

"not to be construed to the prejudice of either party," and that all rights were to be preserved as if the suits "were all separate." It is impossible to interpret the consolidation order otherwise than as a recognition that the suits for the taxes of 1896 and 1897 were regarded by all concerned as then open to any defense upon the merits. If this were not so, and if the railroad companies were at the time of this consolidation actually in default, and not entitled to plead or to defend in these suits, it was folly to include them in the consolidation order under the language used. If there was an existing default, as is now claimed, the revenue agent was entitled to judgment thereon. His consent to the consolidation was an effectual waiver of this right, and he is estopped from now claiming the contrary. In no other way can the words "proceed as one suit," and "*pleadings* in one shall be appropriated to each and all of said cases, . . for each of said years 1892, 1893, 1894, 1895, 1896, and 1897," be given any intelligible meaning. It is noteworthy that the substance of this order of consolidation is the same as that of the order under which the first three suits were consolidated and tried (record, p. 106). This order was entered the day before the first trial by jury was begun, and evidently contemplated a controversy upon the merits; but its language is entirely unsuited to a default such as is now claimed existed when the order under consideration was entered.

The defendant practically contends that this consolidation order is to be construed to the prejudice of the defendants below in that at the time the order was entered the railroad companies were in default in the original consolidated case without any pleading whatever raising any question on the merits. It is inconceivable that the court or the parties then understood (July 8, 1898; record, p. 610)

that the effect of the last consolidation would be to deprive the railroad companies of any trial or hearing on the merits in the two last suits and place them in default for want of a pleading. The reasonable inference from the record undoubtedly is that all parties then recognized that the merits were duly presented in the original case under the exceptions to the striking of the pleas from the files, and there was consequently no necessity for a new trial. The language used was that "this order is made to save the expenses and inconvenience of separate pleadings and trials in each case, and is not to be construed to the prejudice of either party," &c. Yet, the position of the revenue agent now is that at that time the defendant railroad companies were in default for want of any pleading in all the suits, and not entitled to the advantage of any pleading or any hearing whatever on the merits.

To repeat, in the inferior court of original jurisdiction we find the record silent as to the ground upon which the pleas were stricken out; but, in the appellate court, whose judgment alone is now under review, the opinion of the court and the certificate of the Chief Justice show that the case was argued and decided upon the merits. The pleas stricken out alone presented the merits to that court, and consequently it must have considered that it was reviewing the ruling below to the effect that the pleas constituted no defense on the merits. If the state appellate court assumed the record to be sufficient in order to consider and decide the case on the merits, then the fair and reasonable conclusion should be that the merits were duly presented in the appellate court. If so treated by the court whose judgment is now under review, there can be no reason why this court should hold that there was absolutely nothing presenting the merits before such appellate court,

because the court might have sustained the motion to strike out the pleas on technical grounds of practice.

As was said by Mr. Justice Clifford in *Garnharts* v. *United States*, 16 Wall. 162, 165:

> "Suggestion is made that it does not appear upon what ground the order was made, which is all the worse for the prevailing party, as such an order can never be justified unless it was made for good cause appearing in the record. Where the record shows that the answer of the respondent was stricken out by the court, in a case in which the respondent was entitled to a trial by jury, and judgment was rendered against him as upon default, the court will not presume that the order was passed for good cause, unless enough is shown in the record to warrant such a conclusion."

III.

AS TO WHETHER IT WAS TOO LATE TO SET UP THE FEDERAL QUESTION ON THE SECOND APPEAL.

The state revenue agent contends that notwithstanding that the federal question was not decided on the first appeal, the decision on that appeal constitutes *res adjudicata* upon this point even in respect of the suits for the taxes of 1896 and 1897, which had not been consolidated with the main suit and were not before the state supreme court at the time of the first appeal. It is submitted that the rule as to *res adjudicata* on second trials does not go so far as to prevent the making of new defenses on the new trial on points which were not decided on the first appeal, particularly in a case where a new trial on the merits is ordered and the court below is left with ample power to permit parties to make amendments of their pleadings. To repeat the language of Mr. Chief Justice Waite in *McComb, Ex'r*, v. *Knox County Commissioners*, *supra* (91 U. S. 1, 2, cited with approval in *Great Western Telegraph Co.* v. *Burnham*, 162 U. S. 339, 342):

> "The Supreme Court, so far from putting an end to the litigation, purposely left it open. The law of the case upon the pleadings as they stood was settled, but ample power was left in the Common Pleas to permit the parties to make a new case by amendment."

In the case at bar, the federal question was not decided on the first appeal. In the pleadings then before the court, the defendant railroad companies relied upon their charter contract as valid and upon prior decisions of the Supreme Court of Mississippi which sustained their position. These prior decisions were overruled on the first appeal and the case sent down for a new trial on the merits. Thereupon the defendant below sought to present the federal question by a new plea. If the pleas were properly before the court below, as has been above argued, they presented a new defense under the federal constitution. The Supreme Court of Mississippi did not decide that it was too late to raise the federal question because the decision on the first appeal constituted *res adjudicata* even as to that defense. Had it so decided, a very serious question might be presented. But even in that case, it is doubtful whether such a decision that the prior ruling in the case was conclusive upon the federal point would prevent a party from securing a review of the case by this court and under the present writ of error which brings up the whole record. It may be said, as in *Panama Railroad* v. *Napier Shipping Co.*, 166 U. S., 280, 284, that, while the Supreme Court of Mississippi might have felt itself precluded from re-examining the federal question on the second appeal, "no such limitation applies to this court, when, in the exercise of its supervisory jurisdiction, it issues a writ of certiorari to bring up the whole record.

Upon such writ the entire case is before us for examination."

The narrow question to be considered by this court is whether the Supreme Court of Mississippi on the second appeal treated the case as open for discussion on the merits, particularly as to matters and points not previously adjudicated. If it did so treat the case, of course this court will review the decision thus reached by the state court. Mr. Chief Justice Fuller, in *Mutual Life Insurance Co.* v. *Kirchoff*, 169 U. S. 103, 114, emphasized the fact that the state supreme court had not treated the case as re-opened.

It is submitted that the language of the opinion of the state supreme court on the second appeal in the case at bar fairly shows that the court did not decide that the prior appeal was *res adjudicata* as to the whole case, precluding it from a re-examination of the merits, but, on the contrary, that it considered new branches of the discussion on the merits.

The court below in its opinion used the following language (record, p. 685):

> "The court's action in striking out the special pleas stricken out was correct, for the obvious reason that they presented no defense to the action, in whole or in part. The former opinion of this court in this case settled definitely and conclusively all the issues involved, and the special pleas are in effect nothing else than an effort to disregard . . . that opinion. The futility of that sort of pleading needs no comment . . . The former opinion of this court in this cause, and its opinion on the motion to strike that opinion from the files disposed effectively of such of these matters as are not here specifically adverted to."

The court then proceeded to examine and decide several points arising on the merits. It did not discuss the federal

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question because the conclusion of the prior opinion and of the new points discussed on the second appeal was that no contract existed to be impaired; but that the federal question was considered and actually decided on the second appeal conclusively appears by the certificate of the Chief Justice (p. 691). The intention of the court was undoubtedly to reaffirm the prior decision on the first appeal on the points there discussed; but, if the court had intended to rule the doctrine of *res adjudicata* which would have precluded it from considering new points, it is inconceivable that it would have proceeded to discuss and decide *new* points on the merits, as on pages 686 and 687, or have rendered a decision on the federal question, as certified by the Chief Justice (p. 691). The case of *Northern Pacific Railroad Co.* v. *Ellis*, 144 U. S. 458, would be in point if the Mississippi Supreme Court had placed its decision on the ground of *res adjudicata*, and had declined to reconsider the points of law involved in the merits.

The reason why the court below did not apply the rule of *res adjudicata* is twofold. In the first place, new points on the merits, including the federal point, were presented by the new pleas, and the decision on the prior appeal did not conclusively settle the case as to those new points. The rule in this court as to *res adjudicata* on second trials, for example, is "that whatever has been *decided* here upon one appeal cannot be re-examined in a subsequent appeal of the same suit" (*Supervisors* v. *Kennicott*, 94 U. S. 498, 499; *Clark* v. *Keith*, 106 U. S. 464, 465; *Chaffin* v. *Taylor*, 116 U. S. 567, 572; *Thompson* v. *Maxwell Land Grant Co.*, 168 U. S. 451, 456). In stating the rule, this court has always been most careful to limit the effect of the *res adjudicata* on second appeals in the same case to what had

been actually decided on the previous appeal and not to hold that parties would be precluded as to new points properly raised on the new trial. The second writ of error brings up for review such new points as are peculiar to the new trial (*Roberts* v. *Cooper*, 20 How. 467, 481), and this was done by the state supreme court in the case at bar. In the second place, the court did not apply the rule of *res adjudicata* because it could not in any fair or just aspect be applied to the suits for the taxes of 1896 and 1897. Indeed, strictly speaking, the second appeal presented a different suit from that involved on the first appeal. The new consolidated suit, comprising the two separate suits for the taxes of 1896 and 1897, was not the same suit which was before the court on the first appeal. As to those two suits and that portion of the new consolidated suit, there had been no prior appeal. If these two suits had been tried separately, the judgment in the main case on the first appeal would not have been *res adjudicata* on the federal question because the federal question had not been controverted and decided on the first appeal. It would have been held that a decision in the suit for taxes of one year is not *res adjudicata* in a subsequent suit for the taxes of another year unless the point was actually *controverted and decided* in the prior suit (*New Orleans* v. *Citizens' Bank*, 167 U. S. 371, 401; *Werlein* v. *New Orleans*, 177 U. S. 390, 397). Moreover, the rule in Mississippi is that a decision in the suit for the taxes of one year is not *res adjudicata* in a subsequent suit for the taxes of another year. So the court distinctly held on the prior appeal, where it said (record, p. 657):

> "Nor are the taxes of any one year the same cause of action as the taxes of any other year, in the

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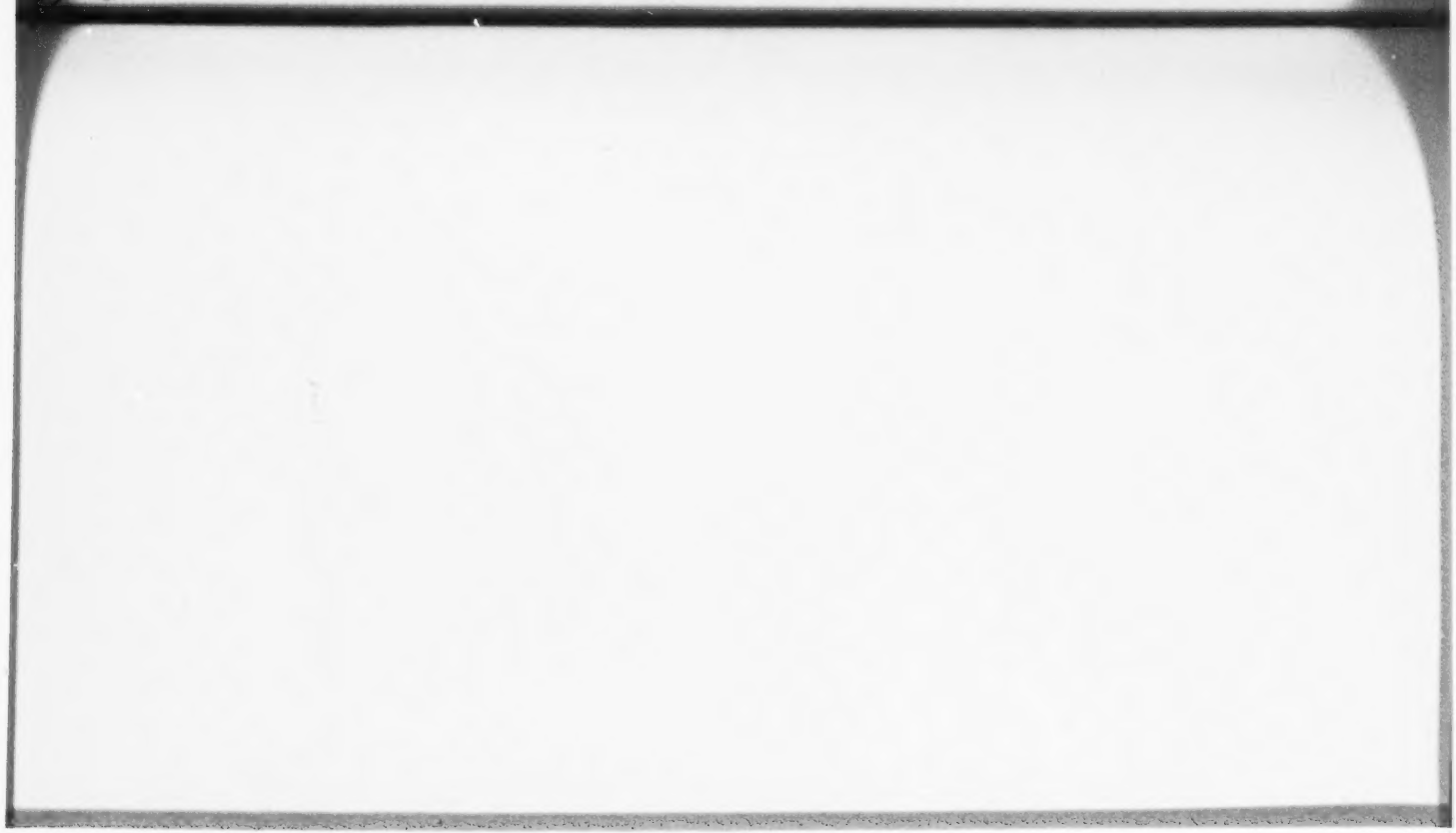
only proper technical signification to be given to the term *res adjudicata*. . . A decision for the taxes of any one year may be invoked under the doctrine of *stare decisis*, where the taxes of any other year are involved under the same claim. But certainly never, on any clear thinking or correct reasoning, under the doctrine of *res adjudicata*."

Washington, October 9, 1900.

WILLIAM D. GUTHRIE,
EDWARD MAYES,
NOEL GALE,
Of counsel for plaintiffs in error.



No. 35.

Supp. Brf. of Guthrie, Dickinson, Mayes & Gale for P. E.

FILED
OCT 31 1900
JAMES H. McKENNEY,
Clerk

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 35.

Filed Oct. 31, 1900.

YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY ET AL.,
Plaintiffs in error,
vs.
WIRT ADAMS, State Revenue Agent.

IN ERROR TO THE SUPREME COURT OF MISSISSIPPI.

Instances of federal and state legislation involving future appropriations of taxes and of public funds, submitted on behalf of plaintiffs in error.

WILLIAM D. GUTHRIE,
J. M. DICKINSON,
EDWARD MAYES,
NOEL GALE,
For plaintiffs in error.

WASHINGTON, October 31, 1900.

(No. 17,341.)

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 35.

YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY ET AL.,
Plaintiffs in Error,

vs.

WIRT ADAMS, State Revenue Agent.

In Error to the Supreme Court of Mississippi.

INSTANCES OF FEDERAL AND STATE LEGISLATION INVOLVING FUTURE APPROPRIATIONS OF TAXES AND OF PUBLIC FUNDS.

FEDERAL LEGISLATION.

Statutes making future appropriations of public funds.

Appropriation for payment of naval pensions, April 23, 1800, 2 Stat. 53; annual appropriation for six years for naval purposes, March 3, 1821, 3 Stat. 642; annual appropriation for five years for law library of Congress, July 14, 1832, 4 Stat. 579; appropriation to private corporation in aid of construction of submarine cable, not exceeding $70,000 until profits equal six per cent. per annum, and then not exceeding $50,000 per annum for 25 years, March 3, 1857, 11 Stat. 187; annual appropriation for twenty years for Eads jetties, $100,000 per annum, March 3, 1875, 18 Stat. 463;

annual appropriation of interest on fund to Sioux Nation, April 30, 1888, 25 Stat. 101; sugar bounties for fifteen years, October 1, 1890, 26 Stat. 583.

Statutes appropriating or applying the proceeds of future sales of public lands.

In City of Washington, May 1, 1802, 2 Stat. 176; in Indiana, April 11, 1818, 3 Stat. 424; in Illinois, December 12, 1820, *id.* 610; in Missouri, Mississippi and Alabama, May 3, 1822, *id.* 674; in Arkansas (leases), January 6, 1829, 4 Stat. 329; generally, September 4, 1841, 5 Stat. 453; January 28, 1847, 9 Stat. 121; in Alabama, August 11, 1848, *id.* 281; in insurrectionary districts, June 7, 1862, 12 Stat. 425; in Dakota and other territories, February 18, 1881, 21 Stat. 326; Indian reservations, March 2, 1885, 23 Stat. 343, 384; leases of park lands, September 25, 1890, 26 Stat. 478; Indian reservations, October 1, 1890, *id.* 659.

Sinking Funds.

To provide for payment of national debt: May 8, 1792, 1 Stat. 282; March 3, 1795, *id.* 434; August 2, 1813, 3 Stat. 76; November 15, 1814, *id.* 145; March 3, 1815, *id.* 227; May 15, 1820, *id.* 582; March 3, 1821, *id.* 636; April 20, 1822, *id.* 666. To provide for payment of District of Columbia bonds: June 20, 1874, 18 Stat. 120; March 3, 1891, 26 Stat. 1103. To provide for Pacific Railroad bonds: May 7, 1878, 22 Stat. 56, 58.

STATE LEGISLATION.

Specific appropriations of future taxes.

ARKANSAS, appropriation of taxes upon railroad company to pay semi-annual interest on bonds issued to such company, Laws 1868–9, p. 147.

COLORADO, appropriation of tax to be levied annually for five years after nine years from date of issue of state bonds, to create fund for redemption thereof, Laws 1885, p. 180.

IOWA, authority to county to give aid and to appropriate taxes levied on railroad to the payment of construction, Laws 1868, p. 54.

NORTH CAROLINA, appropriation of county taxes upon railroad property to payment of subscriptions in aid of a railroad company, Laws 1891, p. 159.

SOUTH CAROLINA, appropriation of taxes to be received from railroad company to payment of interest on bonds issued in aid thereof, Laws 1891, p. 1401; appropriation of taxes, to be assessed within three years of the time of maturity of bonds issued in aid of a railroad, to pay the same, Laws 1892, p. 347.

TENNESSEE, appropriation for twenty years of county tax upon railroad company to subscribers in aid thereof, Laws 1893, p. 234.

Appropriations of future taxes.

California, appropriation of a tax in each fiscal year to University of California, Laws 1897, p. 44; Florida, annual tax of half a mill for public health purposes, Revised Statutes (1891) sec. 784; Illinois, tax of one per cent. per annum for seven years for levee building, Laws 1897, p. 136; annual tax for thirty years for water works, Laws 1899, p. 108; Iowa, annual tax to pay bonds issued in aid of railroad construction, Laws 1857, p. 227; Louisiana, tax to be set apart to pay interest on bonds issued to build penitentiary, Laws 1869, p. 58; portion of a fund of taxes to be collected in future to be paid to builders of New Orleans and Ship Island Canal, Laws 1869, p. 51; special tax to pay bonds issued in aid of Mississippi and Mexican Gulf Ship Canal, Laws 1869, p. 168; Michigan,

annual appropriation of portion of Michigan state tax to Dairymen's Association, Public Acts, 1899, p. 217; Minnesota, general state tax to be annually levied and proceeds applied to Forestry Fund, Laws 1881, p. 203; New Jersey, annual tax of five dollars for each child for maintaining schools, Gen. St. (1895), p. 3056; North Carolina, special annual tax if railroad company fails to pay bonds issued in its aid, Laws 1868–9, p. 97; Ohio, annual tax in aid of universities, Laws 1900, p. 399; South Carolina, special annual tax for four years to repay loan to counties for improvements, Laws 1900, p. 505; Tennessee, appropriation of so much of state revenue as may be necessary to pay interest on state bonds, Laws 1873, p. 35; Texas, authorizing irrepealable tax for five years to pay for drainage work, Gen. Laws, 1899, p. 98; Washington, annual tax of one-fifth of one mill for national guard, Laws 1895, p. 252; Wisconsin, annual state tax of $268,000 for University Fund, Laws 1899, p. 248.

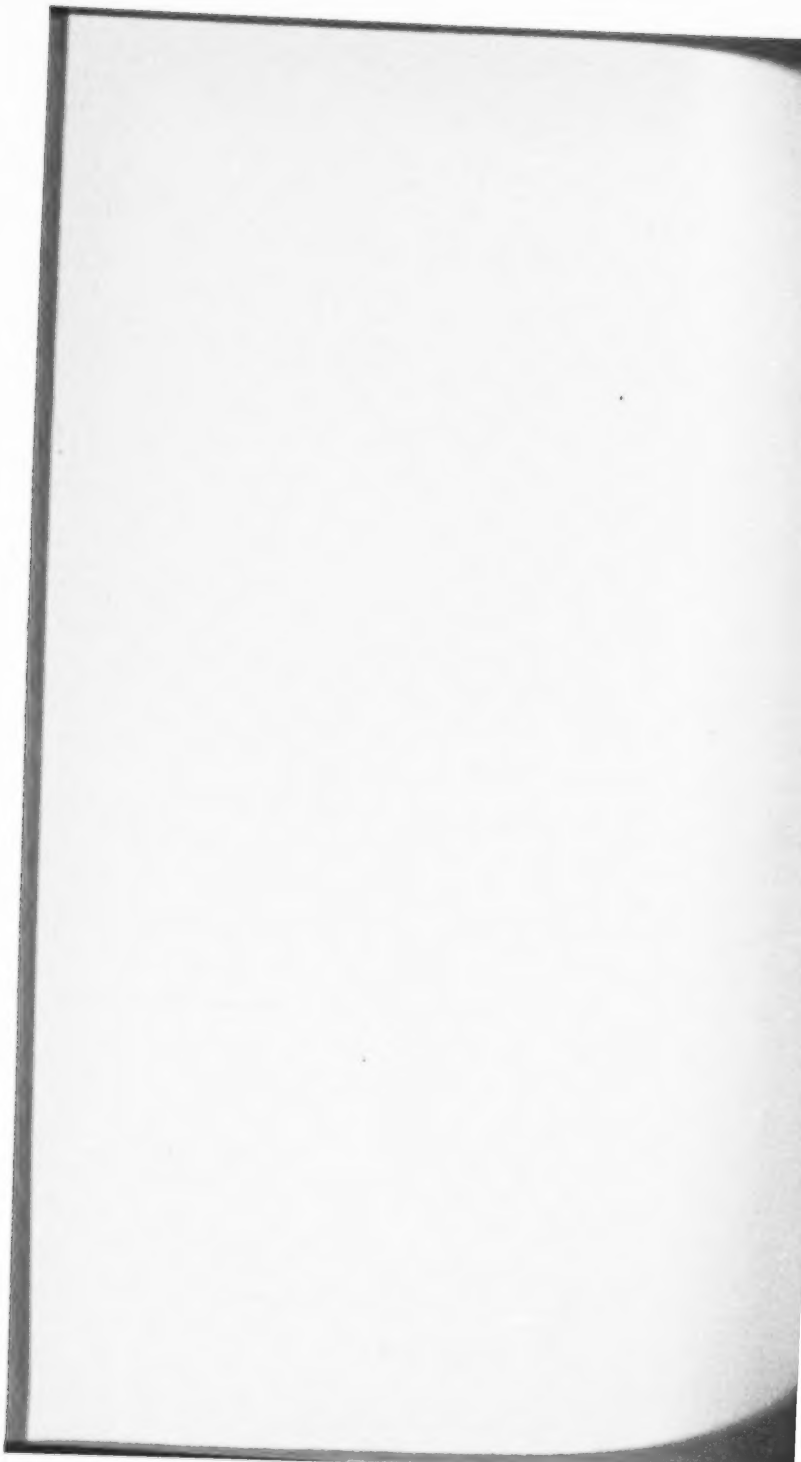
Future Appropriations of Public Funds.

Alabama, appropriating proceeds of lottery privilege to school fund for twenty years, Laws 1868, pp. 263, 264); applying tax on insurance companies to school fund, Laws 1870–1, p. 6. Delaware, appropriation of ten thousand dollars annually to provide for payment of bonds, and to begin thirteen years after passage of act, Laws 1897, p. 343; Indiana, annual appropriations for "Benevolent Institution Fund," "School Revenue for Tuition Fund" and "State Debt Sinking Fund," Laws 1895, p. 299; Kansas, appropriation proceeds annual tax on insurance companies to relief of disabled firemen, Laws 1895, p. 536; Louisiana, appropriation receipts from sale of street railway and other franchises in New Orleans to drainage commission, Laws 1896, p. 163; Maryland, annual appropriation for agricultural fair association, Laws 1894, p. 609; for scholarships in Washington College, Laws 1896, p. 302; for Anne

Arundel Academy, Laws 1900, p. 400; Massachusetts, annual appropriation to Essex County Law Library Association, Acts 1900, p. 228; Michigan, annual tax and appropriation for state weather service, Public Acts 1895, p. 542; annual appropriations for state board of health, Public Acts, 1897, p. 170, and for hospitals of University of Michigan, Public Acts, 1897, p. 260; Minnesota, annual appropriation for Soldiers' Home, Laws 1899, p. 170; Montana, appropriation of receipts from sales of public lands, etc., to payment of bonds issued in aid of State University, Laws 1897, p. 59; New Hampshire, annual appropriation to Fireman's Relief Fund, Laws 1899, p. 301; North Carolina, annual appropriation to institution for deaf mutes and blind, Laws 1852, p. 103; Ohio, appropriation of portion proceeds tax on foreign insurance companies to police pension fund, Laws 1898, pp. 77, 78; Oregon, annual appropriation interest from fund to State College, Laws 1878, p. 94; Pennsylvania, grant of annuity, Laws 1899, p. 314; South Dakota, appropriation to pay interest to fall due on bonds, to be so used, "and for no other purpose," Laws 1890, p. 46; Virginia, annual appropriation to Virginia Agricultural etc. College, Acts, 1899–1900, p. 844; Wisconsin, annual tax and appropriation for constructing buildings for State Historical Society, Laws 1897, p. 449.

Washington, October 31, 1900.

WILLIAM D. GUTHRIE,
J. M. DICKINSON,
EDWARD MAYES,
NOEL GALE,
For plaintiffs in error.



No. 35.
Motion to modify Judg &c.
Filed Jan. 28, 1901
FILED
JAN 28 1901
JAMES H. McKENNEY, Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

No. 35.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, *Plaintiff in Error,*
vs.
WIRT ADAMS, *Defendant in Error.*
} In Error to the Supreme Court of Mississippi.

In the matter of the petition of the Yazoo & Mississippi Valley Railroad Company for a rehearing or a modification of the judgment rendered in this cause.

SEWARD, GUTHRIE & STEELE,
MAYES & HARRIS,
J. M. DICKINSON,
ATTORNEYS FOR PLAINTIFF IN ERROR.

BARNARD & MILLER PRINT, CHICAGO.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1900.

No. 35.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY,
Plaintiff in Error,
vs.
WIRT ADAMS,
Defendant in Error.

In Error to the Supreme Court of Mississippi.

NOTICE.

To Wirt Adams:

You are hereby notified that on Monday, January 28, 1901, Plaintiff in Error will submit a petition to the Supreme Court of the United States, in the City of Washington, District of Columbia, for a rehearing or a modification of the judgment in the above cause, and for such other and further proceedings as may be needful and proper.

SEWARD, GUTHRIE & STEELE,
MAYES & HARRIS,
J. M. DICKINSON,
Attorneys for Plaintiff in Error.

Service of this notice is acknowledged this 21st *day of January, 1901.*

T. A. Catts and
R. C. Beckett
Attorneys for Defendant in Error

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

No. 35.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, *Plaintiff in Error,* *vs.* WIRT ADAMS, *Defendant in Error.*	In Error to the Supreme Court of Mississippi.

PETITION.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now comes the Yazoo & Mississippi Valley Railroad Company, by its attorneys, and respectfully presents to this Honorable Court its petition, for a rehearing, or a modification of the judgment in this cause, in accordance with the opinion handed down on the 7th day of January, 1901, and for such other and further relief as may be needful and proper.

The following reasons are submitted why its prayer should be granted:

This cause involved the right of the defendant in error to enforce the payment of taxes against plaintiff in error, and against the constituent companies composing the consolidated company which is the plaintiff in error in this case for the year 1892 as well as for years thereafter.

Various questions were presented to this Honorable Court upon which the plaintiff in error predicated a defense to all of said taxes, including those for the year of 1892, and among such defenses was the claim that a federal question was involved, that, the said property was exempt from taxation for the year 1892 by contract with the state which had been executed as to the taxes for said year, and could not be lawfully impaired by the subsequent legislation upon which defendant in error founds his right to collect said taxes; that the defendant in error, in attempting to enforce the collection of the taxes against this defendant upon its railroad properties for the year 1892, in manner and form as the same are sought to be enforced, is acting in violation of the constitution of the United States of America in that the said enforcement of the payment of said taxes will deprive the plaintiff in error of contract rights protected by the constitution of the United States of America.

This Honorable Court, in the opinion which has been handed down, did not decide any of the foregoing propositions, but did decide that if plaintiff in error at any time had any contract of commutation or exemption or any right to any protection against the action of defendant in error under and by virtue of the constitution of the United States, the same had been lost by the consolidation which took place October 24, 1892, between the Louisville, New Orleans & Texas Railway Company and the Yazoo & Mississippi Valley Railroad Company, the constituent companies of the new company known as the Yazoo & Mississippi Valley Railroad Company, which is plaintiff in error in this cause.

A decision of the question arising under the Constitu-

tion of the United States was expressly withheld, but the court in respect to such question said as follows:

> "It is true that in the act of March 9, 1882, authorizing the Baton Rouge Company to consolidate, in the act of March 3, 1892, authorizing the Memphis & Vicksburg Company to consolidate, and in the act of February 17, 1882, authorizing consolidations by the Yazoo Company, there were provisions that the consolidated companies should be entitled to the rights, privileges, franchises, property grants and immunities belonging to constituent companies, among which, under the name of immunities, might pass an exemption from taxation, as has been sometimes held by this court; and had not the constitutional provisions of 1890 taken effect before the final consolidation of 1892, we might have been obliged to hold that the consolidated company was entitled to the commutation of taxes provided for in the twenty-first section of the charter of the Mobile and Northwestern Company. But it is scarcely necessary to say that, if the consolidation of 1892 resulted in a new corporation, it would come into existence under the constitution of 1890, with the disabilities attaching thereto, among which is the provision that 'the property of all private corporations for pecuniary gain shall be taxed in the same way and to the same extent as property of individuals.' Even if the legislature, in these several acts of consolidation, had expressly provided that the new corporation thereby formed should be exempted from taxation, the higher law of the constitution would be interpreted as nullifying it to that extent."

The judgment of the lower court in this case included the taxes for the year 1892 as well as taxes for subsequent years, and the court below put its opinion on two grounds and the judgment in this court affirming the judgment of the court below will, unless modified, include said taxes for the year 1892, and cut off in respect to them all pos-

sibility of plaintiff in error getting any benefit of any defenses which it may have under and by virtue of the constitution of the United States of America, in respect of taxes prior to the consolidation.

By express provisions in the orders of consolidation in said causes it was stipulated and ordered that such consolidations of such causes should not operate to the prejudice of either litigant. (See Tr., pp. 106 and 610.)

Section 115 of the constitution of the State of Mississippi provides as follows:

> "The fiscal year of the State of Mississippi shall commence on the first day of October and end on the thirtieth day of September of each year; and the auditor of public accounts and the treasurer of the state shall compile and have published a full and complete report showing the transactions of their respective offices on or before the thirty-first day of December of each year for the preceding fiscal year."

Section 12 of the act adopting the Annotated Code of Mississippi, 1892 (Annotated Code, p. 115), provides as follows:

> "The chapters in the Annotated Code entitled 'Board of Supervisors', 'Corporations', 'Convicts in County Jails', 'Fences and Stock', 'Land Office', 'Lost Records', 'Municipalities', 'Pensions', 'Primary Meetings and Elections', 'Privilege Taxes', 'Registration and Election', 'Revenue', 'Roads, Ferries and Bridges', 'Salaries', 'State Revenue Agent', 'Supervision of Common Carriers', and that part of the chapter on 'Fees' relating to the fees of the land commissioner and that part of the chapter on 'Railroads' relating to the incorporation of railroad companies, and the chapter on 'Dram-shops' as to all licenses which may hereafter be obtained, *shall take effect and be in force from and after the passage of this act;* and that part of the chapters entitled 'Chancery

Courts' and 'Circuit Courts', which fixes the judicial districts and the times for holding courts and the length of their terms in the several counties, shall take effect and be in force from and after the first day of July, 1892; and such chapters and parts of chapters shall be published in the session acts of this year, but no other parts of said code shall be so published."

This act was approved April 2, 1892 (Annotated Code, p. 116).

Section 3746 of said Code provides as follows:

"Taxes, both state and county, assessed upon lands or personal property, shall bind the same, and be entitled to preference over all judgments, executions, incumbrances or liens, whensoever created; and all taxes assessed shall be a lien upon and bind the property assessed from the first day of February of the year in which the assessment shall be made; and no property shall be exempt from distress and sale for taxes. And it shall not be necessary to the validity of an assessment or of a sale of land for taxes that it shall be assessed to its true owner; but the taxes shall be a charge on the land or personal property taxed, and the sale shall be a proceeding against the thing sold, and shall vest title in the purchaser, without regard to who may own the land or other property when assessed or when sold, or whether wrongfully assessed, either to a person, or to the state, or any county, city, town or village, or subdivision of either."

Section 3748 of said Code provides as follows:

"All taxable property brought into the state or acquired or held by any person before the first day of February shall be assessed, and taxes thereon paid for the current year."

Section 3875 of said Code provides as follows:

"Each railroad company owning and operating a railroad shall, on or before the first Monday in April in each year, file with the railroad commission a complete schedule, under oath, of all its property, real or personal, taxable and non-taxable, setting forth therein the length in miles or fractions thereof of its entire road-bed, switches and side-tracks, and showing how many miles or fractions thereof lie in this state, and in each county of the state, and in each city, town or village, and the value of the whole and each part thereof, as subdivided herein; the total amount of capital stock, its par value and its actual value, and the value of its franchise; the number of engines and their respective value; the gross amount of receipts in the year preceding; the number of cars of all kinds, their classes and value; the number of depot buildings and warehouses and other buildings; in what county and city, town, village or levee district located, and the value of each, including the lands and lots upon which the same are built; the value of all machine and car shops and stationary machinery and tools therein, and in what county and city, town, village or levee district located, including the land upon which the same are built; all real, personal or mixed property belonging to the company within the state, not enumerated, with its value; the number of bridges and ferries in this state, in what county and city, town, village or levee district situated, and the value of each, and specifying whether such value is or is not included in the value of the road-bed; a list of all lands in this state owned, describing the same, and giving the location and value thereof, the quantity of land used for depots and machine shops, and its value aside from the buildings thereon; the gross amount of receipts the year preceding from passengers and freights separately, and the proportion thereof earned within and from this state; and if any of said property is claimed to be exempt from taxation, it shall be separately stated, and the law cited under which the claim is made."

Section 3876 of said Code provides as follows:

"If any company, corporation or person who should do so, shall fail, neglect or refuse to render the schedule required by the last section, such company, corporation or person shall forfeit and pay to the state for every such failure, neglect or refusal the sum of five thousand dollars, to be recovered by action, which shall be instituted and prosecuted under the direction of the railroad commission; and, in case of such failure, neglect or refusal the commission shall make out such schedule from the best information obtainable."

Section 3794 *a* of said Code provides as follows:

"The clerk shall make two fair copies of each roll, and three in counties having two judicial districts, as examined and corrected, if it be corrected, one of which he shall transmit to the auditor of public accounts on or before the first Monday of October following; the other he shall deliver to the tax collector on or before the first day of October, and the original he shall retain and carefully preserve as a public record in his office."

Section 3801 of said Code provides as follows:

"On receipt of the assessment rolls the collector shall immediately proceed to collect the taxes, adding the county tax due by each person to his state tax, and collecting all together; and it shall be the duty of every person assessed to pay his taxes to the collector on or before the fifteenth day of December."

The consolidation which took place October 24, 1892, and by virtue of which the court has held that the exemption from taxation if such existed, was lost, was made after the time fixed as of which date the property was assessable to the person or corporation then owning such property. The taxes that were assessable for the year 1892 upon the property of the companies which were con-

solidated into the Yazoo & Mississippi Valley Railroad Company were, for that year, assessable, and were assessed, respectively, to such companies and not to the consolidated company, and at the time such properties were assessable the exemption, if any such exemption existed, had attached and become fixed as to the year 1892, and was in full force and effect, and was not and could not have been lost by such consolidation.

Such assessment was in fact completed after hearing certain objections interposed by the Louisville, New Orleans & Texas Railway Company on the 22d day of September, 1892, which was more than a month prior to such consolidation. (See Tr., pp. 2 and 127.)

The declaration for the taxes of 1892 reads as follows (Rec., 2): "For that, whereas, heretofore, to wit: during the year 1892, the railroads and property of the Louisville, New Orleans & Texas Railway Company, a corporation, * * * was duly assessed for taxation in said State of Mississippi, under its laws, by the Mississippi railroad commission, the said assessment being completed after objections heard on September 22, 1892."

The articles of consolidation were executed on October 24, 1892 (Rec., 14), and the taxes of 1893 and 1894 are alleged (Rec., 71) to have been assessed upon the railroad and property of the constituent company, the Louisville, New Orleans & Texas Railway Company, which became the property of the Yazoo & Mississippi Valley and Illinois Central Railroad Companies in October, 1892. The distinction is, therefore, apparent upon the face of the record. The court below placed its opinion not only upon the consolidation, but upon the ground that the contract of commutation or exemption itself was invalid. This

was necessary in order to affect the taxes for the year 1892.

If it be that said companies before such consolidation had a lawful exemption which was lost by such consolidation, it will work a great hardship if the judgment in this cause be affirmed in respect to the taxes for the year 1892, for thereby all consideration of the defenses set up by plaintiff in error, and which were regarded by this Honorable Court as cut off by the consolidation of October 24, 1892, will be entirely lost and plaintiff in error will be compelled to pay the taxes, amounting to a large sum of money, approximating one hundred thousand dollars, which it does not justly owe, and can never get any relief from such unlawful burden.

Wherefore, it is respectfully urged that the judgment be modified so as to exclude the taxes sought to be recovered for the year 1892, and that such further proceedings in respect of the taxes for said year may be had as justice may require, by affirming as to the taxes for the other years, letting the mandate go down as to them, and proceeding to a decision upon the federal question raised as to the taxes for 1892 upon the arguments already submitted or upon further argument.

Respectfully submitted.

SEWARD, GUTHRIE & STEELE,
MAYES & HARRIS,
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Office Supreme Court U. S.
FILED
JAN 28 1901
JAMES H. McKENNEY

No. 35.

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Mississippi Tax Cases.

Filed Jan. 28, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 35.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY ET AL.,
Plaintiffs in error,
vs.
WIRT ADAMS, State Revenue Agent.

In error to the Supreme Court of the State of Mississippi.

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR IN SUPPORT OF PETITION FOR A REHEARING OR FOR A MODIFICATION OF THE JUDGMENT RENDERED JANUARY 7, 1901.

WILLIAM D. GUTHRIE,
J. M. DICKINSON,
EDWARD MAYES,
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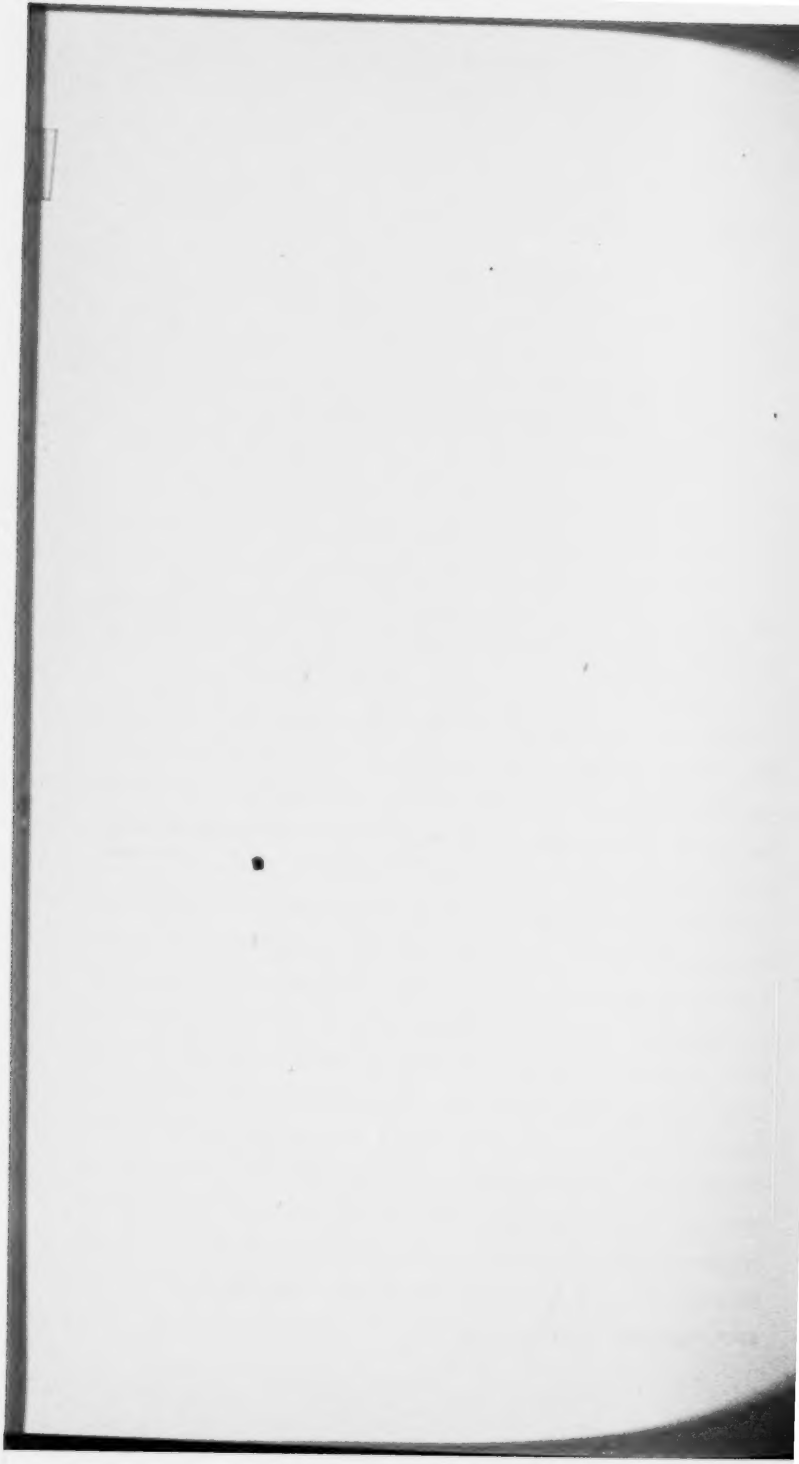
For plaintiffs in error.

WASHINGTON, January 28, 1901.



Supreme Court of the United States.

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BRIEF ON BEHALF OF PLAINTIFFS IN ERROR IN SUPPORT OF PETITION FOR A REHEARING OR FOR A MODIFICATION OF THE JUDGMENT RENDERED JANUARY 7, 1901.

The court has rested its decision of this case upon the effect of the consolidation of October 24, 1892, and therefore has not found it necessary to pass upon the original validity of the contract rights of commutation or exemption claimed on behalf of the plaintiffs in error. The record, however, shows (p. 2) that the taxes for the year 1892, which make up part of the judgment affirmed, had been completely levied and assessed on September 22, 1892, and that the claim of the state, if any, had fully accrued at least one month before the articles of consolidation were executed (*id.* p. 14). The judgment therefore gives to the consolidation a retrospective effect. Under these circumstances, counsel for the plaintiffs in error beg leave to submit the following considerations in support of their petition for a rehearing as to the taxes for 1892 or for a modification of the judgment of affirmance rendered herein.

I.

THE PLAINTIFFS IN ERROR ARE ENTITLED TO THE BENEFIT OF THE CONTRACT OF COMMUTATION OR EXEMPTION IN RESPECT OF THE TAXES FOR THE YEAR 1892.

Whether the provisions of section 21 of the charter of the Mobile and Northwestern Railroad Company are to be considered as creating a right of commutation or appropriation of taxes, or as conferring an absolute exemption, that right of commutation or exemption was a valid grant within the constitutional power of the legislature and had already attached to the taxes for the year 1892 before the consolidation of October 24, 1892. For many years before the adoption of the Mississippi constitution of 1869 it had been customary for the legislature in granting corporate charters to expressly reserve the right or power to tax the property of the corporations thus created (see pp. IV.–V. of appendix to our brief in No. 80, October Term, 1900). The framers of the constitution of 1869, with intent to make this reservation of power generally applicable to corporations, declared that corporate property should be "subject to taxation the same as that of individuals;" but that constitution did not contain any inhibition of specific corporate exemptions—much less of legislative contracts for commutation or appropriation of taxes. For twelve years prior to the granting of the charter here in question—that is, continuously after the adoption of the constitution of 1869—it had been the practice of the legislature to grant absolute exemptions from taxation to corporations, and one hundred and twenty such exemptions were granted during the period between 1870 and 1890 (pp. XVII–XXI of appendix to our brief on the merits in this case). In addition to such absolute exemptions, the legislature had, prior to applying the provisions of section 21 to the

L., N. O. & T. Company, granted more than fifty corporate charters containing agreements for the commutation or appropriation of taxes similar to that here involved (*id.* pp. XV–XVII).

The validity of exemptions under the constitution of 1869 was uniformly recognized and upheld by the supreme court of the state. As early as 1878, six years before the provisions of section 21 were applied to the L., N. O. & T. Company, that court in the case of *Mississippi Mills* v. *Cook*, 56 Miss. 40, 52, construing the above-mentioned provision of the constitution of 1869, determined that it did not of itself prohibit exemptions, but only declared the liability of corporations to taxation subject to the control of the legislature. This authoritative construction of the constitution of 1869, subsequently reiterated, became as much a part of that instrument as the text itself (*Douglass* v. *County of Pike*, 101 U. S. 677, 686). The decision in *Mississippi Mills* v. *Cook*, *supra*, was followed without break for twenty years, as will be seen by reference to the following cases involving in one way or another the question of the validity of exemptions under the constitution of 1869: *McCulloch et al.* v. *Stone*, 64 Miss. 378, 392; *Y. & M. V. R. R. Co.* v. *Thomas et al.*, 65 Miss. 553, 562; *Vicksburg Bank* v. *Morrell*, 67 Miss. 47, 56; *Attala Co.* v. *Kelly*, 68 Miss. 40, 44; *L., N. O. & T. Ry. Co.* v. *Taylor*, *id.* 361, 363; *Railroad Co.* v. *Lambert*, 70 Miss. 779, 786. There was no hint of any change in the judicial view until the decision of the state supreme court in this case; and this court in reviewing that decision has refrained from determining the constitutional question.

The acquiescence of all departments of the state government in this view of the validity of such exemptions was universal. In addition to the uniform and continuous

usage of the legislative and judicial departments, the executive officers of the state, including its law officers, without exception, for fully twenty years adopted the same construction and consistently acted upon it.

This long continued practice of the legislative, executive and judicial departments is most convincing as to the legality of these commutations or exemptions. No rule of interpretation is better settled in this court than that which gives the greatest weight to such practice and interpretation. In *The Laura*, 114 U. S. 411, 416, Mr. Justice Harlan, citing *Stuart* v. *Laird*, 1 Cranch, 299, 308, said:

> "Touching the objection now raised as to the constitutionality of the legislation in question, it is sufficient to say, as was said in an early case, that the practice and acquiescence under it, 'commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction.'"

In *Hawkins et al.* v. *Caroll Co.* 50 Miss. 735, 752 (decided in 1874), Simrall, J., said:

> "At the time of the adoption of the constitution the power of the legistature to authorize municipal aid to these enterprises, coupled with the delegated authority of taxation, was well established, both by legislative precedents and judicial decisions in this and the other states."

See, also, *Ogden* v. *Saunders*, 12 Wheat. 213, 290; *Briscoe* v. *The Bank of the Commonwealth of Kentucky*, 11 Pet. 257, 318; *Prigg* v. *The Commonwealth of Pennsylvania*, 16 Pet. 539, 620; *Cooley* v. *Board of Wardens of Port of Philadelphia et. al.* 12 How. 299, 315; *Auffmordt* v. *Hedden*, 137 U. S. 310, 329; *Schell's Executors* v. *Fauché*, 138 U. S. 562, 572; *Field* v. *Clark*, 143 U. S. 649, 691; *McPherson* v. *Blacker*, 146 U. S. 1, 27; *Kennedy* v. *Gies*,

25 Mich. 83, 92; *State* v. *Luther*, 56 Minn. 156, 164; *Emery* v. *Reed*, 65 Cal. 351.

The Mississippi authorities are to the same effect: *Daily* v. *Swope, Guardian, etc.* 47 Miss. 367, 383; *French* v. *The State*, 52 Miss. 759, 762; *Shotwell* v. *Covington*, 69 Miss. 735, 738; *Chrisman* v. *Brookhaven*, 70 Miss. 477, 483.

At the time of the adoption of the constitution of 1890, the validity of exemptions was so firmly established in Mississippi that there can be no reasonable doubt as to what the common understanding of the framers of that constitution was upon the subject. That constitution provided (section 181):

> "Exemptions from taxation to which corporations are legally entitled at the adoption of this constitution, shall remain in full force and effect for the time of such exemptions as expressed in their respective charters, or by general laws, unless sooner repealed by the legislature."

It is clear that this provision of the new constitution was intended to apply to and preserve rights of commutation or exemption such as that involved in the case at bar, from the fact that, except in the case of two or three small private schools, altogether insignificant in the fiscal system of the state, there were in 1890 no corporations entitled to exemptions which had been granted prior to 1869. Exemptions had been commonly granted before that time, but they had either never been availed of, or had terminated by expiration of the period for which they were granted, or had lapsed for other cause. Practically all corporate exemptions, therefore, such as are mentioned in section 181 of the new constitution, must necessarily have been granted under the constitution of 1869, and these were the exemptions which the framers of the constitution of 1890 had in mind and

which they intended to protect in good faith. Surely, the use of the word *legally* was not intended to deprive the section of all practical force and effect or to conceal a snare.

The legality of exemptions in Mississippi under the constitution of 1869 had been declared and upheld prior to 1890 by at least four decisions of the highest tribunal of the state. The constitution of 1890, therefore, referred to a class of exemptions sanctioned by the legislative practice of many years under the constitution in force, permitted by the universally accepted construction of that constitution, and confirmed and declared by the highest state court. These were the exemptions "to which corporations are legally entitled." The language of section 181 fairly applies to no other subject matter.

No more persuasive union of all canons of constitutional construction and interpretation can well be imagined than are found in this case as to the legislative power to grant exemptions, namely: (1) A common course of legislation evincing the universally entertained view of corporate liability to taxation, and recognizing the necessity for providing that corporations should be "subject to taxation," which view continued for many years; (2) the adoption of that view of liability to taxation in the constitution of 1869; (3) a judicial inquiry into the validity of claims for exemption, and a judicial declaration of their validity; (4) common and long-continued legislative recognition, under the constitution of 1869, of the legality of commutations or appropriations and exemptions, and repeated refusals by the legislature to repeal such provisions in corporate charters; (5) continuous acquiescence by the executive department and by those charged with the collection of taxes; and (6) a subsequent constitution, dealing with existing exemptions necessarily created

under the constitution of 1869, and confirming those to which corporations were "legally entitled." In truth, the convention which adopted the constitution of 1890 could not have indicated more plainly that it meant to confirm and continue such rights as that claimed by these plaintiffs in error if it had specifically named and included them in that instrument.

Stearnes v. Minnesota, 179 U.S. 223, 232.

II.

IF A REHEARING AS TO THE TAXES FOR 1892 IS DEEMED IMPRACTICABLE, THEN THE PROPER REMEDY OF THE PLAINTIFF IN ERROR IS AN APPLICATION FOR A MODIFICATION OF THE JUDGMENT IN THIS COURT.

The case of *Supervisors* v. *Stanley*, 105 U. S. 305, 316, affords sufficient authority for this application. In that case, the court, as it supposed, had disposed of the whole case, as shown by the record, and had directed a final judgment. Upon a subsequent suggestion, however, that certain issues had not been disposed of upon the trial in the court below, the court examined the record, and, it appearing that the complaint contained averments which might afford a solid ground of recovery, and which manifestly had not been passed upon before, either by the trial court or by the appellate court, this court (p. 318) directed that its judgment be "so far modified as to permit the court below, in its discretion, to hear evidence on that point, and, if necessary, to allow an amendment of the pleading, to present it properly." In the case at bar the court is not asked to go so far. Its attention is requested to a fact, indisputably appearing on the face of the record here, which, it is submitted, makes it not only proper, but necessary, in the determination of the rights of the parties, that a decision should be had upon the validity of the contract rights claimed on behalf of the plaintiffs in error. The relief asked does not

involve further proceedings in any other court, because, in any event, the judgment rendered here will finally determine the issues, and, if the plaintiffs in error should be successful in their claim to be relieved from the judgment so far as it includes the taxes of 1892, it would only be necessary to reverse the judgment of the state court as to the taxes for that year. The question presented to the court, if this application be granted, has already been fully argued at the bar and in the briefs submitted, and any further discussion would only be necessary if desired by the court. In that event, the proceeding might partake of the charac er of a rehearing, but at present it is conceived that, upon the face of the record and the opinion of the court, the application for a modification of the judgment will be granted so that the judgment shall be affirmed as to the taxes for 1893 to 1897 inclusive and reversed as to the taxes for the year 1892.

Washington, January 28, 1901.

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No. 35.

Brf. of Guthrie, Dickinson, Mayes & Gale for P. E. (rehearing)

Office Supreme Court U. S.
FILED
MAR 18 1901
JAMES H. McKENNEY,
Clerk

Supreme Court of the United States.

OCTOBER TERM, 1900.

Filed Mar. 18, 1901.

No. 35.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY ET AL.,
Plaintiffs in error,
vs.
WIRT ADAMS, State Revenue Agent.

In error to the Supreme Court of the State of Mississippi.

BRIEF FOR PLAINTIFFS IN ERROR ON REHEARING.
(AS TO THE TAXES FOR THE YEAR 1892.)

WILLIAM D. GUTHRIE,
J. M. DICKINSON,
EDWARD MAYES,
NOEL GALE,
For plaintiffs in error.

WASHINGTON, March 16, 1901.

[17,341.]

[17,341.]

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 35.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY ET AL.,
Plaintiffs in error,
vs.
WIRT ADAMS, State Revenue Agent.

In error to the Supreme Court of the State of Mississippi.

BRIEF FOR PLAINTIFFS IN ERROR ON REHEARING AS TO THE TAXES FOR THE YEAR 1892.

The court rested the decision of this case rendered January 7, 1901, upon the effect of the consolidation of October 24, 1892 (180 U. S. 1), and, assuming all the taxes in the suit to have accrued after the consolidation, the opinion did not pass upon the original validity of the contract rights of exemption or commutation claimed on behalf of the plaintiffs in error. The record, however, shows (p. 2) that the taxes for the year 1892, which make up part of the judgment affirmed, had been completely levied and assessed on September 22, 1892, and that the claim of the state had fully accrued at least one month before the articles of consolidation were executed. This appears from the declaration of the defendant in error, for it is alleged (p. 2):

> "The said assessment being completed after objections heard on September 22nd, 1892."

The judgment therefore gives to the consolidation of October 24, 1892, a retrospective effect.

The question is of vital importance to the plaintiffs in error, and the amount involved greatly exceeds one year's taxes, because, as the court knows, suits have been brought to recover the taxes prior to the consolidation,[1] and it may well be held in those suits, under the doctrine of *New Orleans* v. *Citizens Bank*, 167 U. S. 371, and *Baldwin* v. *Maryland*, 179 U. S. 220, that the decision in the case at bar constitutes *res judicata* because taxes which had been assessed and had accrued prior to the consolidation were involved.

The liability in this action of both the Yazoo and Mississippi Valley Company and the Illinois Central Company for the taxes of 1892 is predicated upon the allegation that these companies "by taking said property and railroad of said Louisville, New Orleans & Texas Railway Company became liable for its debts and obligations and liabilities and did in fact agree to and did assume and promise to pay all said debts, obligations and liabilities of whatever kind or character" (record, pp. 5, 6). This allegation is without meaning if the taxes in question did not constitute a corporate debt or obligation of the L., N. O. & T. Company at the time of the consolidation (October 24, 1892), which might then be paid and discharged. As matter of fact, the obligation was then not only a lien as of February 1, 1892, but payable October 1, 1892, (sections 3746, 3794*a*, 3801 of the Mississippi Code of 1892, *infra*, p. 3, appendix, p. XIII), and being so payable, it is difficult to see why the right of exemption or commutation under the charter had not

[1] *Illinois Central Railroad Co.* v. *Adams*, 180 U. S. 28, 29, 40; *Yazoo and Mississippi R'd Co.* v. *Adams*, 180 U. S. 41, 42.

already attached and become vested. If the taxes did not constitute an obligation of the L., N. O. & T. Company at the time of the consolidation, the record contains no allegation or evidence showing that the Yazoo Company (the consolidated company) became liable for them. In other words, the case, so far as concerns the taxes of 1892, depends wholly upon the fact that before the consolidation, "the assessments being completed," these taxes had become "debts" or "obligations" of the company which was entitled to the right of exemption or commutation. If any right then existed in respect of these accrued taxes, whether of exemption or appropriation, it was a vested right which was not lost by the consolidation.

In the brief in opposition to the motion for a rehearing, the defendant argued, in regard to the *ad valorem* taxes that, because the plaintiffs in error had until the 15th day of December in which to pay their taxes without having their property distressed and sold, therefore "the effect of the consolidation on October 24, 1892, is exactly the same as if a valid law had been passed on that date repealing the exemption and prohibiting the sheriffs and tax collectors from *thereafter* receiving the affidavits in lieu of money for the taxes" (p. 4). This argument, however, quite overlooks the fact that the taxes for 1892 were assessed and became a lien on the property as of February 1, 1892. This clearly appears from the following provisions of the Mississippi code:

> "Sec. 3746. *Taxes a lien, from what date* (Laws 1884, p. 16). Taxes, both state and county, assessed upon lands or personal property, shall bind the same, and be entitled to preference over all judgments, executions, incumbrances, or liens, whensoever created; and all taxes assessed shall be a lien upon and bind the property assessed, from the first day of February of the year in which the assessment shall

be made; and no property shall be exempt from distress and sale for taxes. And it shall not be necessary to the validity of an assessment, or of a sale of land for taxes, that it shall be assessed to its true owner; but the taxes shall be a charge on the land or personal property taxed, and the sale shall be a proceeding against the thing sold, and shall vest title in the purchaser, without regard to who may own the land or other property when assessed or when sold, or whether wrongfully assessed, either to a person, or to the state, or any county, city, town, or village, or subdivision of either."

"Sec. 3748. *What date fixes liability to taxation.* All taxable property brought into the state or acquired or held by any person before the first day of February shall be assessed, and taxes thereon paid for the current year."

As the declaration itself averred, the assessment was "completed after objections heard on September 22nd, 1892" (record, p. 2); that is to say, the tax became fixed and determined on that date. The tax became actually collectible on October 1, 1892, the date upon which the assessment rolls were delivered to the tax collector (code, sec. 3794*a*; app., p. XIII). The duty of the tax collector upon receipt of the assessment rolls is prescribed by sec. 3801 of the code as follows:

"Sec. 3801. *Collection of taxes.* On receipt of the assessment-rolls the collector shall immediately proceed to collect the taxes, adding the county tax due by each person to his state tax, and collecting all together; and it shall be the duty of every person assessed to pay his taxes to the collector on or before the fifteenth day of December."

If the affidavits had been tendered on October 1, or at any time up to October 23, 1892, it would clearly have been the duty of the tax officers to accept them. The period between October 1 and December 15 constituted merely a period of grace in which payment could be made

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at the convenience of the taxpayer. Nothing remained to be done in order to complete the obligation; and the only relation which the date of December 15 had to the matter was that upon that date it would become the duty of the tax collector to collect the tax forcibly by distress and sale (code, sec. 3802). It will therefore, be seen that the claim that the consolidation of October 24, 1892, deprived the plaintiffs in error of the right to tender the affidavits, rests upon nothing more substantial than a mere delay in presenting them. Such a claim must be entirely untenable. The correct theory is that as soon as the tax became actually payable, that is, on October 1, 1892, after the completion of the assessment and the receipt of the assessment rolls by the tax collector, the right to the exemption by means of a tender of the affidavits accrued and became vested. The rights both of the state and of the railroad company became fixed on that date; and, assuming that the law under which the right accrued was valid, no subsequent law could have deprived the plaintiffs in error of that vested right, and certainly it was not lost by consolidation. As to the privilege taxes, first assessed in 1892, there is additional reason for relieving the plaintiffs in error. Both the constitution of 1869 and that of 1890 dealt with the taxation of the *property* of corporations. But under the settled law of Mississippi, there is a clear distinction between taxes upon property and taxes upon privileges. *Vicksburg Bank* v. *Worrell*, 67 Miss. 47, 57.

Indeed, in the court below, the argument of one of the counsel for the revenue agent (77 Miss. at p. 224), expressly recognizes that the point was made, and this conclusively shows that the present suggestion is not an afterthought. All that can be said is that as the court

below held the contract invalid *ab initio*, counsel directed all the argument to meeting that contention.

It is, therefore, submitted that any rights in respect of the taxes of 1892 were not lost or surrendered or waived by the consolidation.

I.

THE VALIDITY OF THE CHARTER CONTRACT.

The point now presented is whether exemptions of property or commutations of taxes could be granted by the legislature of Mississippi under article XII. of the state constitution of 1869.

The power to exempt under that constitution has been repeatedly adjudged in the courts of Mississippi in a series of cases beginning with *Mississippi Mills* v. *Cook*, 56 Miss. 40 (1878). Mr. Justice Brown in the opinion in the case at bar said (*Yazoo and Mississippi V. R'y. Co.* v. *Adams*, 180 U. S. at p. 22):

> "In cases arising under the Mississippi constitution of 1869, the method adopted in the charter of the Mobile and Northwestern Company of cummuting the taxes was originally sustained under the theory that the provision of that constitution declaring 'the property of all corporations for pecuniary profits shall be *subject* to taxation, the same as that of individuals,' did not mean that it should be necessarily *subjected* to taxation, but that it might be exempted altogether by the legislature. *Mississippi Mills* v. *Cook*, 56 Missisippi 40. But by the constitution of 1890, 'all existing charters or *grants of corporate franchises* under which organizations have not in good faith taken place at the adoption of this constitution, shall be subject to the provisions of the article,' one of which was (section 181) that 'the property of all private corporations for pecuniary gain shall be taxed in the same way and to the same extent as property of individuals.'"

Since the original decision in this court, the Supreme

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Court of Mississippi, in the case of *Wirt Adams, State Revenue Agent*, v. *Tombigbee Mills*, decided February 18, 1901, has again upheld the power of the legislature of Mississippi to grant exemptions under the constitution of 1869. The opinion is written by Whitfield, C. J., who also wrote the opinion in the case at bar, and, among other things, he draws a distinction between that case and the case at bar by emphasizing the fact that in the *Tombigbee Mills* case the corporation had not lost its exemption by consolidating with any other corporation. The opinion also attempts to distinguish the two cases on other grounds. A copy of this recent opinion is filed herewith. The following extract from the opinion will be interesting. Referring to the act of 1882, exempting factory property from taxation, under which the exemption involved in that case was granted, the court said:

> "It does not select certain persons or certain corporations, and seek invidiously to extend to them special privileges denied to all others. But in furtherance of a great and just public policy, always cherished in this State—namely, the establishment of cotton factories for the consumption of the product on which our material wealth rests—it did, as under the constitution of 1869 it might do, select certain kinds of property, whether owned by individuals or corporations, and exempted that selected property from taxation. Manifestly this exemption contained in the said Act of 1882 was valid, and it is clear it has never been repealed and it was not sought to be made irrepealable. This appellee never lost its exemption by consolidating with any other corporation. It has always retained 'the precise corporate existence' it originally had. Its exemption was, therefore, continued by Sec. 181 of the constitution of 1890, subject to legislative repeal. But it has never been repealed. The legislation, with respect to railroads and cotton factories, under this Act as to this matter of exemption, is materially different as to the

legislative repeal. Section 182 of the constitution of 1890 expressly authorized exemptions from taxation of manufactories and other new enterprises of public utility, for five years from the date of the charter in the case of a corporation, and from the commencement of the work in the case of individual enterprises; but no such provision was made for railroads. And section 3744, subdivision (v) of the Code of 1892, passed in pursuance of section 182 of the constitution of 1890, provides for these exemptions as to manufactories of various kinds. Here is both constitutional and legislative recognition of the exemption in this case as still existing. For it would be obviously absurd for the Legislature to enact said subdivision (v) of section 3744, offering this five years' exemption to cotton factories for the future, and at the same time repeal the sort of an exemption we have before us here. That would be 'keeping the word of promise to the ear, but breaking it to the hope.' Individuals and corporations would distrust as to the future if an exemption like this, validly granted, under general law, and on the faith of which appellee has invested its money, should be repealed. But a very different state of case existed as already pointed out, as to the exemption denied in *Y. & M. V. R. R. Co.* v. *Adams*, 77 Miss. 194. There the exemption was void in its origin, being a special grant by a special Act to a special corporation. And that exemption was repealed. It is not at all difficult to see the wisdom of the public policy which makes the discrimination between the exemption here and that in *Y. & M. V. R. R. Co.* v. *Adams*."

But apart from this recent adjudication, it must be very clear that, considered in itself and in connection with the subject matter of the enactment, the provisions of section 21, providing for the exemption from or commutation of taxes on this railroad property, constituted a valid contract between the state and the railroad company, if not prohibited by the state constitution. The consideration is ample, and the terms of the agreement are plain and enforceable. In the absence of any

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limitations imposed by the state constitution then in force, there was no restraint upon the power of the state legislature to make the contract, nor upon the right of the incorporators of the railroad company to accept, rely and insist upon its benefits. And if the contract was valid when made and had not been waived or terminated at the date of the consolidation, its obligation is protected by the Federal Constitution from impairment as to all rights accrued prior to the consolidation. It is, of course, now a settled rule of constitutional law that any stipulation respecting taxation contained in the charter of a corporation, whether constituting a grant of state or municipal funds, or providing for an appropriation or commutation of taxes, or for an entire exemption of the corporate property or stock, must be construed as an inviolable contract under the protection of the Constitution of the United States, if not in conflict with the existing state constitution, and that it cannot be revoked by any subsequent legislation, or even by an amendment of the state constitution (*State Bank of Ohio* v. *Knoop*, 16 How. 369, 378; *Home of the Friendless* v. *Rouse*, 8 Wall. 430, 435; *Wilmington Railroad* v. *Reid*, 13 Wall. 264, 266; *Humphrey* v. *Pegues*, 16 Wall. 244, 249; *Trask* v. *Maguire*, 18 Wall. 391, 401; *Pacific Railroad Company* v. *Maguire*, 20 Wall. 36, 43; *Erie Railway Company* v. *Pennsylvania*, 21 Wall. 492, 498; *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 664; *Grand Lodge* v. *New Orleans*, 166 U. S. 143, 146).

The form of the legislative contract in suit (first adopted in the legislation of Mississippi on July 20, 1870, laws 1870, ch. 124, sec. 21, immediately after the adoption of the constitution of 1869), is as follows (record, p. 40, appendix, p. 11):

"Section 21. Be it further enacted, That in consideration of the construction of the railroads provided for herein, and of the great benefit which the State will receive in the development of its agricultural resources by means of said railroads as works of internal improvement, and also of the increased value which will thereby be added to the property of the State, thus enabling the State to greatly increase its revenue without additional and burdensome taxation on the people, the State hereby agrees with said company (and which agreement is irrepealable), that all taxes to which said company shall be subject for the period of thirty years, are hereby appropriated and set apart, and shall be applied to the payment of the debts and liabilities which the said company may have incurred in the construction of said road, or for money borrowed by said company upon lands or otherwise, to be used in constructing said road, or paying debts incurred by said company in constructing the same; and it shall be the duty of the tax collector in every county, in each and every year, to give to said company a receipt in full for the amount of said taxes upon receiving from said company an affidavit made by the president or cashier of said company that the amount of said taxes have actually and in good faith been paid and applied by said company during the year, in payment of the debts incurred, or money borrowed as aforesaid, and which receipt shall be in full of all taxes, county, State and municipal, to which said company shall be subject. Provided, however, that whenever the profits of said company shall enable it to declare and pay to the stockholders an annual dividend of eight per cent. on its capital stock over and above the payment of its debts and liabilities, then the appropriation of the taxes aforesaid shall cease, and said taxes shall be paid by said company to the tax collector, to be by him paid over as required by law."

Whether the provisions of this section 21, constituting a part of the charter of the L., N. O. & T. Company (as explained in 180 U. S. at pp. 9–11) are to be considered as conferring an absolute exemption or as

creating a right of commutation of taxes, that right of exemption or commutation was a valid grant within the constitutional power of the legislature, which had already attached to the taxes for the year 1892 prior to the consolidation of October 24, 1892.

If, instead of this form of contract, the state had agreed to accept in payment of taxes upon this railroad for a certain period and upon certain conditions bonds or coupons issued by the railroad company for the purpose of securing additional funds to complete the construction of this public improvement, there could be little question that this would constitute a valid contract and that the railroad company or the bondholder could enforce it. Similar provisions in bank charters that their notes shall be receivable in payment of taxes have been held to constitute valid and irrepealable contracts with the holders of such notes, and the doctrine is now well settled (*Woodruff* v. *Trapnall*, 10 How. 190, 205; *Furman* v. *Nichol*, 8 Wall. 44, 59; *Keith* v. *Clark*, 97 U. S. 454; *Virginia Coupon Cases*, 114 U. S. 270, 279). There was no inhibition of such grants in the Mississippi constitution of 1869, nor is there even in that of 1890. The Supreme Court of Mississippi has repeatedly declared the doctrine that the building of a railroad is a public use, and that taxes may be voted and levied in aid of such a public improvement (*Brown* v. *Beatty*, 5 George 227, 240; *Hawkins et al* v. *Carroll Co.*, 50 Miss. 735, 757; *New Orleans, &c., R. R. Co.* v. *McDonald*, 53 Miss. 240, 245; *Miss. Const.* 1869, Art. 12, Sec. 14). The same rule has always been held in this court, and now generally prevails throughout this country (*Rogers* v. *Burlington*, 3 Wall. 654, 663; *Thomson* v. *Lee County*, 3 Wall. 327, 330; *Mitchell* v. *Burlington*, 4 Wall. 270, 273; *Railroad Company* v. *County of Otoe*, 16 Wall. 667,

672; *Olcott* v. *The Supervisors*, 16 Wall. 678, 694; *Sharpless* v. *Mayor of Philadelphia*, 21 Pa. St. 147, 169; *Thomas* v. *Leland*, 24 Wend. 65, 68; *Napa Valley R. R. Co.* v. *Napa Co.* 30 Cal. 435, 436; *Stein* v. *Mayor of Mobile*, 24 Ala. 591, 614).

II.

THE HISTORY OF EXEMPTIONS, &C., UNDER THE CONSTITUTION OF 1869.

For many years prior to the adoption of the Mississippi constitution of 1869, it had been customary for the legislature in granting corporate charters to expressly reserve the right or power to tax the property of the corporations thus created (see pp. X-XII of appendix). The framers of the constitution of 1869, with intent to make this reservation of power applicable generally to all corporations, declared that corporate property should be "subject to taxation the same as that of individuals;" but that constitution did not contain any inhibition of general or specific exemptions of corporate property—much less of legislative contracts for commutation of taxes. For twelve years prior to the granting of the charter here in question—that is, continuously after the adoption of the constitution of 1869—and for twenty years prior to the constitution of 1890, it had been the practice of the legislature to grant to corporations absolute exemptions from taxation. One hundred and twenty such exemptions were granted during the period between 1870 and 1890 (see pp. V–IX of appendix). In addition to such absolute exemptions, the legislature had, prior to applying the provisions of section 21 to the L., N. O. & T. Company, granted more than fifty corporate charters containing agreements for the commutation or appropriation of taxes similar to that involved in the present case (*id.* pp. III–V), which form of contract has been held by

the court below to be the equivalent to an exemption. At any rate, if not equivalent to an exemption, these agreements constitute valid contracts for the commutation or appropriation of taxes.

As early as 1878, four years before the granting of the charter in suit, the Supreme Court of Mississippi in the case of *Mississippi Mills* v. *Cook*, 56 Miss. 40, 52, construing the provisions of section 13 of article XII. of the constitution of 1869, determined that this section did not of itself prohibit exemptions, but only declared the liability of corporations to taxation in the discretion or judgment and subject to the control of the legislature. This authoritative construction of the constitution, subsequently reiterated in *Railroad Company* v. *Lambert*, 70 Miss. 779 (*vide* 180 U. S. at p. 13), became as much a part of the constitution of 1869 as the text itself (*Douglass* v. *County of Pike*, 101 U. S. 677). And that this construction of the meaning of the constitution of 1869 was not strained or unreasonable is shown by the legislation of Mississippi for many years prior to the adoption of that constitution, from which it appears that the legislature, when granting charters of incorporation, had often thought it necessary to provide that the corporations should be "subject to taxation," the terms of the provisions being either precisely like those adopted in the constitution of 1869, or having the same effect in substance. The construction adopted in *Mississippi Mills* v. *Cook*, therefore, involved no departure or change or new rule in regard to corporate taxation. It simply recognized that the constitution made that general which before had been special, and embodied this common provision of liability to taxation, instead of leaving it to be dealt with by changing legislatures in each particular case. Many of these old acts are referred to in the appendix

(pp. x–xii), and contain most persuasive evidence of the meaning which was generally attributed in the legislation of Mississippi to the clause under consideration when the constitution of 1869 was adopted. The rule was analogous to that laid down in Massachusetts and Pennsylvania, where the property of railroad and other companies serving a public purpose has been held not subject to taxation under general statutes (*Inhabitants of Worcester* v. *The Western Rail Road Corporation*, 4 Metc. 564, 566; *Lehigh Coal and Navigation Company* v. *Northampton County*, 8 W. & S. 334, 338). The framers of the constitution of 1869 undoubtedly intended to subject all corporations to the power of taxation under the general tax laws, but with discretion in the legislature to grant repealable or limited exemptions, as theretofore had been the constant practice.

Moreover, this was the uniform and consistent practice of the legislature. Thus, at almost every session held between the adoption of the constitution of 1869 and the adoption of the constitution of 1890, exemptions from taxation were granted, not only to railroad companies, but to other corporations for profit which were supposed to serve in some sense a public purpose. The acts granting these exemptions are referred to in the appendix (pp. v–ix), and exhibit a fixed and consistent course of legislation upon this subject. Some idea of the extent of this policy of exemption may be formed from the numerous examples cited. These acts surely amount to a legislative construction of the highest authority respecting the true meaning of this portion of the constitution of 1869, and ought to receive much weight in determining not only the proper interpretation of the constitution of 1869, but what the exemptions were which the constitution of 1890 intended to ratify and continue.

The same view of the validity of these exemptions prevailed in the other departments of the state government. The executive officers of the state, including its law officers, uniformly, for fully twenty years, adopted the same construction and consistently acted upon it. In the judicial department the decision in *Mississippi Mills* v. *Cook*, *supra*, was followed without break for twenty years, as will be seen by reference to the following cases involving, in one way or another, the question of the constitutionality of exemptions under the constitution of 1869: *McCulloch et al.* v. *Stone*, 64 Miss. 378; *Y. & M. V. R. R. Co.* v. *Thomas et al.*, 65 Miss. 553; *Vicksburg Bank* v. *Worrell*, 67 Miss. 47; *Attala County* v. *Kelly*, 68 Miss. 40; *L., N. O. & T. Ry. Co.* v. *Taylor*, 68 Miss. 361; *Railroad Co.* v. *Lambert*, 70 Miss. 779. And this is again strikingly reiterated in the recent opinion in the *Tombigbee Mills* case.

This long-continued practice of the legislative, executive and judicial departments ought to be most convincing as to the legality of these exemptions. No rule of interpretation is better settled in this court than that which gives the greatest weight to such practice and interpretation. In *The Laura*, 114 U. S. 411, 416, Mr. Justice Harlan, citing *Stuart* v. *Laird*, 1 Cranch, 299, 308, said:

> "Touching the objection now raised as to the constitutionality of the legislation in question, it is sufficient to say, as was said in an early case, that the practice and acquiescence under it, 'commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction.'"

And in *Ogden* v. *Saunders*, 12 Wheat. 213, 290, Mr. Justice Washington said that the doctrine—

> "proceeds upon the presumption, that the cotem-

> poraries of the constitution have claims to our deference on the question of right, because they had the best opportunities of informing themselves of the understanding of the framers of the constitution, and of the sense put upon it by the people when it was adopted by them."

In view of the fact that the investment by stockholders and creditors of the railroad company was clearly made in reliance upon this established practice as to exemptions and of the authoritative interpretation of the highest court of the state affirming the constitutional power to exempt, the following language of Mr. Justice Swayne in *Township of Pine Grove* v. *Talcott*, 19 Wall. 666, 677, is singularly applicable:

> "When the bonds were issued, there had been no authoritative intimation from any quarter that such statutes were invalid. The legislature affirmed their validity in every act by an implication equivalent in effect to an express declaration. And during the period covered by their enactment, neither of the other departments of the government of the State lifted its voice against them. The acquiescence was universal."

See, also, *Briscoe* v. *The Bank of the Commonwealth of Kentucky*, 11 Pet. 257, 318; *Prigg* v. *The Commonwealth of Pennsylvania*, 16 Pet. 539, 619; *Cooley* v. *Board of Wardens of Port of Philadelphia et al.*, 12 How. 299, 315; *Auffmordt* v. *Hedden*, 137 U. S. 310, 329; *Schell's Executors* v. *Fauché*, 138 U. S. 562, 572; *Field* v. *Clark*, 143 U. S. 649, 691; *McPherson* v. *Blacker*, 146 U. S. 1, 27; *Kennedy* v. *Gies*, 25 Mich. 83, 92. The Mississippi authorities are to the same effect: *Daily* v. *Swope, Guardian, etc.*, 47 Miss. 367, 383; *French* v. *The State*, 52 Miss. 759, 762; *Shotwell* v. *Covington*, 69 Miss. 735, 738; *Chrisman* v. *Brookhaven*, 70 Miss. 477, 483.

As Simrall, J., said in *Hawkins et al.* v. *Carroll Co.*, 50 Miss. 735, 752 (1874):

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"At the time of the adoption of the constitution, the power of the legislature to authorize municipal aid to these enterprises, coupled with the delegated authority of taxation, was well established, both by legislative precedents and judicial decisions in this and the other states."

And Mitchell, J., said in *State* v. *Luther*, 56 Minn. 156, 164:

"This amounted to a legislative construction of the constitution, which of itself would be entitled to great weight."

The Supreme Court of California said in *Emery* v. *Reed*, 65 Cal. 351:

"We have frequently said that, with respect to laws passed under the late Constitution, the construction put upon them by the highest court in existence under it, would be accepted by us without regard to our own views in respect to the correctness or incorrectness of that construction."

It only remains to consider whether there is any sound ground of distinction, *under the constitution of 1869*, between an exemption from taxation of a railroad and an exemption of cotton factories. Indeed, it may well be doubted whether cotton factories are public concerns in any such sense as would justify their exemption from taxation or any appropriation of taxes for their support. *Loan Association* v. *Topeka*, 20 Wall. 655; *The State* v. *Osawkee Township*, 14 Kansas 418. On the other hand, a railroad is an indisputable public enterprise in aid of which exemptions may be granted or taxes voted.

The position of the court below in the *Tombigbee Mills* case is that the legislature could *exempt* by general act, but could not exempt by special act. In other words, had the exemption or appropriation in suit been applicable to all railroads, it would have been valid; but it becomes invalid because it is a special act limited

to one railroad. The position evidently is that the greater power to exempt all railroads does not include the lesser power to exempt any particular railroad. No such distinction, it is submitted, finds authority in the constitution of 1869 or any reason in the nature of the subject matter. The constitution warrants no such classification. What provision of the constitution of 1869 declared that the legislature might exempt cotton factories, but could not exempt railroads? What provision of that instrument declared that railroads could be exempted as a class, but could not be exempted in particular cases? Concede the power to exempt at all—cotton factories or railroads whether belonging to corporations or individuals—and it logically follows that any railroad may be exempted if the public good so requires. The argument in support of the power to exempt mills and factories, but not to exempt a railroad unless all railroad property were included, would reduce the constitutional rule to a mere question of method. Railroads are never identical in situation, character, route or terminus. Each railroad is *sui generis*. Each touches different points of country, is built under different conditions, tends to foster and develop different interests. It should indeed require very plain language in a constitution to evidence an intention to permit an exemption of *all* railroads, but to prohibit an exemption of any one, no matter how differently situated from the other railroads of the state. Yet such an extreme and practically illogical result is what the opinion in the *Tombigbee Mills* case would seem to indicate.

The Mississippi court, in sustaining the exemption involved in the *Tombigbee Mills* case, speaks of the "furtherance of a great and just public policy, always

cherished in this state—namely, the establishment of cotton factories." But this is a relatively small consideration when compared with the overshadowing necessity of securing the construction of railroads, which was then impossible without outside capital, (see brief filed on original argument, pp. 2–5). Without the railroads, the benefit to be derived from the establishment of the factories would be minimized. The act involved in the *Tombigbee Mills* case was passed in 1882, the same year in which the charter here involved was granted, and after the passage of laws under the constitution of 1869, providing for exemption or commutation of taxes in respect of at least forty-five railroads. The state desired to accomplish the necessary railroad construction without taxing the community. The legislature proposed to capitalists and contractors and materialmen and all others who might assist in the construction of the road and receive in return the company's promise of payment that, to the extent of the taxes receivable from the new property created with their funds, it would forego or exempt, provided those taxes were applied to the repayment of their advances. It was on the faith of this promise not only that the railroad corporation itself undertook the construction of the road and invested its capital, but that its creditors risked their funds, their materials and their labor, and it is simply common honesty, as it is to the true interests of the state itself, to perform the obligation in good faith. No state has ever profited by the repudiation of its plighted faith. As Mr. Justice Field said in *Hartman* v. *Greenhow*, 102 U. S. 672, 682:

> "There is no wealth or power equal to that which ultimately comes to a State when in all her engagements she keeps her faith unbroken."

III.

The express ratification contained in the constitution of 1890.

At the time of the adoption of the constitution of 1890, the validity of exemptions was so firmly established in Mississippi that there can be no reasonable doubt as to what the common understanding of the framers of the constitution was upon the subject. That constitution provided (section 181):

> "*Exemptions from taxation to which corporations are legally entitled at the adoption of this constitution, shall remain in full force and effect for the time of such exemptions as expressed in their respective charters, or by general laws, unless sooner repealed by the legislature.*"

It is clear that this provision of the new constitution was intended to apply to and preserve exemptions such as that involved in the case at bar, from the fact that, except in the case of two or three small private schools, altogether insignificant in the fiscal system of the state, there were in 1890 no corporations entitled to exemptions which had been granted prior to 1869. Exemptions had been commonly granted before that time, but they had either never been availed of, or had terminated by expiration of the period for which they were granted, or had lapsed for other cause.[1] Practically all corporate exemptions, therefore, such as are mentioned in section 181 of the new constitution, must necessarily have been granted under the constitution of 1869, nearly all of which were to particular railroad corporations, and these were the exemptions which the framers of the constitution of 1890 had in mind and which they intended to protect in good faith.

[1] The exemption of the Mobile and Ohio Railroad Company had been surrendered in 1882 in consideration of a release by the state of a debt due it from the company, amounting to over $300,000. (Appendix Senate Journal, 1882, Governor Lowry's message.)

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The use of the word *legally* was not intended to deprive the section of all practical force and effect or to conceal a snare.

In *State* v. *Luther*, 56 Minn. 156, 164, it appeared that after a continuous course of legislation in respect to commuted taxation upon corporations, which was said to amount to "a legislative construction of the constitution, which of itself would be entitled to great weight," a constitutional amendment was adopted providing for the submission of any law for the repeal of such statutes respecting commuted taxation to a vote by the people. Mitchell, J., said:

> "This language must have been selected and this amendment adopted with reference to the existing legislation and the general legislative policy to which we have referred; and, read and construed in that light, it amounts to a clear recognition of the validity of existing laws providing for this commuted system of taxation of railroad property and lands, and of legislative power to enact such laws for the future. If it did not refer to this, there was nothing to which it could refer. It is, by necessary implication, a validation of past legislation of that kind, and a grant of power to enact it in the future."

As the legality of exemptions in Mississippi under the constitution of 1869 had been declared and upheld prior to 1890 by at least four decisions of the highest tribunal of the state (now reaffirmed by that court), the constitution of 1890, therefore, referred to a class of exemptions sanctioned by the legislative practice of many years under the constitution in force, permitted by the universally accepted construction of that constitution, and confirmed and declared by the highest state court. These were the exemptions "to which corporations are legally entitled." The language of section 181 fairly applies to no other subject-matter.

No more persuasive union of all canons of constitutional construction and interpretation can well be imagined than are found in this case as to the legislative power to grant exemptions—namely, (1) a common course of legislation evincing the universally entertained view of corporate liability to taxation, and recognizing the necessity for providing that corporations should be "subject to taxation," which view continued for many years; (2) the adoption of that view of liability to taxation in the constitution of 1869; (3) a judicial inquiry into the validity of claims for exemption and a judicial declaration of their validity; (4) a common and long-continued legislative recognition, under the constitution of 1869, of the legality of the exemptions and repeated refusals by the legislature to repeal such exemptions; (5) a continuous acquiescence by the executive department and by those charged with the collection of taxes; and (6) a subsequent constitution, dealing with existing exemptions, necessarily created under the constitution of 1869, and confirming those to which corporations were "legally entitled." In truth, the convention which adopted the constitution of 1890 could not have declared more plainly that it meant to confirm and continue such exemptions as that claimed by these plaintiffs in error if it had specifically named and included them in that instrument.

The decision of the Supreme Court of Mississippi in the *Tombigbee Mills* case, decided February, 1901, not only reiterates and reaffirms the doctrine of the *Mississippi Mills* case that the power to exempt existed under the state constitution of 1869, but holds that such exemptions were continued in force by the constitution of 1890. This recent decision emphasizes the point urged on the original argument that the rule of exemption declared

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in the *Mississippi Mills* case in 1878 may justly be said to constitute a part of the contract relied on by the plaintiffs in error.

CONCLUSION.

As the obligation of the charter contract of exemption is clearly impaired by the subsequent state legislation of 1892 and 1894 (180 U. S., at pp. 12, 14), under the authority of which, and not otherwise, the state revenue agent has prosecuted the suits resulting in the judgment now under review, it is submitted that such legislation conflicts with the contract clause of the constitution of the United States, and is void. The judgment below should, therefore, be reversed as to the taxes of 1892, which accrued prior to the consolidation act of October 24, 1892.

Washington, March 16, 1901.

WILLIAM D. GUTHRIE,
J. M. DICKINSON,
EDWARD MAYES,
NOEL GALE,
For plaintiffs in error.

APPENDIX.

A.

Constitutional provisions involved.

CONSTITUTION OF 1869.

ARTICLE XII., SEC. 13. The property of all corporations for pecuniary profits shall be subject to taxation the same as that of individuals.

SEC. 20. Taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value, to be ascertained as directed by law.

CONSTITUTION OF 1890.

SECTION 181. The property of all private corporations for pecuniary gain shall be taxed in the same way and to the same extent as the property of individuals, but the legislature may provide for the taxation of banks and banking capital by taxing the shares according to the value thereof (augmented by the accumulations, surplus, and unpaid dividends), exclusive of real estate, which shall be taxed as other real estate. Exemptions from taxation to which corporations are legally entitled at the adoption of this constitution, shall remain in full force and effect for the time of such exemptions as expressed in their respective charters, or by general laws, unless sooner repealed by the legislature. And domestic insurance companies shall not be required to pay a greater tax in the aggregate than is required to be paid by foreign insurance companies doing business in this state, except to the extent of the excess of their ad valorem tax over the privilege tax imposed upon such foreign companies; and the legislature may impose privilege taxes on building and loan associations in lieu of all other taxes except on their real estate.

SECTION 182. The power to tax corporations and their property shall never be surrendered or abridged by any contract or grant to which the state or any political subdivision thereof may be a party, except that the legislature may grant exemption from taxation in the encouragement of manufactures and other new enterprises of public utility extending for a period not exceeding five years, the time of such exemptions to commence from date of charter, if to a corporation; and if to an individual enterprise, then from the commencement of work; but when the legislature grants such exemptions for a period of five years or less, it shall be done by general laws, which shall distinctly enumerate the classes of manufactures

and other new enterprises of public utility entitled to such exemptions, and shall prescribe the mode and manner in which the right to such exemptions shall be determined.

SEC. 258. The credit of the state shall not be pledged or loaned in aid of any person, association, or corporation; and the state shall not become a stockholder in any corporation or association, nor assume, redeem, secure, or pay any indebtedness, or pretended indebtedness alleged to be due by the state of Mississippi to any person, association, or corporation whatsoever, claiming the same as owners, holders, or assignees of any bond or bonds, now generally known as "Union Bank" bonds and "Planters' Bank" bonds.

SEC. 279. All writs, actions, causes of action, proceedings, prosecutions, and rights of individuals and bodies corporate, and of the state, and *charters of incorporation shall continue.*

B.

LAWS CREATING THE CONTRACT IN QUESTION.

An Act to incorporate the Mobile and Northwestern Railroad Company, approved July 20, 1870.

SECTION 21. *Be it further enacted*, that in consideration of the construction of the Railroads provided for herein, and of the great benefit which the State will receive in the development of its agricultural resources by means of said Railroads as works of internal improvement, and also of the increased value which will thereby be added to the property of the State, thus enabling the State to greatly increase its revenue without additional and burdensome taxation upon the people, the State hereby agrees with said Company (and which agreement is irrepealable), that all taxes to which said Company shall be subject for the period of thirty years, are hereby appropriated and set apart, and shall be applied to the payment of the debts and liabilities which the said Company may have incurred in the construction of said road, or for money borrowed by said Company upon lands or otherwise, to be used in constructing said road, or paying debts incurred by said Company in constructing the same; and it shall be the duty of the Tax Collector in every county in each and every year, to give to said Company a receipt in full for the amount of said taxes upon receiving from said Company an affidavit made by the President or Cashier of said Company, that the amount of said taxes have actually and in good faith been paid and applied by said Company during the year, in payment of the debts incurred, or money borrowed as aforesaid, and which receipt so given shall be in full of all taxes, county, state, and municipal,

to which said Company shall be subject; *Provided, however*, That whenever the profits of said Company shall enable it to declare and pay to the stockholders an annual dividend of eight per cent. upon its capital stock over and above the payment of its debts and liabilities, then the appropriation of the taxes aforesaid shall cease, and said taxes shall be paid by said Company to the Tax Collector, to be by him paid over as required by law. (Laws Mississippi, 1870, ch. 104, p. 268.)

ACT APPLYING SECTION 21 TO THE MEMPHIS AND VICKSBURG RAILROAD COMPANY AND OTHERS.

An Act supplemental to the Acts of incorporation of certain Railroad Companies, approved August 8, 1870.

SECTION 1. *Be it enacted by the Legislature of the State of Mississippi*, That the provisions of the twenty-first section of an Act entitled, "An act to incorporate the Mobile and Northwestern Railroad," be, and they are hereby made to apply to the following Railroad Companies: the Memphis and Vicksburg Railroad; the Vicksburg, Yazoo Valley, and Grenada Railroad; the Canton and Vicksburg Railroad; the Natchez and Jackson Railroad; the Meridian and Red River Railroad; the Ship Island, Mississippi City, and Paducah Railroad; the Elyton and Aberdeen Railroad; the Grenada, Louisville, and Meridian Railroad; the Greenville and Rolling Fork Railroad; and the charters of said Companies are hereby amended so as to confer upon said Companies all the rights, privileges, immunities, and franchises granted by the Act of incorporation of the said Mobile and Northwestern, embraced in the twenty-first section thereof.

SEC. 2. *Be it further enacted*, That this Act take effect and be in force from and after its passage. (Laws Mississippi, 1870, ch. 113, p. 327.)

C.[1]

I. List of charters containing agreement for appropriation or commutation of taxes as embodied in section 21 of Act of July 20, 1870.

1870. Mobile and Northwestern Railroad Company, Laws 1870, pp. 255, 268.
" Memphis and Vicksburg Railroad Company, Laws 1870, p. 327.
" Vicksburg, Yazoo Valley, and Grenada Railroad Company, *Ib.*
" Canton and Vicksburg Railroad Company, *Ib.*
" Natchez and Jackson Railroad Company, *Ib.*

[1] Regular sessions of the Legislature of Mississippi were held annually between 1870 and 1878, inclusive, and thereafter beginning with the year 1880 were held biennially.

1870. Meridian and Red River Railroad Company, *Ib.*
" Ship Island, Mississippi City, and Paducah Railroad Company, *Ib.*
" Elyton and Aberdeen Railroad Company, *Ib.*
" Grenada, Louisville, and Meridian Railroad Company, *Ib.*
" Greenville and Rolling Fork Railroad Company, *Ib.*
1871. Meridian, Red River and Texas Railroad Company, Laws 1871, pp. 119, 129.
" Artesia, Starkville and Grenada Railroad Company, Laws 1871, pp. 138, 147.
" Columbus, Fayette and Decatur Railroad Company, Laws 1871, pp. 187, 188.
" Lexington Branch Railroad Company, Laws 1871, pp. 189, 199.
" Elyton, Corinth and Tennessee River Railroad Company, Laws 1871, pp. 202, 218.
" Yazoo City, Raymond and Crystal Springs Railroad Company, Laws 1871, pp. 228, 236.
" Vicksburg, Pensacola and Ship Island Railroad Company, Laws 1871, pp. 237, 250.
" Ripley Railroad Company, Laws 1871, pp. 268, 279.
1872. An act to encourage the introduction of Machinery and the establishment of Factories, etc., Laws 1872, p. 65.
" Arkansas City and Grenada Railroad Company, Laws 1872, pp. 347, 360.
" Corinth, Kossuth and Kosciusko Railroad Company, Laws 1872, pp. 335, 346.
" Corinth and Nashville Railroad Company, Laws 1872, p. 283.
" Gibson and Rolling Fork Railroad Company, Laws 1872, pp. 294, 297.
" Grenada, Houston, and Eastern Railroad Company, Laws 1872, pp. 286, 291.
" Helena, Water Valley, and Eastern Railroad Company, Laws 1872, pp. 299, 311.
" Mississippi River and Sardis Railroad Company, Laws 1872, pp. 380, 386.
" Memphis, Oxford, and Meridian Railroad Company, Laws 1872, pp. 369, 379.
" Natchez and Brookhaven Railroad Company, Laws 1872, pp. 362, 367.
" New Orleans, Baton Rouge, and Vicksburg Railroad Company, Laws 1872, pp. 246, 255.
" New Orleans and Northeastern Railroad Company, Laws 1872, p. 314.

1872. Vicksburg, Yazoo Valley, and Grenada Railroad Company, Laws 1872, pp. 319, 335.
1873. Mississippi Mills, Laws 1873, p. 212.
" Stonewall Cotton Factory, Laws 1873, p. 212.
" Perkinsville Manufacturing Company, Laws 1873, p. 303.
" Wanneeta Mills and Magnolia Mills, Laws 1873, p. 367.
" Ashland Railroad Company, Laws 1873, pp. 518, 520.
" Ashland, Holly Springs and Chulahoma Railroad Company, Laws 1873, pp. 596, 597.
" Grenada, Louisville and Meridian Railroad Company, Laws 1873, pp. 513, 514.
" Holmes County Central Railroad Company, Laws 1873, pp. 520, 530.
" Liberty and Woodville Railroad Company, Laws 1873, pp. 499, 509.
" Mississippi City and Helena Railroad Company, Laws 1873, pp. 531, 540.
" Mobile and Little Rock Railroad Company, Laws 1873, pp. 576, 579.
" Pascagoula and Jackson Railroad Company, Laws 1873, pp. 496, 499.
" Savannah and Memphis Railroad Company, Laws 1873, pp. 594, 595.
" West and East Railroad Company, Laws 1873, pp. 479, 488.
" Yazoo City, Yazoo Valley Railroad Company, Laws 1873, pp. 543, 553.
1878. Natchez, Jackson and Columbus Railroad Company, Laws 1878, pp. 233, 234.
1880. Jackson, Yazoo City and Arkansas City Railroad Company, Laws 1880, pp. 228, 234.
" Greenville, Columbus and Birmingham Railroad Company, Laws 1880, pp. 246, 247.
1882. Gordon Cotton Mills Company, Laws 1882, pp. 574, 576.
" Port Gibson Cotton Mills, Laws 1882, pp. 591, 596.
" Vicksburg and Mississippi Railroad Company, Laws 1882, pp. 896, 916.
" Louisville, New Orleans and Texas Railway Company, Laws 1882, pp. 1011, 1013.
1884. Louisville, New Orleans and Texas Railway Company, Laws 1884, p. 936.

II. List of charters granting exemptions from taxation.

1870. Whitworth Female College, Laws 1870, pp. 380, 381.
" Macon Male School, Laws 1870, pp. 401, 402.

1870. Attala County Agricultural and Mechanical Association, Laws 1870, pp. 457, 459.
1873. Educational Society of South Mississippi and East Louisiana, Laws 1873, pp. 429, 433.
" Baldwyn Female College, Laws 1873, p. 435.
" University of Columbus, Laws 1873, pp. 438, 439.
" Plowman and Agricultural Society, Laws 1873, p. 462.
1874. Abbeville Female College, Laws 1874, p. 158.
1877. Manufacturing Companies, Laws 1877, p. 72.
1878. Port Gibson, Utica and Crystal Springs Railroad Company, Laws 1878, pp. 463, 472.
" Brandon Street Railway Company, Laws 1878, pp. 484, 487.
1880. All railroads while in process of construction, Laws 1880, pp. 19, 86.
" Lea Female College, Laws 1880, pp. 291, 293,
" Meridian and Aberdeen Fair Grounds, Laws 1880, p. 633.
1882. Purchasers of railroads at foreclosure, on incorporation, Laws 1882, pp. 47, 48.
" Delta Land and Manufacturing Company, Laws 1882, pp. 533, 537.
" Mississippi Improvement and Manufacturing Company, etc., Laws 1882, pp. 545, 550.
" Mississippi Mining, Milling, etc., Company, Laws 1882, pp. 555, 558.
" Star Mining, Milling and Manufacturing Company, Laws 1882, pp. 559, 561.
" Marshall Mills, Laws 1882, pp. 561, 564.
" D. Mayer Agricultural and Manufacturing Company, Laws 1882, pp. 564, 565.
" Hope Oil Mill, etc., Company, Laws 1882, pp. 570, 573.
" Warren Cotton Mills Company, Laws 1882, pp. 587, 588.
" Luxapalila Manufacturing and Mining Company, Laws 1882, pp. 588, 591.
" Cooper's Wells Company, Laws 1882, pp. 599, 602.
" Meridian Mills, Laws 1882, pp. 606, 608.
" Blue Mountain Academy, Laws 1882, pp. 667, 668.
" Louisville Male and Female Seminary, Laws 1882, p. 670.
" Palo Alto Academy, Laws 1882, pp. 675, 676.
" Yazoo and Mississippi Valley Railroad Company, Laws 1882, pp. 838, 847.
" Memphis and New Orleans Railroad and Levee Company, Laws 1882, pp. 874, 883.
" Canton, Aberdeen and Nashville Railroad Company, Laws 1882, pp. 1001, 1009.

1882. Memphis, Selma and Brunswick Railroad Company, Laws 1882, p. 1022.
" Gulf and Ship Island Railroad Company, Laws 1882, pp. 849, 861.
" Birmingham and North-Western Railroad Company, Laws 1882, pp. 1040, 1049.
" Tennessee and Mississippi Rivers Railroad Company, Laws 1882, pp. 989, 1000.
" Vicksburg and North-Eastern Railroad Company, Laws 1882, pp. 1015, 1018.
" Meridian, Brookhaven and Natchez Railroad Company, Laws 1882, pp. 1049, 1064.
" Helena, Sardis, Pontotoc and Birmingham Railroad Company, Laws 1882, pp. 885, 895.
" Mississippi Mexican Gulf Railroad Company, Laws 1882, pp. 961, 974.
" Alabama and Mississippi Railroad Company, Laws 1882, pp. 863, 870.
" Mississippi and Arkansaw Railroad Company, Laws 1882, pp. 933, 942.
" Meridian, Winona and Helena Railroad Company, Laws 1882, pp. 943, 959.
" Mississippi, Alabama and Georgia Railway Company, Laws 1882, pp. 975, 988.
" Pass Christian City Railroad Company, Laws 1882, pp. 818, 821.
" City Railroad of Columbus, Laws 1882, pp. 822, 824.
" Georgia Pacific Railway Company, Laws 1882, pp. 824, 826, 834, 837.
1884. Mississippi State Fair Association, Laws 1884, pp. 827, 829.
" Sunflower Navigation Company, Laws 1884, pp. 859, 862.
" Hunt and Huddleston College Faculty Association, Laws 1884, pp. 874, 876.
" Lea Female College, Laws 1884, pp. 878, 879.
" Maury Institute, Laws 1884, pp. 880, 881.
" Grenada Collegiate Institute, Laws 1884, pp. 881, 883.
" Caledonia Branch Railroad Company, Laws 1884, pp. 888, 895.
" Warrior Coal Fields Railroad Company, Laws 1884, pp. 895, 901.
" Tombigbee Railroad Company, Laws 1884, pp. 901, 907.
" Moss Point, Scranton and East Pascagoula Railroad Company, Laws 1884, pp. 911, 915.
" Macon and Tuscaloosa Railroad Company, Laws 1884, pp. 915, 916.

1884. Mississippi River and Deer Creek Railroad Company, Laws 1884, p. 918.
" Memphis, Oxford and Columbus Railway Company, Laws 1884, pp. 919, 920.
" Port Gibson & Alabama Railroad Company, Laws 1884 pp. 922, 934.
" Terry, Brandon and Northeastern Railroad Company, Laws 1884, pp. 936, 937.
" Helena, Memphis and New Orleans Railroad Company, Laws 1884, pp. 937, 938.
" West Point Street Railway Company, Laws 1884, pp. 941, 944.
" Tombigbee and Grand Trunk Railroad Company, Laws 1884, p. 950.
" Natchez and Mobile Railroad Company, Laws 1884, pp. 951, 953.
" Front and Asylum Street Railway Company, Laws 1884, pp. 955, 956.
" Mississippi River and Mexican Gulf Railroad Company, Laws 1884, pp. 957, 963.
" Rodney, Jackson and Tuscaloosa Railroad Company, Laws 1884, pp. 968, 969.
" Arkansas City, Winona and Eastern Railway Company, Laws 1884, pp. 969, 971.
" Mississippi River and Eastern Railroad Company, Laws 1884, pp. 975, 986.
" Tallahatchie Valley Railroad Company, Laws 1884, pp. 987, 992.
" New Orleans and Northwestern Railway Company, Laws 1884, pp. 994, 1004.
" Meridian and Brunswick Railroad Company, Laws 1884, pp. 1005, 1013.
" Helena, Water Valley, Aberdeen and Birmingham Railroad Company, Laws 1884, pp. 1014, 1023.
1886. Kansas City, Memphis and Birmingham Railroad Company, Laws 1886, pp. 191, 200.
" Memphis, Birmingham and Atlantic Railroad Company, Laws 1886, pp. 203, 207.
" Pensacola and Memphis Railroad Company of Mississippi, Laws 1886, pp. 209, 221.
" Vicksburg, Yazoo-Delta and North Eastern Railway Company, Laws 1886, pp. 222, 227.
" Hill City Street Railway Company, Laws 1886, pp. 232, 235.
" Mississippi and Louisiana Bridge and Railroad Company, of Natchez, Mississippi, Laws 1886, pp. 237, 244.

1886. Port Gibson Female College, Laws 1886, p. 634.
" Cooper Normal College, Laws 1886, pp. 726, 727.
" Pittsboro Male and Female College, Laws 1886, pp. 734, 735.
1888. Macon, Tuscaloosa and Birmingham Railroad Company, Laws 1888, pp. 490, 499.
" Helena, Tupelo and Decatur Railroad Company, Laws 1888, pp. 500, 508.
" Brookhaven, Columbia and Mobile Railroad Company, Laws 1888, pp. 508, 509.
" Enterprise Street Railway Company, Laws 1888, p. 518.
" Vicksburg Electric Street Railway Company, Laws 1888, pp. 522, 523.
" Mississippi and Gulf Railroad Company, Laws 1888, pp. 542, 546.
" Mississippi Southern Railway Company, Laws 1888, pp. 548, 557.
" Columbus, Fulton and Eastport Railroad Company, Laws 1888, pp. 558, 563.
" Greenville and Durant Railroad Company, Laws 1888, pp. 563, 569.
" Waynesboro, Pascagoula and Gulf Coast Railroad Company, Laws 1888, pp. 570, 575.
" Greenville, Egypt Ridge and Bogue Phaliah Railway Company, Laws 1888, pp. 584, 591.
" Meridian Cotton Mills, Laws 1888, pp. 595, 596.
" Natchez Hotel, Laws 1888, p. 614.
" Deasonville High School, Laws 1888, p. 628.
" Liberty Male and Female College, Laws 1888, pp. 630, 631.
" Tombigbee Normal Institute, Laws 1888, p. 632.
" Montrose High School, Laws 1888, pp. 635, 636.
" Gulf Port Dental College, Laws 1888, p. 638.
" Mt. Carmel Normal College, Laws 1888, pp. 639, 640.
1890. Millsaps College, Laws 1890, pp. 553, 555.
" Pickens High School, Laws 1890, p. 561.
" Harper's Baptist College, Laws 1890, pp. 563, 564.
" Pleasant Hill High School, Laws 1890, pp. 569, 570.
" Hebron High School, Laws 1890, pp. 570, 571.
" Bellefontaine Male and Female High School, Laws 1890, p. 574.
" Saltillo High School, Laws 1890, p. 577.
" Waynesboro Normal Institute and College, Laws 1890, pp. 581, 582.
" Old Myrtle Normal College, Laws 1890, pp. 583, 584.

1890. Starkville Street Railway Company, Laws 1890, pp. 655, 660.
" Nashville and Mississippi Delta Railroad Company, Laws 1890, pp. 682, 687.
" Mississippi River, Alabama and Chattanooga Railroad Company, Laws 1890, pp. 703, 713.
" Greenville, Nashville and Chattanooga Railway Company, Laws 1890, pp. 732, 741.
" Columbus and Fulton Railroad Company, Laws 1890, pp. 743, 751.
" Alabama, Mississippi and Western Railroad Company, Laws 1890, pp. 751, 756.
" South Mississippi Railroad Company, Laws 1890, pp. 759, 767.
" Yazoo Delta Central Railway Company, Laws 1890, pp. 769, 778.

ANNOTATED CODE 1892, SEC. 2956 (Powers of Mayors and Aldermen of Cities and Towns):

Thirty-first.—To aid and encourage the establishment of manufactories, gas-works, water-works, and other enterprises of public utility other than railroads, within the corporate limits, by exempting all property used for such purposes from *municipal taxation* for a period not longer than ten years.

REVENUE LAW OF 1890.

(Laws 1890, c. 2, p. 9.)

SECTION 1. * * * Cities and towns are prohibited from levying or collecting any other tax on banks or on solvent credits owned by individuals or corporations, greater than 75 per cent. on the State tax.

SEC. 3 (p. 11). That the State tax for the year 1890 is hereby fixed and levied at three and one-half mills on the dollar, and for the year 1891 three mills for general purposes. * * *

D.

REFERENCES TO SOME STATUTES OF MISSISSIPPI, PRIOR TO 1869, RESERVING POWER TO TAX CORPORATIONS.

The legislature expressly reserved power to impose taxes in the following charters:

1833. Commercial and Rail Road Bank of Vicksburg, Laws 1833, p. 129.
1836. Commercial Bank of Rodney, Laws 1836, p. 137.
" Commercial Bank of Manchester, *id.*, p. 142.
" Commercial Bank of Columbus, *id.*, p. 152.

1836. Tombigbee Rail Road Company, *id.*, p. 227.
" Aberdeen and Pontotoc Railroad and Banking Company, *id.*, p. 241.
" Tallahatchie Rail Road Company, *id.*, p. 283.

In the following instances the charters provided that the capital stock of the respective corporations should "from time to time, as the Legislature may hereafter direct, be subject to be taxed annually." * * *

1833. Grand Gulf Rail Road and Banking Company, Laws 1833, p. 147.
1836. Mississippi and Alabama Rail Road Company, Laws 1836, p. 165.
" Lake Washington and Deer Creek Rail Road and Banking Company, *id.*, p. 215.

The following acts expressed in varying language the same reservation of power to the legislature:

1833. Protection Insurance Company, Laws 1833, p. 84.
" West Feliciana Railroad Company, *id.*, p. 153.
1836. Gainsville and Narkeetah Railroad Company, Laws 1836, p. 86.
" Mississippi Springs Railroad Company, *id.*, p. 296.
1850. Yazoo and Houston Railroad Company, Laws 1850, p. 352.
1859. Warren Insurance Company, Laws 1859, p. 122.
1862. Columbus Life and General Insurance Company, Laws 1862, p. 295.

In the following charters the legislature expressly declared that the property of the respective corporations should be "subject" or "liable" to taxation:

1836. Commercial Bank of Natchez, Laws 1836, p. 252.
1852. Columbus Life and General Insurance Company, Laws 1852, p. 199.
1854. Memphis and Charleston Railroad Company, Laws 1854, p. 86.
1865. Hernando Mutual Insurance Company, Laws 1865, p. 314.
" Pearl River Manufacturing Company, *id.*, p. 381.

The legislature of 1866–67 (the last session held before the adoption of the Constitution of 1869) in the charter of the Memphis, Holly Springs and Mobile Railroad Company expressly reserved to the state the power to levy income taxes upon the travel on the railroad (Laws 1866–67, p. 637), and reserved the same power in respect to the New Orleans, Mobile and Chattanooga Railroad Com-

pany (*id.*, p. 344). In the cases of the Bradford Machinery Company (*id.*, p. 473) and the Hashuqua Manufacturing Company (*id.*, p. 712) provisions were inserted declaring that the property and effects of the companies should remain liable to taxation.

E.

STATUTES DISTINGUISHING CITY TAXATION FROM STATE AND COUNTY TAXATION.

In the following statutes the legislature of Mississippi expressly exempted, or authorized the exemption of, corporations from city taxation:

1870. Jackson Street Railway, Laws 1870, p. 560.
1873. Natchez Street Railway, Laws 1873, p. 346.
1874. Corinth Street Railway, Laws 1874, p. 236.
" Pass Christian Street Railway, *id.*, p. 196.
1878. Brandon Street Railroad Company, Laws 1878, p. 487.
1882. Pass Christian City Railroad Company, Laws 1882, p. 821.
" City Railroad of Columbus, *id.*, p. 824.
1884. Mississippi State Fair Association, Laws 1884, p. 829.
" West Point Street Railway Company, *id.*, p. 944.
" Front and Asylum Street Railway Company, *id.*, p. 956.
1886. Hill City Street Railway Company, Laws 1886, p. 235.

In the following instances the exemption was from state and county taxation, leaving the corporations subject to city taxation:

1871. Levee Board, District No. 1, Laws 1871, p. 54.
" Sardis Agricultural and Mechanical Society, *id.*, p. 636.
1884. Helena, Memphis and New Orleans Railroad, Laws 1884, p. 938.
1886. Cooper Normal College, Laws 1886, p. 727.
1888. Montrose High School, Laws 1888, p. 636.
1890. Harper's Baptist College, Laws 1890, p. 564.
" Pleasant Hill High School, *id.*, p. 570.
" Bellefontaine High School, *id.*, p. 574.

In the following acts exemptions were granted from county and municipal taxes:

1888. Deasonville High School, Laws 1888, p. 628.
" Enterprise Street Railway Company, *id.*, p. 518.
" Liberty Male and Female College, *id.*, p. 631.
1890. Pickens High School, Laws 1890, p. 561.
" Saltillo High School, *id.*, p. 577.
" Starkville Street Railway Company, *id.*, p. 660.

The legislature of 1888 saw fit to exempt a hotel in Natchez from payment of county taxes only (Laws 1888, p. 614).

ANNOTATED CODE 1892.

3794a. *Clerk to make copies, etc.* The clerk shall make two fair copies of each roll, and three in counties having two judicial districts, as examined and corrected, if it be corrected, one of which he shall transmit to the auditor of public accounts on or before the first Monday of October following; the other he shall deliver to the tax collector on or before the first day of October, and the original he shall retain and carefully preserve as a public record in his office.

3801. *Collection of taxes.* On receipt of the assessment rolls the collector shall immediately proceed to collect the taxes, adding the county tax due by each person to his state tax, and collecting all together; and it shall be the duty of every person assessed to pay his taxes to the collector on or before the fifteenth day of December.

3802. *Taxes collected by distress.* All taxes remaining unpaid on the fifteenth day of December, shall immediately be collected by the collector, by distress and sale of any personal property liable therefor; and such sale shall take place at the court-house door, unless the property distrained be too cumbrous to be removed; and five days' notice of the time and place of sale shall be given by advertisements put up in three public places in the county, one of which shall be at the court-house door; and the collector shall be allowed to collect and retain in addition to the taxes, all necessary expenses of removing and keeping the property distrained.

Office Supreme Court U.S.
FILED
MAR 18 1901
JAMES H. McKENNEY
Clerk

No. 35.
Appx. to Brx. of Guthrie, Dickins & Mayes & Gale for P. E. (rehear)

MISSISSIPPI TAX CASES.

Filed Mar. 18, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 35.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY ET AL.,
Plaintiffs in error,
vs.
WIRT ADAMS, State Revenue Agent.

In error to the Supreme Court of the State of Mississippi.

OPINION OF THE SUPREME COURT OF THE STATE OF MISSISSIPPI IN WIRT ADAMS, STATE REVENUE AGENT, V. TOMBIGBEE MILLS, DECIDED FEBRUARY 18, 1901.

WIRT ADAMS, State Revenue Agent,

v.

TOMBIGBEE MILLS.

WHITFIELD C. J :—

The appellee was chartered March 27th 1887, under the general statute of this State approved March 9th 1882, entitled " an Act to encourage factories in this State, and to exempt them from taxation", section one of which is as follows :

" SECTION I. Be it enacted by the Legislature of the State of Mississippi, That to encourage the introduction of factories in this State, the machinery used for the manufacture of cotton or woolen goods, yarns or fabrics, composed of these or other materials, or for the making of all kinds of machinery or implements of husbandry, or all other things or articles not prohibited by law, the manufactured goods and the material used therefor, the buildings in which the machinery is located and ground upon which situated or which may be within the necessary enclosure around such buildings, also all ware-houses and other storehouses used exclusively by the company in its business and adjacent to the factory and its enclosures, and also the offices of the officers and employees adjacent to and located on the grounds of such factory, and used by them alone, (but shall not apply to any railroad shops or machine works, which are the property of railroads), and no other property, shall be and is hereby declared to be exempt from all taxation, State, county and municipal, for the period of ten years from the time such factory is completed and in operation ".

It will be carefully noted that this is not a special Act, attempting to grant a special exemption to a particular corporation as was the case in Y. & M. V. R. R. Co. v. Adams, 77 Miss. 194. Nor is it

a statute applicable to all corporations of the same class even, constructing such factories whilst subjecting such factories to be constructed by individuals to taxation. It is a broad general statute, applicable to the particular kind of property specified—cotton factories to be built,—whether owned by corporations or individuals.

In Y. & M. V. R. R. Co. v. Adams 77 Miss. 194, we said:

"Mississippi Mills v. Cook decided that the property of private corporations for pecuniary profit was and should remain subject to taxation. It expressly held that, while an exemption might be granted, yet it might at any time be repealed by the legislature, and further, that no exemption could be granted to any private corporation for pecuniary profit by a special act extending a special exemption to that special corporation alone; but that, in order to make any such exemption valid, it must be extended to all corporations for pecuniary profit of the same class and in the same situation. And the precise exemption asserted in that case was asserted distinctly under the acts of April 1, 1872, and of April 17, 1873, amendatory thereof, set out at pages 42 and 43 of 56 Miss. The Mississippi Mills did not claim that it had a valid exemption by virtue of a special act granting such special exemption to the Mississippi Mills alone but that it had such exemption in common with all other factories similarly situated by virtue of said general law. The exemption set up here under the twenty-first section of the Mobile & Northwestern charter is wholly different. The claim here is that this particular railroad is entitled to this special exemption, which it is conceded is not now, and never was, extended to all other railroads similarly situated in this state. And further, this exemption is irrepealable on its face, and the Mississippi Mills case decided that no irrepealable exemption was constitutional. It is certainly obvious from these considerations alone that Mississippi mills v. Cook is no authority to sustain the exemption set up here. It is further clear that the constitutionality, under the constitution of 1869, of a legislative grant of exemptions to private corporations for pecuniary profit if it embraced all of the same class —the property of individuals being at the same time taxed—was not argued, considered, or decided in Mississippi Mills v. Cook, but was conceded by the attorney general and the judges who wrote the majority opinions. One of the vices of the decision in Mississippi Mills v. Cook is that it did not hold that all the profit was required to be taxed by the terms of the constitution (sections 13, 20, art. 12) just as and when the property of individuals was. Instead of doing

this, the court decided that all such property was free from taxation, unless the legislature expressly subjected it to taxation, even though the property of private individuals was taxed, inverting the rule of the constitution. It was certainly an idle performance to declare, as the court did declare, that the whole effect of the constitutional provision was to render the property of private corporations for pecuniary profit liable to taxation. That every body knew, and to so limit the constitutional declaration was to emasculate it. More than 35 years had intervened between the previous constitution of the state and the constitution of 1869. When that previous constitution was adopted—in 1832—the state was young, and had had little experience with the grasping demands of corporations for grants of exclusive privileges; but the experience of more than 35 years had taught it wisdom in this regard—wisdom learned long prior by older commonwealths like California and Iowa, from the constitution of which latter state the provisions of the constitution of 1869 in question were doubtless borrowed; and so section 13 of article 12 was put in the organic law of the land, beyond the reach of legislative control, for the express purpose of formulating a fundamentally great line of public policy prohibiting any difference in the exercise of the taxing power between the property of individuals and the property of private corporations for pecuniary profit. The court in Mississippi Mills v. Cook 56 Miss. at pages 51, 52, looked too narrowly at the mere word "subject." It should have taken broadly the whole section into view, and deducted from all its terms the meaning of the provision. Judge Campbell in Beck v. Allen 58 Miss. 177, most wisely said: "Subtlety and refinement and astuteness are not admissible to explain away the expression of the sovereign will. The framers of the constitution and the people who adopted it must be understood to have intended the words employed in that sense most likely to arise from them on first reading them." This is the doctrine announced by Cooley and Story, and our construction of the meaning of section 13, to wit, that it required the property of private corporations for pecuniary profit to be taxed just as and when—"the same as"—the property of individuals so that one would not be exempt and the other taxed, is the identical construction placed upon the same words by the supreme court of the United States, of Alabama, Arkansas, California, Florida, and Iowa. We prefer now to distinctly allign ourselves with the supreme court of the United States on this import-

ant question, and over-rule the Mississippi Mills v. Cook in so far as it held that the property of private corporations for pecuniary profit was not, by Const. 1869, art. 12, sections 13, 20, expressly directed to be taxed just as the property of individuals. The decisions of the United States supreme court to which we refer are as follows : " Railroad Co. v. Palmes, 109 U. S. 248, 3 Sup. Ct. 193 ; Railway Co. v. Berry, 113 U. S. 475, 5 Sup. Ct. 529 ; People v. Cook, 148 U. S. 408, 13 Sup. Ct. 645 ; Keokuk & W. R. Co. v. Missouri, 152 U. S. 303, 310-312, 14 Sup. Ct. 592.

"The decisions of the state supreme courts to which we have referred are as follows : City of Davenport v. Chicago R. I. & P. R. Co. 38 Iowa 635 ; People v. McCreery, 34 Cal. 432 ; Fletcher v. Oliver, 25 Ark. 289 ; Palmes v. Railroad Co., 19 Fla. 231 (which collates the constitutions of Wisconsin, Missouri, Illinois, Kansas, Mississippi, Alabama, Arkansas, and Louisiana)."

We then reviewed the facts in that case and added :

" It will thus be clearly seen : (1) That the exemption claimed in Mississippi Mills v. Cook was one claimed under a general law applicable to all the factories in the state of the same class ; whereas, the exemption claimed here, to wit, the twenty-first section of the charter of the Mobile & Northwestern Railroad Company, is an exemption attempted to be granted to this special corporation, and not to all the other railroads in the state,—a special privilege under a special charter to a special corporation. (2) That the Mississippi Mills had established their factory, after the passage of the acts of 1872 and 1873, on the faith of those acts as a rule of property ; whereas, the Louisville, New Orleans & Texas Railroad Company never came into existence, as admitted by counsel for the railroad, until the 12th day of August, 1884, by the consolidation of the Baton Rouge Railroad and the Vicksburg & Memphis Railroad, after the construction of the road had been practically finished in July, 1884. (3) That the exemption claimed in Mississippi Mills v. Cook had no irrepealable feature ; Whereas, the exemption set up under the said twenty-first section is on its face irrepealable, and was so judicially declared to be, in the Lambert Case itself. (4) That the Louisville, New Orleans & Texas Railroad Company claims under charters granted in 1882 and 1884, asserting as its exemption this twenty-first section, the unconstitutionality of which, as violative of section 13 of article 12 of the constitution of 1869, was not only not considered, argued, or decided in Mississippi Mills v. Cook but which, by virtue of its irrepealable feature and its special

grant of an exclusive privilege to a special corporation, would have been condemned by the reasoning of that very case. (5) And not only is it true that the particular exemption claimed here, under this twenty-first section, was not argued or decided in Mississippi Mills v. Cook, but no other decision was ever rendered in this state in which the constitutionality of this twenty-first section was even involved, until McCulloch v. Stone, decided in 1886, four years after the grant of the charter of the Louisville, New Orleans & Texas Railroad Company. (6) From which it necessarily follows that that road was not built on the faith of any decision ever rendered in this state, up to the time of the grant of its charter, which even involved the constitutionality of said twenty-first section, and that the claim that it was organized or built on the faith of such decision, operating as a rule of property, is utterly unfounded and absurd. (7) That the Taylor Case was neither more nor less than a fictitious case, which misled the court by the misstatement of fact that the Vicksburg, Pensacola & Ship Island Railroad, was one of the constituent members of the Louisville, New Orleans & Texas Railroad and its charter was a constituent charter of that railroad, and that the Taylor Case is authority for nothing. (8) That the Lambert Case was decided at the March term, 1893, eleven years after, not before, the grant of the charter of the Louisville, New Orleans & Texas Railroad Company. And it is hence utterly incomprehensible to the legal mind how anybody could invoke that case, under the doctrine of *stare decisis*, as affording a rule of property to a company constructed under a charter granted before it was rendered. Such claim becomes more incomprehensible still when the further fact is recalled that the consolidation of the Louisville, New Orleans & Texas and Yazoo & Mississippi Valley into the present Yazoo & Mississippi Valley Railroad Company took place October 24, 1892, long before the decision in the Lambert Case.

"Let us get out of the realm of idle and reckless assertion into the realm of fact, and inquire more particularly and accurately exactly what was decided, even in the opinion of the court, which went far beyond the record, in Mississippi Mills v. Cook. The vice of that decision is that it looked exclusively to the word "subject" in section 13 art. 12, and failed to give force and effect to the words, "the same as that of individuals." When we say that the court's construction of the word "subject" attributed to it some supposed magical effect, we are simply reiterating the language of Chalmers, J. He said (56 Miss. 69)

"I find no such magic as my colleague in the words, 'shall be subject to taxation the same as that of individuals.' To me they have no meaning other than that which would be conveyed by the equivalent phrase, 'shall be treated or shall be dealt with the same as that of individuals.' This, and many similar phrases which might perhaps be suggested, convey one and the same idea, namely, that the lawgiver, in the imposition of taxes, shall know no difference between the property of individuals and that of corporations for pecuniary profit." The opinion of the court declares as its gist that section 13 was not mandatory upon the legislature to tax the property of private corporations for pecuniary profit whenever the property of individuals was taxed. It distinctly put the property of such private corporations, as to the power to tax them or exempt them, in a class by themselves, distinct from the class of individuals. In other words, it held that, although the property of individuals might be taxed, yet the property of such corporations might be at the same time exempted by the legislature from taxation; provided such exemption extended to all corporations of the same class in the state. We think it is perfectly manifest that the language "the same as the property of individuals", imperatively commanded the legislature, whenever they tax the property of private individuals, to tax also the property of such corporations, and under the same rules of equality and uniformity. It was well said by Campbell, J: that this provision of section 13 "sprang from the experience that corporations were in the habit of asking and obtaining legislative exemption from liability to taxation." 56 Miss. 56. That experience the state has acquired in the 35 years elapsing between the constitution of 1832 and the constitution of 1869, and that experience was wisely availed of to put an end to the grant of exclusive privileges to such corporations. It marked a new era in the history of corporate taxation in this state. It laid down a fundamentally new line of great public policy,—one that will be found essential to the preservation of the rights of the people, as is abundantly attested by the experience of older states dealing with such corporations. It is that feature of the decision, thus holding that this section 13 merely permitted the taxation of such corporations, but did not require that taxation whenever the property of individuals was taxed, and in just the same manner, in all respects, as the property of private individuals was taxed, which we now condemn and overrule. In no other respect do we interfere with the decision in that case. That case decided, that under the

constitution of 1869 the legislature had the power to select for exemption from taxation certain designated kinds of property, such as the agricultural implements of farmers, the tools of the mechanic etc. Such exemption of particular kinds of property, for reasons of public policy, the constitution allowed the legislature to grant, and, when granted, it applied to such property, whether owned by individuals or such corporations. And to permit such exemption was perfectly consistent with holding that said section mandatorily required the legislature to tax the property of such corporations whenever and just as it taxed the property of individuals. The vice of the holding of the court was in disregarding and repudiating the correlation by the constitution of the property of such corporations and the property of private individuals in the same category as to the right to tax and the duty to tax, and in declaring that under that section the legislature might put into operation a scheme of taxation which taxed property of all the private individuals in the state, and at the same time, at the will of the legislature, exempt all property of such corporations from any taxation whatever. The constitution plainly and clearly yoked together indissolubly the property of such corporations and the property of individuals, and subjected both alike to the same taxation, to be imposed under the same rules of equality or uniformity. The legislature might not exempt all the property of private corporations for pecuniary profit, and tax all the property of private individuals, but it might exempt certain selected kinds of property, in pursuance of a wise public policy, whether that property belonged to such corporations or to private individuals.

"One other observation. The case before us most emphatically does not present a claim to exemption under a charter identical with the charter in Mississippi Mills v. Cook, nor the case of any corporation which has acted on the faith of a decision construing a charter identical with the charter in the case of Mississippi Mills v. Cook, and which might thus be said to constitute, for such corporation, acting on it and investing its capital on it, a rule of property. It will be time enough to decide that precise question when that question shall be presented."

A case stronger than that is now before us, in this respect, that this Act of 1882, under which appellee was organized, applies not only to all corporations of the same class, but to the specified property in the hands of individuals or corporations. It does not select certain persons or certain corporations, and seek invidiously

to extend to them special privileges denied to all others. But in furtherance of a great and just public policy, always cherished in this State,—namely, the establishment of cotton factories for the consumption of the product on which our material wealth rests—it did, as under the constitution of 1869 it might do, selected certain kinds of property, whether owned by individuals or corporations, and exempted that selected property from taxation. Manifestly this exemption contained in the said Act of 1882, was valid, and it is clear it has never been repealed and it was not sought to be made irrepealable. This appellee never lost its exemption by consolidating with any other corporation. It has always retained "the precise corporate existence" it originally had. Its exemption was therefore continued by Sec. 181 of the constitution of 1890, subject to legislative repeal. But it has never been repealed. The legislation with respect to railroads, and cotton factories, under this Act as to this matter of exemption, is materially different as to the legislative repeal. Section 182 of the constitution of 1890 expressly authorized exemptions from taxation of manufactories and other new enterprises of public utility, for five years from the date of the charter, in the case of a corporation, and from the commencement of the work in the case of individual enterprises; but no such provision was made for railroads. And section 3744, subdivision (v) of the Code of 1892, passed in pursuance of section 182 of the constitution of 1890, provides for these exemptions as to manufactories of various kinds. Here is both constitutional and legislative recognition of the exemption in this case as still existing. For it would be obviously absurd for the Legislature to enact said subdivision (V) of section 3744, offering this five years exemption to cotton factories for the future, and at the same time repeal the sort of an exemption we have before us here. That would be "keeping the word of promise to the ear, but breaking it to the hope". Individuals and corporations would distrust as to the future if an exemption like this, validly granted, under general law, and on the faith of which appellee has invested its money, should be repealed. But a very different state of case existed as already pointed out, as to the exemption denied in Y. & M. V. R. R. Co. v. Adams 77 Miss 194. There the exemption was void in its origin being a special grant by a special Act, to a special corporation. And that exemption was repealed. It is not at all difficult to see the wisdom of the public policy which makes the discrimination between the exemption here, and that in Y. & M. V. R. R. Co.

v. Adams. Let it be specially noted that the discrimination is pointedly made in this very Act which while exempting the machinery shops &c of factories, expressly says it shall not apply to any Railroad shops or machine works which are the property of railroads.

But it is clear that the real estate assessed at $9000—being the tenement houses of the employees, is not exempt under the Act of 1882. It is not "located on the grounds of said factory".

And it is equally clear that the capital stock of said appellee is not exempt within and under said Act. Section 6 of the charter uses the word "property"—not the Act of 1882. The charter must square with the Act of 1882, the exemption must be such as that Act allows. *Strictissimi juris* is the rule, against the exemption and in favor of the State. The word "property" in the charter must be held to mean such property as is specified in the Act of 1882—the visible property therein named. But there is an agreement in the record that the entire capital stock has been all along invested in the said exempt plant, except $60000 of it, which it is also agreed has been invested all along in the purchase of the raw material, which is also exempted from taxation.

It is not here a question as to the power of the Legislature to exempt such visible property and tax the capital stock. But the question here is what did the Legislature intend to exempt?

We think it is clear that the capital stock should be estimated at its market value, and if that market value exceeds the amount of the capital stock so invested in the exempted plant and raw material,—(that is to say, in this case all the capital stock), the excess of the market value over the amount of capital stock so used to purchase the plant, and the raw material (in this case all the capital stock)—alone should be taxed. That is to say, all that can be taxed here, under the agreement in this record, would be the excess in value, of the market value of the capital stock over its par value. All this is matter of evidence. Clearly this was the legislative intent:—for otherwise the exemption would be one in name merely. To exempt the plant, and yet tax that amount of the capital stock used to purchase the plant, would be to give with one hand, and take back with the other. This is the doctrine of the State v. Simmons, 70 Miss. *supra*, and is thoroughly set forth in Thompson on Corporations vol. 2 sections 2813–2819—see especially section 2813.

For the reasons indicated the judgment is reversed and cause remanded.

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No. 756. 24pp

Office Supreme Court, U. S.
FILED
APR 5 1899
JAMES H. McKENNEY,
Clerk.

Brief of Beckett for D. E. (mo.)

In the Supreme Court of the United States.

NO. 756

Filed April 5, 1899.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, AND ILLINOIS CENTRAL RAILROAD COMPANY,

Plaintiff in Error

versus

WIRT ADAMS, STATE REVENUE AGENT,

Defendant in Error.

Error to the Supreme Court of the State of Mississippi.

MOTION TO DISMISS OR AFFIRM, AND BRIEF OF ARGUMENT.

R. C. BECKETT,

Attorney for Defendant in Error.

Baltimore & Hatcher, Printers, [illegible] Fayette St.

5596

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD CO., AND THE ILLINOIS CENTRAL RAILROAD CO.,

PLAINTIFFS IN ERROR.

versus

WIRT ADAMS, STATE REVENUE AGENT,

DEFENDANT IN ERROR.

Error from the Supreme Court of the State of Mississippi.

NOTICE ON MOTION TO DISMISS OR AFFIRM.

To MR. EDWARD MAYES, *Counsel for Plaintiffs in Error:*

Please take notice that on Monday, the 24th day of April, A. D. 1899, at the opening of the Court, or as soon thereafter as counsel can be heard, the motions of which the attached are copies, will be submitted to the Supreme Court of the United States, for the decision of said Court thereon. Annexed hereto also is a copy of the brief of argument to be submitted with the said motions in support thereof. And accompanying is the special record and all the opinions of the Supreme Court of Mississippi.

R. C. BECKETT,

Counsel for Defendants in Error for the Purposes of These Motions.

UNITED STATES OF AMERICA,

CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

Before me, L. B. Moseley, Clerk of the said Circuit Court of the United States for the Southern District of Mississippi, this day personally appeared, Wirt Adams, the defendant in error in the above

styled cause, and being by me duly sworn deposes and on oath says that he this day served the foregoing notice, with the annexed motions and brief of argument, and accompanying opinions and special record on Mr. Edward Mayes, the counsel of record for the plaintiffs in error, by delivering to him in hand and in person a true copy of said notice, motions and brief of argument, opinions and special record.

Sworn to and subscribed before me this the ——— day of April, A. D. 1899, as witness my hand and the seal of said Court.

In the Supreme Court of the United States.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD CO., AND THE ILLINOIS CENTRAL RAILROAD CO.,

PLAINTIFFS IN ERROR.

versus

WIRT ADAMS, STATE REVENUE AGENT,

DEFENDANT IN ERROR.

Error from the Supreme Court of the State of Mississippi.

MOTION TO DISMISS OR AFFIRM.

Now comes the defendant in error, Wirt Adams, State Revenue Agent, by his counsel, appearing in that behalf, and moves the Court to dismiss the above entitled cause for want of jurisdiction in the Supreme Court of the United States to review the same, in that:—

1. No Federal question was raised or attempted to be raised in the State Courts until after the decision and judgment of the State Supreme Court of Mississippi on the first appeal to that Court, and then for the first time in the suggestion of errors, and the action of the Circuit Court below after the mandate was sent down to that Court in striking from the files the additional pleas attempted to be filed at its July, 1898, term after the Supreme Court had settled the principles of the cause, and long after the pleading terms of all the cases had expired, and out of time, raises no Federal question.
2. The action of the defendants, plaintiffs in error here, in withdrawing all their pleas on file and permitting judgment *nil dicit* to go against them, when and because the Circuit Court struck from the files their said additional pleas attempting to set up a Federal question, was an admission that they had no defense on the facts of the case, and deprived them of any right to insist on a Federal question.

3. The petition for removal of the case from the State Circuit Court to the United States Circuit Court does not present any Federal question, and was not made until after the case had been tried in the State Supreme Court, reversed and remanded, and long after the appearance terms of each and all of the cases, and overruling the same, raises no Federal question.

4. No Federal question is mentioned or relied on by the plaintiff, anywhere, and under repeated decisions of this Court that it cannot be raised by the defendants, their attempt to thus raise such a question and use it as a basis to secure a removal to the United States Circuit Court presents no Federal question.

5. The charters of the two railroad companies which by consolidation formed the present Yazoo & Mississippi Valley Railroad Company, one of the plaintiffs in error, to-wit; that of the original Yazoo & Mississippi Valley Railroad Company was granted by the Legislature of the State of Mississippi on February 17th, 1882 (Acts 1882, p. 838), and that of the Louisville, New Orleans & Texas Railway Company by the Act of March 15th, 1884 (Acts of 1884, p. 936), amendatory of the Act of March 3d, 1882 (Acts 1882, p. 1011), after the Mississippi Constitution of December 1st, 1869, had been adopted, and had been construed in the year 1878 by the Mississippi Supreme Court in the case of Mississippi Mills vs. Cook, 56 Miss. Rep., p. 40, to prohibit the Legislature from granting irrepealable exemptions from taxation, and the decision of the said Supreme Court of Mississippi on the first appeal that section five of the charter of said Louisville, New Orleans & Texas Railway Company, under which the exemption is claimed in this case, is in conflict with Sections 13 and 20, Article 12, of said Mississippi Constitution and void, because it is in terms irrepealable raises no Federal question.

6. The decision of said Supreme Court on said first appeal, under the facts above stated, that said alleged exemption, if it existed was lost by and in the consolidation of October 24, 1892, between the said original Yazoo & Mississippi Valley Railroad Company and Louisville, New Orleans & Texas Railway Company raises no Federal question.

7. The decision of said Supreme Court on said first appeal, under said facts, that Section 180 of the Mississippi Constitution of November 1st, 1890, prevented said alleged exemption, if it existed, from passing into said consolidation of October 24th, 1892, raises no Federal question.

8. The decision of said Supreme Court under the facts above

stated that the exemption claimed in this case was repealed by the laws of Mississippi, the same being a repealable exemption raises no Federal question.

9. The action of the Circuit Court in refusing a continuance on account of the absence of alleged leading counsel, and in overruling the objections of the defendants to a trial at the July, 1898, term of the Court are matters of State practice and raise no Federal question.

10. The said Wirt Adams, State Revenue Agent, sues for the use of the State of Mississippi, and of the counties therein, of De Soto, Tunica, Coahoma, Bolivar, Washington, Sharkey, Issaquena, Warren, Claiborne, Jefferson, Franklin, Amite, Wilkinson, Tallahatchie, and Leflore, and of the towns of Tunica, Lula, Ciahoma, Clarksdale, Jonestown, Frier's Point, Shelby, Cleveland, Shaws, Rosedale, Gunnison, Leland, Hollandale, Rolling Fork, Vicksburg, Port Gibson, Russum, Harriston, Hamburg, Roxie, Knoxville, Gloster and Centerville, and neither said State, nor any of said counties, or towns are named or made parties to the citation of writ of error.

11. The sheriffs and tax collectors of said fifteen counties, to-wit: W. H. Rollins, T. O. King, R. N. Harris, G. P. Melchior, J. L. Griffin, H. J. Wright, A. N. Smith, J. M. A. Brennan, N. S. Walker, L. W. Caradine, R. S. Butler, D. M. Butler, C. H. Neyland, C. H. Fonda, W. C. George, and ex-Tax Collector J. L. Sullivan were all made parties to the first declaration under Annotated Code of 1892, section 4200, the same sheriffs and tax collectors to the second declaration, the same except Williams Griffin and Charles Kennard, instead of J. L. Griffin and N. S. Walker to the third declaration, and W. S. Wissinger, F. L. Hope, F. B. Fitzgerald, R. M. Edwards, J. B. Hebron, C. H. Walton, R. W. Smith, Dan N. Hebron, R. C. McCay, C. C. Coffey, J. P. Jones, J. B. Turnispeed, J. M. Sessions, J. H. Sullivan and J. B. Humphries to the fourth and fifth declarations, and yet none of them are named in or made parties to the cita- or made parties to the citation or writ of error.

12. The Mississippi State railroad assessors, composed of J. F. Sessions, Walter McLaurin and J. H. Askew, were each made parties to the first, second and third declarations, under said section 4200 of the Annotated Code, and said State railroad assessors composed of J. J. Evans, J. D. McGinnis and M. M. Evans were each so made parties to the fourth and fifth declarations, and yet none of them are named in or made parties to the citation or writ of error.

No Federal question is raised in this case.

14. No Federal question was raised at the proper time, nor in the appropriate way.

15. There are non-Federal questions decided, which are sufficient to sustain the judgment, without reference or regard to any alleged Federal question.

And the said defendant in error by counsel as aforesaid also moves the Court to affirm the said judgment from which said writ of error purports to have been taken, because although the record in said cause may show that this Court has jurisdiction in the premises, yet it is manifest that said writ of error was obtained for delay only.

R. C. BECKETT,

Counsel for Defendant in Error for the Purposes of These Motions.

In the Supreme Court of the United States.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY AND ILLINOIS CENTRAL RAILROAD COMPANY,

PLAINTIFFS IN ERROR.

versus

WIRT ADAMS, STATE REVENUE AGENT,

DEFENDANT IN ERROR.

Error from the Supreme Court of the State of Mississippi.

STATEMENT AND BRIEF FOR DEFENDANT IN ERROR ON THE MOTION TO DISMISS OR AFFIRM.

STATEMENT.

We will state generally that this is a consolidated suit embracing five separate suits, one for the taxes of 1892, one for those of 1893 and 1894 combined, one for those of 1895, one for those of 1896, and the last for the taxes of 1897, on what was formerly the property of the Louisville, New Orleans & Texas Railway Company, claimed in the declarations to be the property of the defendants, the present plaintiff in error. 2, 7 0, 9 9. 6 11, 6 2 2

The first three suits were consolidated and tried together under a consent order at the July, 1896, term of the Circuit Court of Hinds County, Mississippi.

Special Record, pp. 55-56.

There was a verdict and judgment in favor of the plaintiff for the taxes of 1895, and in favor of the defendants for the taxes of 1892, 1893 and 1894.

Special Record, pp. 68-70.

Both sides appealed to the State Supreme Court, the plaintiff as appellant and the defendants as cross-appellants. The Mississippi Annotated Code of 1892 provides that "writs of error as heretofore used are abolished; and all cases, civil and criminal, at law and in chancery, shall be taken to the Supreme Court as herein provided, and shall be dealt with by said Court without regard to the manner of removing the cases to such Court." Sec. 31.

Section 147 of the Constitution (Annotated Code of 1892, bottom page 65), provides that "no judgment or decree in any Chancery or Circuit Court rendered in a civil case shall be reversed or annulled on the ground of want of jurisdiction to render said judgment or decree, from any error or mistake as to whether the cause in which it was rendered was of equity or common law jurisdiction."

Section 3747 of the Annotated Code of 1892 makes all taxes lawfully levied "a debt due by the person or corporation owning the property or doing the business, * * * and may be recovered by action," and Section 3746 makes the taxes "entitled to preference over all judgments, executions, incumbrances or liens whensoever created" * * * and this is a re-enactment of Section 470 of the Code of 1880.

We make these citations to show that where no objection is made in the trial Court, it is immaterial under the Mississippi practice whether the suit should have been brought in the Court of law or equity proper.

On June 20th, 1898, the Supreme Court reversed the case both on the appeal and cross-appeal, on account of the compromise verdict of the jury in dividing the years on substantially the same evidence, and after settling the principles involved in the pleadings, it was remanded, and disposed of again in the Circuit Court at its June, 1898, term in favor of the plaintiff, and from a judgment in the Supreme Court on February 20th, 1899, on the second appeal, affirming the action of the Circuit Court this writ of error is prosecuted.

The present Yazoo & Mississippi Valley Railroad Company was formed from a number of railroad companies, as follows:

The Memphis & Vicksburg and Natchez & Jackson Railroad Companies were chartered by the Legislature of Mississippi in 1870, at first without any exemption from taxation, but at the same ses-

sion an exemption was given to the Mobile & Northwestern Railroad Company, by what is now generally known as the 21st section of the Mobile & Northwestern Railroad Company charter, and this 21st section was by a general bunching act extended to several other railroads by name, including said above named two railroad companies, but not to all the railroads chartered at that session.

There was an act passed on March 3d, 1882, authorizing the said Memphis & Vicksburg Railroad Company and a Mississippi Valley & Ship Island Railroad Company to consolidate and form one company, and the charters of the two companies were made a part of the charter of the consolidated company, and by the 5th section of the act the 21st section of said Mobile & Northwestern Railroad charter was made a part of the act.

The said Mississippi Valley & Ship Island Railroad Company did not go into the consolidation, and on March 15th, 1884, an amendatory act was passed authorizing any other railroad company to take the place of the Mississippi Valley & Ship Island Railroad Company, and under said act, on August 12th, 1884, the said Louisville, New Orleans & Texas Railway Company was formed by a consolidation of the said Memphis & Vicksburg Railroad Company with the New Orleans, Baton Rouge, Vicksburg & Memphis Railroad Company, together with a Louisiana Company and a Tennessee Company.

This New Orleans, Baton Rouge, Vicksburg & Memphis Railroad Company was chartered on March 9th, 1882.

On February 19th, 1890, an act was passed allowing the Natchez, Jackson & Columbus Railroad Company to sell its railroad together with all rights, privileges, franchises and "immunities," and in March, 1890, it was sold under this act to said Louisville, New Orleans & Texas Railway Company.

The original Yazoo & Mississippi Valley Railroad Company was chartered on February 17th, 1882, and on October 24th, 1892, a consolidation or merger was consummated between the said Yazoo & Mississippi Valley Railroad Company and said Louisville, New Orleans & Texas Railway Company under the name of the present Yazoo & Mississippi Valley Railroad Company, one of the plaintiffs in error.

In December, 1892, there was an injunction sued out by said

Natchez, Jackson & Columbus Railroad Company against the sheriff of Adams County alone, to prevent the collection of State and county taxes on that railroad in that county, and the Supreme Court at its spring term on May 8th, 1893, sustained this injunction and held that property was not liable for taxation for that year.

In December, 1893, the State revenue agent commenced bringing these suits for the taxes on the original property of the said Louisville, New Orleans & Texas Railway Company, shown in the declarations to be the main line, Riverside Division, and Helena, Bayou Sara and Tallahatchie Branches, but not including any part of this Natchez, Jackson & Columbus Railroad. The original name of Natchez & Jackson had been changed to Natchez, Jackson & Columbus Railroad Company as shown in what is known as the Lambert Case in 70 Miss., cited below.

M. & V.R. R. Co. Charter, Acts 1870, p. 316; p. 8 Special Record.

N. & J. R. R. Co. Charter, Acts 1870, p. 221.

Acts extending 21st Section, Acts 1870, p. 327; Special Record, pp. 8-10.

The 21st Section, Acts 1870, pp. 268-269; Special Record, pp. 9-10.

Acts Authorizing L., N. O. & T. Ry. Co., Acts 1882, p. 1011 and Acts 1884, p. 936; Special Record, pp. 10-13.

Consolidation deed August 12, 1884; Special Record, p. 1.

N. O. B. R. V & M. R. R. Co. Charter, Acts 1882, p. 920; Special Record, p. 10.

Y. & M. V. R. R. Co. Charter, Acts 1882; p. 838; Special Record, p. 12.

Consolidation deed Y. & M. V. R. R. Co., Special Record, pp. 3-6.

Act Authorizing Sale N. J. & C. R. R., Acts 1890, p. 675.

N. J. & C. R. R. Co. vs. Lambert, 70 Miss. 779.

Declarations, as to what property involved, Special Record, p. 14.

In these consolidated causes the Supreme Court of Mississippi decided five things:

1st. That the Legislature could not grant an exemption to a railroad company by name as such under said Constitution of 1869.

2d. That it could not grant an irrepealable exemption under said Constitution.

3d. That a new company was formed by the consolidation of October 24th, 1892, and no exemption passed into it.

4th. That if the consolidation was a technical merger, still section 180 of the Constitution of 1890 prevented any exemption from passing into it.

5th. That any alleged exemption was repealed by the acts of 1884, 1886 and 1890.

See Opinions of June 20th, and November 22d, 1898.

See also Special Record, pp. 124-127. 3 Mull Rec p 513 & 63

No provision of the Federal Constitution was anywhere mentioned or relied on *till after this decision*, and since that time the defendants have in their suggestion of errors, petition to remove to the Federal Court, additional pleas, and in their assignment of errors on the second appeal assailed *this decision* as violative of section 10, Art. 1, and the 14th Amendment to the Constitution of the United States.

To save repetition the other material facts are omitted here, but will be narrated in the brief under the various grounds of the motion to dismiss, to which they are applicable.

The material parts of the Constitutions, laws and charters involved, including the exemption claim, known as the 21st section of the Mobile & Northwestern Railroad Company charter, are printed in the Special Record, pages 7-13, and the deed of consolidation of October 24th, 1892, is on pages 3-6.

While the consolidated case for the taxes of 1892, 1893 and 1894, and 1895 was pending in the Supreme Court, two other suits had been brought for the taxes of 1896 and 1897 respectively, and on the return of the case to the Circuit Court these two suits were also by a consent order consolidated with that, and they all proceeded under the Circuit Court, No. 2788, which was the number of the first suit.

Special Record, pp. 117-118.

BRIEF ON MOTION.

FIRST GROUND.

This is substantially the same as the 14th ground, that no Federal question was raised at the proper time or in the appropriate way, ex-

cept that it suggests in detail why this is so. There are, among others, three reasons why this ground is well taken.

1st. No Federal question was at any time raised or attempted to be raised until after the decision in the Supreme Court, on June 20th 1898, and then for the first time in the suggestion of errors, which under the Supreme Court, rule 10 (see 70 Miss., p. XXIII.), is used in practice instead of a petition for rehearing. It is as follows: "The Court will, at any time during the term at which a judgment is rendered, consider a written suggestion of error of law or fact therein, and will take such action as may seem proper."

We have printed the whole record of the pleadings up to that point in order to show that there was no attempt whatever to raise a Federal question until then. That was too late.

Miller vs. Cornwall, 168 U. S. 133-135.

Pim vs St. Louis, 165 U. S., 273.

Sayward vs. Denny, 158 U. S., 180.

Morrison vs. Watson, 154 U. S., 111.

Miller vs. Texas, 153 U. S., 535.

Loeber vs. Schroeder, 149 U. S., 580.

Bushnell vs. Crooke, 148 U. S., 682.

Schuyler vs. Bolling, 150 U. S., 85.

Powell vs. Brunswick, 150 U. S., 433.

2nd. This is a writ of error from a second appeal to the State Supreme Court, and in Mississippi as in this Court, and we suppose generally in Courts of last resort, the rule is that what has been examined and decided or could have been examined and decided on the first appeal is *res adjudicata* and cannot be re-examined on a second appeal unless it is left open by the decision.

McKinney vs. State, 117 Ind., 27-28.

Bridgeforth vs. Gray, 39 Miss., 136.

Henderson vs. Winchester, 31 Miss., 290.

Stewart vs. Stebbins, 30 Miss., 66.

Smith vs. Elder, 14 S. & M. (Miss.), 100; 13 S. & M., 138 and 445.

Supervisors vs. Kennicut, 94 U. S., 498.

The Lady Pike, 96 U. S., 461.

Sizer vs. Many, 16 How., 98.

Great Western vs. Burnham, 162 U. S., 343-344.

The plaintiffs in error may attempt to rely on the last case just cited of Great Western, etc., vs. Burnham, which leaves it open as to whether this Court will notice a Federal question on a second appeal that was not raised on the first appeal.

162 U. S., 340-341, 343-346.

But the decision refers to another exactly in point in this case, where the writ of error was dismissed, N. Pac. R. R. Co. vs. Ellis, 144 U. S. 458. 162 U. S., 344-345.

And in a later case it is held that a Federal question cannot be raised for the first time after the principles of the case have been settled by the Supreme Court, and the case reversed and remanded.

Union, etc., vs. Kirchoff, 169 U. S., 103.

This would follow logically from the ruling that the question cannot be raised for the first time on a petition for rehearing, for if it was raised in the petition for rehearing and overruled, it would overturn the established principles of *res adjudicata* to hold that it could then be raised in the inferior Court, which has no authority to overrule the Supreme Court. As we understand the rule to be deduced from these cases in 144 U. S., 162 U. S., and 169 U. S., it is this: That in order for a party to lay the proper foundation to obtain a review of his case in this Court, he must claim the right at the proper time and in the appropriate way, and that then the State Court cannot deprive him of it, if he does not abandon it himself. While the writ of error only brings up the proceedings since the first appeal *for review*, it does bring up *the record of the whole case*, and this Court on opening that record will determine first, whether the party has claimed the right at the proper time and in the appropriate way before judgment in the first appeal, and second, whether he has accepted the decision of the Supreme Court and abandoned his claim either by active or silent acquiescence, or whether he has still insisted on and retained it. It is due the State Courts that they should know at all times that the Federal question is being reserved and that it is the paramount question, which must control all others. This Court does not countenance experimenting.

Rosenthal vs. Coates, 148 U. S., 147-148.

L. & N. R. R. Co. vs. Louisville, 166 U. S., 709.

3rd. After the cause was remitted to the Circuit Court the defendants attempted to file certain "additional pleas," setting up for the first time their so-called Federal questions. These pleas attacked *the decision of the Supreme Court* and presented no Federal question, as we will endeavor to show under the argument on the 5th, 6th, 7th and 8th grounds of the motion. As to being deprived of their property without due process of law, the record shows that they were noted for their much-speaking, being heard twice in the Circuit Court and *five times* in the Supreme Court.

For additional pleas, Special Record, p. 145.

We will only deal here with questions of practice.

As shown in the bill of exceptions no leave was ever asked to file these pleas, and this was one of the grounds of the motion to strike them out, except the 2nd pleas on which plaintiff took issue.

Special Record, p. 186.

The pleading and regular trial terms had long since passed, and the cause was called peremptorily for trial. It is an unfailing rule that if a party wishes to file pleas out of time he must present them with his application so that the Court may judge whether they are such pleadings as ought to be filed.

Hunt vs. Walker, 40 Miss., 590.

18 Am. & Eng. Enc. Law, p. 505 and n. 5.

If this is not done the pleadings will be stricken out on motion.

Pool vs. Hill, 44 Miss., 306.

It is true the defendants could either on the hearing of the motion or afterwards ask leave to file them, *but this was never done.*

Pfeifer vs. Chamberlain, 52 Miss., 90-91.

If the Court should refuse to strike out, it is equivalent to leave to file, but striking them out cannot be assigned for error, for that would destroy the rule and pleading terms and give a party a right to file any kind of pleas, *sine die*, and *nolens volens.*

And even if leave had been asked to file them, it was a matter of discretion with the trial Court, and pertains to the State practice and modes of proceedure and raises no Federal question.

Stevens vs. Nichols, 157 U. S., 370-371.

Mexican Nat. R. R. Co. vs. Pinckney, 149 U. S., 199-201.

Long Island vs. Brooklyn, 166 U. S., 688.

Iowa Central vs. Iowa, 160 U. S., 389.
Hagar vs. California, 154 U. S., 639.
Sheets vs. Selden, 7 Wall., 416.
Wright vs. Hollingsworth, 1 Pet., 165.
Chirac vs. Reineker, 11 Wheat., 280.
Walden vs. Craig, 9 Wheat., 576.
Belleville vs. Cox, 109 N. Ca., 265.
Agne vs. Seitsinger, 104 Iowa, 485-486.

Of course the trial terms of the first three cases had been long past, for they had been to the Supreme Court. In the last two cases the writs were served in December, 1896, and December, 1897, and were returnable to the January, 1897, and January, 1898, terms respectively, as shown by certified copies of the writs which are filed and copied in Special Record, pp. 26-31.

These writs are not in the Supreme Court record, for the reason that under the State practice such writs are not included unless by request of a party to the suit, under Supreme Court Rule 3 (70 Miss., p. XX.), which provides that "A transcript shall not contain any part of the case except the pleadings, evidence, instructions, bills of exceptions and the order, judgment or decree appealed from, unless the appellant shall by writing, request other matters specified to be embraced in the transcript, a copy of which request shall be annexed to the transcript."

The Annotated Code of 1892 provides that "The defendant shall plead on or before the first day of the term to which the process is returnable, or within such other time as the Court by rule or otherwise shall allow;" "at the appearance term."

Pool vs. Hill, 44 Miss., 306, section 722, Code of 1892.

And "The summons in actions in the Circuit Court shall be made returnable on the first day of the term, and shall be executed five days before the return day thereof;" ib. Sec. 3417.

And in regard to suits by the revenue agent, "Such suits may be tried at the return term and shall take precedence of other suits." ib. Sec. 4194.

The Courts were held as follows: "In the County of Hinds, first district, second Monday of January and July, twenty-four days." ib. Sec. 626.

This was amended by the act of February 5th, 1898 (Acts of 1898, p. 72), to read as follows: "In the County of Hinds, first district, second Monday of January, twenty-four days; and third Monday of June, eighteen days," with the usual provision making all antecedent matters disposable of at these terms. This was after the appearance and trial terms of these cases.

Section 156 of the present Constitution (Annotated Code of 1892, bottom p. 66) provides that "The Circuit Court shall have original jurisdiction in all matters civil and criminal in this State not vested by this Constitution in some other Court,"

Hence the presumption is that its orders and judgments are correct, including the order striking out these pleas, and especially as the defendants did not *in writing*, or otherwise request these writs to be included in the Supreme Court record, but we have had certified copies of the writs made to show *affirmatively* that the attempt to file the pleas was too late.

We do not wish to claim a right to a judgment by default in these last two cases, for we now admit that there was a verbal understanding that these two cases were to take the same course as the previous cases, and this agreement was carried out in the order of consolidation. Special Record, pp. 117-118

What we do claim is that the striking out of these "additional pleas," because attempted to be filed out of time, and without leave of the Court, was not only right, but was a matter of State practice and procedure, which is not reviewable by this Court.

And besides, it is the proper practice to strike out pleas which attempt to set up points which have been settled adversely on appeal.

Agne vs. Seitsinger, 104 Iowa, 485-486.

And in the opinion of the State Supreme Court on the last appeal, rendered February 20th, 1899, they say "the futility of that sort of pleading needs no comment." Trial Rec p. 685

Another ground of the motion to strike out was that these pleas were very voluminous, stuffed with long and immaterial recitals, and rendered the true issue indefinite and uncertain, and the statute expressly authorized the striking out of such pleas. In common law Courts the rules of pleading require the issue to be reduced to a certain and definite point, in order that juries, who are not sup-

posed to be learned in the law, may have some intelligent idea of what they are trying. No ordinary jury could form the least conception of the precise issue they were called on to try in these pleas, whether the question was when the State was admitted into the Union, or when the treaty of Dancing Rabbit Creek was made, or whether the Supreme Court should be reversed, or many other useless and immaterial issues. The Code provides that if any pleading is so prolix or so framed as to hinder, embarrass or delay a fair trial on the merits, or so that the precise issue is rendered indefinite and uncertain, it may be stricken out on motion and this is the case here, and presents no Federal question.

Annotated Code, 1892, Sec. 704.

SECOND GROUND OF MOTION.

Withdrawal of Pleas, and Permitting Judgment "Nil Dicit."

There are three sets of these withdrawn pleas:—

1st. A Separate plea of the I. C. R. R. Co. to the first declaration, denying the alleged purchase of the L., N. O. & T. R. R., and a separate plea of the Y. & M. V. R. R. Co., claiming the benefit of the 5th section of its charter being a re-enactment of said 21st section of the charter of the M. & N. W. R. R. Co., reciting the consolidation of October 24th, 1892, and alleging in detail that the railroad companies had delivered the affidavits required in said 21st section, and received the tax collectors' receipts, and had never been able to pay the 8 per cent. dividend on capital stock, and denying the alleged purchase of the L., N. O. & T. R. R. by the I. C. R. R. Co.

2nd. A joint plea by the Y. & M. V. R. R. Co. and I. C. R. R. Co., setting up the same things.

3rd. A separate plea each numbered 2 of the "additional pleas," setting up the same things. Special Record, pp. 32, 33, 35, 145.

To these pleas, except the first of the I. C. R. R. Co. which concluded to the country, the plaintiff filed six replications to which demurrers were overruled. They were substantially as follows:—

1st. A denial that the L., N. O. & T. R. R. was not purchased by the I. C. R. R. Co., as alleged.

2nd. A denial that the profits had not been sufficient to pay the 8 per cent. dividend.

3rd. A denial that the taxes had been applied to the construction debts.

9th. Alleges that the proper cost of the road was not more than $4,000,000, and that the L., N. O. & T. Ry. Co. had issued $13,805,000 of four per cent. bonds, $8,731,000 of five per cent. bonds, and $8,374,000 of six per cent. bonds, and divided the proceeds except what was required to construct the road among the officers and stockholders, and that it was impossible to trace the proper construction debt or to tell what rate of interest it bears, which is a waiver of any pretended exemption.

10th. Alleges that the L. N. O. & T. Ry. Co. issued 48.242 shares of stock and disposed of the same for little or no consideration to its incorporators and others to make them stockholders; that the charter did not authorize the issuance of paid-up stock without consideration, and that the profits were sufficient to pay the dividend of 8 per cent. upon the full amount paid or agreed to be paid for the stock.

11th. Alleges that the I. C. R. R. Co. had paid off by novation with its own bonds all the construction debts and liabilities of said L. N. O. & T. Ry. Co., and the profits were more than sufficient to pay the 8 per cent. dividend on the stock.

14th. Alleges that all the railroads and branches of said L. N. O. & T. Ry. Co., except the main line and Tallahatchie Branch were acquired by purchase and did not come under the exemptive protection in the L. N. O. & T. charter.

Special Record, pp. 39-46 for these replications.

After the Court had striken out the "additional pleas" the defendants withdrew all their pleas on file and left these replications standing.

Special Record, p. 187, for withdrawal.

The verbal excuse made by them, which does not appear in the record, was that it gave the plaintiff undue advantage. That he was willing to go to trial on the facts of the case, and if he could secure a verdict in his favor well and good, but if it was adverse to him, he would then move for a judgment on the plea *non obstante veredicto*.

But this was an advantage which he had fairly gained by the

decision of the Supreme Court. In their opinion of November 22nd, 1898, pages 31, 32 and 33, they say there is evidence going to show that the railroad was not built by the L. N. O. & T. Ry. Co., and also that there is proof in the record that it had been able to pay this 8 per cent. dividend ever since the year 1888.

This Court has decided that it cannot review questions of fact even where a Federal question is involved, and the decision of the questions of fact raised by the pleas and replications would not even have involved a Federal question, but simply whether the railroad company had complied with its charter in matters *in pais*.

Egan vs. Hart, 165 U. S. 188.

Are the defendants then in any position to confess and abandon these facts and boldly ask this Court to take jurisdiction of a case which they themselves confess that they cannot sustain on the facts?

Was it not their duty to have gone on and tried the case on the facts, and if they succeeded, then the Federal question, if there was one, would have been *necessarily involved*, and that is essential to give this Court jurisdiction. As it stands, a Federal question is not and cannot be *neccssarily* involved, because the defendants stand before this Court in default or mute on the facts.

THIRD AND FOURTH GROUNDS.

Petition to remove to the Federal Court. Special Record, pp. 118-133.

This petition was filed after the case had gone to the Supreme Court and they had settled the principles of the case, and reversed and remanded it, and long after the appearance and regular trial terms of all the cases, and is so manifestly unwarrantable as to raise the presumption that the defendants did not expect it to be treated seriously, but were merely using it as a lever in a desperate attempt to lift themselves into this Court from the Supreme Court of the State. But in answer to such attempts this Court has said:

"Further, to sustain this removal would certainly violate the spirit of the removal acts, which do not contemplate that a party may experiment on his case in the State Court, and upon an adverse decision, then transfer it to the Federal Court. Here, Rosenthal has

gone through the State trial and appellate Courts, and his rights have been finally declared by the Supreme Court of the State; and though as yet no formal decree has been entered in the trial Court, it is none the less true that he has experimented with the State Courts and been beaten and now seeks a different forum."

Rosenthal vs. Coates, 148 U. S. 147, 148.

There are three reasons why the removal should not have been allowed, and several why this Court should not take jurisdiction.

1st. It was not asked for at the appearance terms. This is essential.

Fox vs. So. Ry. Co., 80 Fed. Rep. 945.

Fisk vs. Henarie, 142 U. S. 459.

K. C. R. R. Co. vs. Daughtry, 138 U. S. 303.

Martin vs. Balt. & O. R. R. Co., 151 U. S. 673.

2nd. Because the Federal question must appear from the plaintiff's own statement of his claim, and cannot be raised by the defendant in his petition for removal. Cases exactly in point are:

Penn vs. Union & P. Bank, 152 U. S. 454.

Chappell vs. Waterworth, 155 U. S. 102.

Postal Tel. Co. vs. Ala., 155 U. S. 487.

East Lake vs. Brown, 155 U. S. 488.

Mex. Nat. R. R. Co. vs. Davidson, 157 U. S. 201-208.

Oregon vs. Skottmore, 162 U. S. 490.

Oregon vs. Mullen, 162 U. S. 498.

Oregon vs. Conlin, 162 U. S. 498.

Walker vs. Collins, 167 U. S. 57.

Galveston vs. Texas, 170 U. S. 226. & 303. 171. US. 685

Right here we wish to press on the attention of this Court this idea, viz.:

We think this Court in its conservatism does not give that importance to its decisions in these matters to which they are justly entitled. It is a co-ordinate department of the government and as such entitled to as much consideration as any other.

When they decide that a certain state of case will not support a removal that is certainly the law of that case, and it ought to be *the* law of every other case occupying that identical status until it is modified or reversed. Of course it will not be the law of any case

occupying a different status, and it ought not to be considered settled if the decision is by a divided Court. But we contend that when dissenting opinions have disappeared, and it has become the settled rule of the Court, it then has all the authority of absolute law, and a case brought here in defiance of that rule should not be affirmed, but dismissed for want of jurisdiction, because the Court having settled the law that it is not removable, that eliminates from it the *color* of a Federal question of which it before lacked only the *essence*. In the steady sunlight of the rule the shadow vanishes.

3rd. No Federal question is raised in the pettition for removal.

We will argue this point under the 5th, 6th, 7th and 8th grounds of the motion as they deal with the rulings of the Supreme Court which constitute the grievances complained of in the suggestion of errors, in this petition for removal, and the "additional pleas."

What we wish to call the attention of the Court to here is, that there must be color for a real and not a fictitious, or *factitious* Federal question. The pleader cannot *create* a Federal question by any system of pleading.

N. O. vs. N. O. Wat. Wks. Co., 142 U. S. 87, 88.

Wilson vs. North Carolina, 169 U. S. 595.

St. Joseph vs. Steele, 167 U. S. 662.

Clark vs. McDade, 165 U. S. 172.

Hamblin vs. Western, 147 U. S. 532.

And that the striking out of, or refusing a manifestly defective petition for removal raises no Federal question.

Penna. Co. vs. Bender, 148 U. S. 255.

Wilson vs. N. Ca., 169 U. S. 595.

It was said by the Chief Justice in Millingar vs. Hartupee, 6 Wall. 258, that "If a right were claimed under a treaty or statute and on looking into the record, it should appear that no such treaty or statute existed, or was in force, it could hardly be insisted that this Court could review the decision of a State Court that the right claimed did not exist."

N. O. vs. N. O. Wat. Wks. Co., 142 U. S. 87, 88.

In this case there is no statute *"in existence or in force"* which justified a petition for removal of this case after *"the appearance term."*

As said by this Court in the last case cited above, if it were "otherwise a Federal question might be set up in almost any case, and the jurisdiction of this Court invoked simply for the purpose of delay." If six months, why not six years, or sixty years, or after final judgment? Where will the limit be fixed? And delay is plainly the purpose here. The petition is filed after the appearance term, raised no Federal question, and is not a removable case, if it did, under repeated decisions of this Court, and there could have been no reasonable expectation of its being granted.

Another idea occurs here. We think if there ever was any Federal question presented by the refusal of this petition, it was waived and lost by the judgment *nil dicit*.

We do not contend that if a petition for removal is refused, the petitioner cannot say nothing further, and let judgment go against him, nor that he cannot go on with his case, and in either event save the benefit of his application.

But in this case the defendants did neither, and we do contend that when they did not remain silent, but took further steps in the case, and then in writing made a voluntary withdrawal of their pleas on file, and abandoned the case, they abandoned it for all purposes not saved in the written withdrawal. They did not simply stand back and let judgment go on their pleas, but actively withdrew the pleas, which was an actual abandonment of the case, and they did not save and reserve any right to afterwards insist on their petition for removal. See the withdrawal.

Special Record, p. 187.

This is a peculiar case, and we wish to make our meaning plain. For instance, a party can plead the statute of limitations, payment, and the statute of frauds. Now if the Court should overrule or strike out his plea of payment, or any of the other pleas, we do not contend that he could not withdraw the remaining pleas, which, perhaps, he could not prove, and still reserve and test his right to insist on the overruled or stricken out plea, because that would be an independent and complete defense within and of itself to the suit.

But in this case the pleas withdrawn contain the basic principle of any and all other pleas whatever. Any plea relying on the laws of this State, or the United States, or any other law, which did not as a

condition precedent allege a compliance with these requirements of the charter would be fatally defective on demurrer.

Hence when the defendants withdrew the pleas containing these defenses, although they had been set up in separate pleas, they cut out the roots of their case and left the branches to wither.

FIFTH GROUND.

That the alleged exemption is unconstitutional because in terms *irrepealable.*

For the first opinion of Supreme Court, Special R. 124-127.

While the Supreme Court of Mississippi in one of its holdings did decide that under sections 13 and 20, Art 12 of the Constitution of 1869, exemptions could not be granted to corporations as a class, while individuals were taxed (see their full opinion, pp. 19-23), and while that was within the scope of the case, still it was not strictly necessary to a decision of this particular case, and hence is not reviewable here, and we omit any argument on it, although that part of the decision is the chief stock in trade of the defendants. Full Rec p 660-66

The alleged exemption in this case purports on its face to be irrepealable, "and which agreement is irrepealable."

For this 21st section see Special Record, pp. 9, 10.

The exemption in Miss. Mills vs. Cook was not to a single corporation, but to "all manufacturing companies" of a certain class, equally and uniformly, and while it is very similar in other respects to this 21st section now in controversy, it totally omits the words above quoted, "and which agreement is irrepealable."

56 Miss. 42.

That case did decide in the words of Judge Campbell on page 53, "The Constitution says it shall be subject to taxation the same as that of individuals; and the legislative act, whether it be a charter or other form of law, which says it shall be exempt and not subject to taxation, is in conflict with the Consttution;" * * * * and in the words of Chief Justice Simrall on page 62, "If the exemption is granted in the form of a contract in the charter, that is prohibited."

That decision was rendered at the April, 1878 term, and the charter of the L. N. O. & T. Ry. Co. now in controversy, was

authorized long afterwards on March 15th, 1884 (Acts of 1884, p. 936), by an act amending the act of March 3rd, 1882 (Acts 1882 p. 1011.)

Special Record, pp. 1 and 10-13.

It is not claimed by the plaintiffs in error anywhere that their alleged exemption was ever repealed, or attempted to be repealed by the legislature. But they claim that the *decision of the Supreme Court* violates Section 10 Article 1, and the 14th amendment of the Constitution of the United States. The Supreme Court held that this exemption being in terms irrepealable was manifestly unconstitutional even under the construction in said Miss. Mills Case.

See their opinion, pp. 19, 20. Duer R. p 514. 559-560.

This presents no Federal question. It has often been held by this Court that the decisions of the State Courts construing their own antecedent laws, or Constitution, or overruling their former opinions present no Federal question. That the Constitution of the United States only guards against a *subsequent law*, and not the decisions of the Courts. The distinction between both classes was made clear in the first case cited below.

Central Land Co. vs. Laidley, 159 U. S. 109-112.

Turner vs. Wilkes Co., No. 642 in this Court, decided March 20th, 1899.

Miller vs. Cornwall, 168 U. S. 134.

Adams Exp. Co. vs. Ohio, 165 U. S. 219.

Hansford vs. Davis, 163 U. S. 278, 279.

Winona vs. Minn., 159 U. S. 528, 529.

Hagar vs. California, 154 U. S. 639.

Wood vs. Brady, 150 U. S. 20-23.

Huntington vs. Athill, 146 U. S. 684.

Brown vs. Smart, 145 U. S. 454-458.

N. O. vs. N. O. W. W. Co., 142 U. S. 87, 88

St. Paul vs. Todd, 142 U. S. 286, 287.

N. O. vs. La. Sug. Co., 125 U. S. 18-30.

Lehigh vs. Easton, 121 U. S. 388-392.

N. J. C. R. R. Co. vs. Mills, 113 U. S. 256, 257.

Boyd vs. Ala., 94 U. S. 645.

R. R. Tax Cases, 92 U. S. 575

R. R. Co. vs. McClure, 10 Wall. 511-515.

R. R. Co. vs. Brock, 4 Wall., 177.

SIXTH GROUND.

That the alleged exemption was lost in and by the consolidation of October 24th, 1892.

Summary opinion, Special R. pp. 124-127.

The present Yazoo & Mississippi Valley Railroad Company (Y. & M. V. R. R. Co.) was formed on October 24th, 1892, by a consolidation of the original Yazoo & Mississippi Valley R. R. Co. with the Louisville, New Orleans & Texas Railway Company (L. N. O. & T. Ry. Co.) and said L. N. O. & T. Ry. Co., was formed on August 12th, 1884, by a consolidation between the Memphis & Vicksburg Railroad Company (M. & V. R. R. Co.) and the New Orleans, Baton Rouge, Vicksburg & Memphis Railroad Company (N. O. B. R. V. & M. R. R. Co.) for which charters and deeds of consolidation, see

Special Record, pp. 1-13.

There are two phases to this question, one of law and the other of fact.

1st. As there is no *subsequent law* after October 24th, 1892, which is claimed to effect this consolidation or exemption in any way, it is clear that the decision of the State Court that the effect of the statutes under which the consolidation was made was to create a new corporation and that the alleged exemption did not pass to the consolidated company is merely a construction by the State Court of its own local laws, and raises no Federal question under the authorities cited under the previous ground. See also in addition—

Long Island vs. Brooklyn, 166 U. S. 688.

Iowa Centr. vs. Iowa, 160 U. S. 389.

See the admirable argument of the Supreme Court on the effect of this consolidation in their opinion of November 22, 1898, p. 1-19. Full Rec p. 638-659

In that opinion, pp. 16-19, the Court decide that the case of N. J. & C. R. R. Co. vs. Lambert, 70 Miss. 779, known as the Lambert Case, is not *res adjudicata* as contended by plaintiffs in error and besides overrule it. That presents no Federal question. The decis-

ions of the State Courts as to the effect of their own decisions raises no Federal question.

Phoenix Ins. Co. vs. Tenn., 161 U. S., 184-186.

California vs. Holliday, 159 U. S. 415-417.

Newport vs. Newport, 151 U. S. 527-538.

In re. Woods, 143 U. S. 202-206.

San Francisco vs. Itsell, 133 U. S. 65.

It could not be *res adjudicata* because it was not pleaded or offered in evidence.

See above opinion, pp. 16, 17. Trans Rec p. 656

21 Am. and Eng. Enc. Law, pp. 258, 259, and N. 1.

So. Pac. R. R. Co. vs. U. S., 168 U. S. 2, 55-60. U.S. vs Bliss 172 U.S. 326

And the rule is that a judgment concludes not only everything which was, but everything that might have been pleaded or offered in evidence, and this rule extends to and embraces a prior judgment, which if not pleaded or offered in evidence as *res adjudicata* or an estoppel, is itself overturned, concluded and annulled by the later judgment of June 20th, 1898.

1st. Van Fleet Former Adj., pp. 90, 91.

Freeman on Judgments, Section 332.

Even if the Lambert Case had been pleaded or offered in evidence, as it was a *different railroad*, and different charter, it would not only have not been *res adjudicata*, but not even *controlling authority*, as *stare decisis* or otherwise.

Wilmington vs. Alsbrook, 146 U. S. 279-302.

But as shown above neither the doctrine of *res adjudicata* nor *stare decisis* raises any Federal question in this Court.

Central Land Co. vs. Laidley, 159 U. S. 109-112.

Phœnix Ins. Co. vs. Tenn., 161 U. S. 184-186.

See also Wood vs. Brady, 150 U. S. 20-23.

2nd. The Supreme Court also found as a fact that what was actually done, as shown by the evidence, was the creation of a new corporation. Trans Rec. p. 515. &

See their opinion of November 22nd, 1898, pages 5-8. 643 - 647

That was the finding of a fact within the competence of the Court, and its findings of fact raises no Federal question and is not subject to review.

Egan vs. Hart, 165 U. S. 188.
Israel vs. Arthur, 152 U. S. 361, 362.
Dower vs. Richards, 151 U. S. 663-672.
Backus vs. Font Street, 169 U. S. 563.

SEVENTH GROUND.

That Section 180 of the Constitution of November 1st, 1890, prevented any exemption from passing into the consolidation of October 24th, 1892.

Summary opinion, Special R. 124-127.

It will be noticed that this consolidation occurred nearly two years *after* the adoption of this Constitution.

Under this head the Supreme Court decide—

First—That a new corporation was formed and said Section 180 prevented an exemption from passing into it on the authority, among many other cases cited, of L. & N. R. R. Co. vs. Palmes, 109 U. S. 248.

St. Louis vs. Berry, 113 U. S. 475.
Schurz vs. Cook, 148 U. S. 408.
Keokuk vs. Mo., 152 U. S. 303, 310-312.
See their opinion, pp. 1-23. Fuller R. p. 638-655

Second—That even if the effect of the consolidation in this case were a technical merger, and not consolidation, that still said Section 180 would prevent the exemption from passing, for the reason that the Constitution was adopted *before* the consolidation, and the authority to consolidate is not a vested right, but a mere license, which may be withdrawn or modified at any time before it is availed of on the authority of

Pearsall vs. G. N. R. R. Co., 161 U. S. 667.
L. & N. R. R. Co. vs. Ky., 161 U. S. 695.
Keokuk vs. Mo., 152 U. S. 312.
6 Am. and Eng. Enc. Law (2nd Ed.), p. 802.
See their opinion, pp. 1 and 9-15. Fuller R. p 513. 638. 648-655
See also Galveston vs. Texas, 170 U. S. 226-240.
Bank vs. Tenn., 163 U. S. 424, 425.

So that under neither of the foregoing views is any Federal question involved.

The first proceeds on general principles of the construction of exemption laws, under repeated decisions of this and all other Courts, that an exemption from taxation is not to be implied, and that before it will pass into a consolidation the legislative intent to that effect must be clearly shown, quoting the opinion of Mr. Justice Peckham, in Phœnix Ins. Co. vs. Tennessee, 161 U. S. p. 178, that "Mere silence is the same as a denial of the exemption."

See their opinion, p. 11. Trial Rep. 650

And the second view proceeds on the ground that as an authority to consolidate is a mere license, that it will be subject to the laws in force at the time it is made, and neither of these views raise any Federal question. Under the last view the only question is, does the effect of said Section 180 prevent the exemption from passing, and this is a construction of the State Constitution by the Supreme Court of the State, and involves no Federal question in that the authority to consolidate is not a right, which before its exercise can be impaired, but a mere amendable or revocable license.

It is certainly a novel excuse set up in the petition to remove and in the additional pleas, that the defendants did not expect the Court to decide as it did, and that hence they are deprived of their property without due process of law, and that this is the first opportunity they have had to plead it. To plead what? Their surprise?

It is a very painful feeling to suddenly lose confidence in the judgment or sanity of the judges, but it is a very common thing for the Courts to decide cases, and for the lawyers and litigants on one side or the other "not to expect the Court to decide as it did," in fact we might almost venture to say it is inevitable, at least quite common, and arises naturally from the practical application of the quaint principle that it is very unwise for a Supreme Court to decide on both sides of the same question at the same time, though they sometimes do at different times.

But the pleadings show that the defendants had full notice that these points were being made and pressed, from the inception of the litigation. One of the grounds of the demurrer to their plea, which recited in detail a full compliance with the requirements of this 21st section, was that "said plea is no defense."

The 5th and 6th replications to this plea claimed that the exemp-

tion was lost in the consolidation and cut off by the Constitution of 1890.

The charges asked by plaintiff to the jury were among others a peremptory instruction, and specific charges on the effect of the consolidation; among the errors assigned in the motion for a new trial was the overruling of these contentions, and so among plaintiffs assignments of errors in the Supreme Court; and the points were all made in the brief of plaintiff in the Supreme Court, so that these points were openly and continuously pressed, and it is idle for defendants now to claim any surprise, or that they never had any opportunity to plead Section 10, Article 1, or the 14th Amendment of the Constitution of the United States. They must plead it at the *proper time* and in the *appropriate way*. Without intending to dictate, suppose they, after setting up the exemption and reciting a full compliance with the 21st section as they did, and the consolidation as they did, had just before the formal close of the plea, added something like this; "and having fully complied with the requirements of its charter in that behalf, the said defendants insist that it is a contract protected by Section 10, Article 1, of the Constitution of the United States, and that to deprive them of it now would not only violate that provision, but also the 14th Amendment to the said Constitution, because it would deprive them of their property without due process of law," would not that have been *at the proper time and in the appropriate way?*

For these demurrers, replications, charges, and assignment of errors, etc., see

Special Record, pp. 35-55, 61-64, 71, 97, and our original brief, on file, pp. 16, 17, 25-41.

EIGHTH GROUND.

That the alleged exemption was repealed by the Acts of 1884, 1886 and 1890. Nothing is said about this by the Supreme Court in the summary of their holdings delivered on June 20th, 1898, but it closes by saying "there are other views leading to the same conclusion which we may embrace in the opinion yet to be filed."

See first opinion, pp. 124-127. Duell R. p. 515.

They did not file this full opinion till November 22nd, 1898.

In the meantime, in July, 1898, the case had been again tried in the Circuit Court on this "summary," or rather the proceedings, were under it, for there was no trial.

A motion was made to strike this full opinion from the files because it contained this *new ground*.

The proper motion would have been to strike the new ground *out of the opinion*, and not to strike out the whole opinion. This motion was overruled. See opinion overruling the same. Trans. R. p. 678

But the Court in its opinion of February 20th, 1899, in the last appeal, say that as it was put in after the trial, it could not possibly have had any influence *on the trial*, and was therefore *absque injuria*, as the judgment was sustainable on the other grounds without this one.

See their last opinion. Trans. Rec. p. 687

Hence under the settled rule of this Court, that if the judgment can be sustained on any of the other grounds, this would not confer jurisdiction, even if it were "without due process of law."

But the defendants did have the chance to make this point *on the second appeal*, and as shown by the last opinion of the Court *they did make it*, devoted almost their entire argument to it, and the Court did then re-affirm it, after they had had an opportunity to be heard, and were heard, and they said nothing about the United States Constitution. Trans. Rec. p. 685-687

This settles the question that the legislature had a right to repeal it.

But this raises no Federal question, for the reason that the charter was granted by the Amendatory Act of March 15th, 1884, after the decision in the Mississippi Mills Case, 56 Miss., p. 40, in 1878, holding that all exemptions were *repealable*. The defendants are estopped to set up any contention about its being "an irrevocable appropriation of taxes," because they accept the charter under the construction in said Miss. Mills Case holding a substantially identical "appropriation of taxes" to be an exemption and *repealable*.

56 Miss. p. 42.

Before the Federal Constitution can be invoked it must *in limine* be shown that there is such a contract as is subject to impairment.

N. O. vs. N. O. Wat. Wks. Co., 142 U. S. 87, 88.

St. Joseph vs. Steele, 167 U. S. 662.

And it can raise no color of a Federal question for the legislature to repeal a *repealable exemption*, and much less for a State Court to construe its own laws where no Federal question could be involved in a construction either *pro* or *con*.

This is not in conflict with the case of Yazoo & Miss. Valley R. R. Co. vs. Thomas, 132 U. S. 174. In that case, p. 182, it was claimed that the exemption of the original Y. & M. V. R. R. Co., not this one, was a contract "irrevocable and protected by the contract clause of the Constitution of the United States; that the unwarranted application of the general laws subsequently passed, etc., is equivalent to a direct repeal of the charter exemption."

This Court, no doubt having in mind their own decisions at that time of Louisville vs. Palmes, 109 U. S. 248, and St. Louis vs. Berry, 113 U. S. 475, holding exemptions under similar constitutions void and illegal, significantly started off their opinion, p. 184, with the remark, "That the Supreme Court of Mississippi did not put its decisions upon the ground that it was not competent under the State Constitution for the State to contract with the company, that the latter should not be subjected to taxation."

If it had there would clearly have been no Federal question, but only the construction of an antecedent Constitution.

And on page 188 they say "it is agreed that the property could not be taxed until the period of exemption, whatever that is, shall have expired."

The question there was whether the exemption commenced from the date of the charter as contended on one side, or only from the time when the railroad was completed to the Mississippi river, as contended on the other, and when "it was agreed" that the exemption was a valid contract, it clearly raised a Federal question, for if the State should undertake to tax it on the theory that it was not exempt till completed to the Mississippi River, when under a legal and proper construction of the contract it was exempt from the date of the charter, such action would violate the obligation of the contract, and hence this Court was forced to decide whether the admitted exemption should commence at the one time or the other.

But in the case at bar, the State Supreme Court have decided the identical question left undecided in the above case that an irrepealable exemption was unconstitutional and void, and they show further that at the time this charter was granted on March 15th, 1884, it had been determined in the Miss. Mills Case, in 56 Miss. 40 that all exemptions were repealable, and hence a repeal could not impair the contract of exemption if any existed.

NINTH GROUND.

Under this ground we will notice two questions of practice.

1st. The jurisdiction of the Circuit Court commencing its term on June 20th, 1898, to try a case reversed and remanded to it from the Supreme Court on that day, the mandate being filed July 4th, 1898, and the case being reached and called for trial on July 4th, 1898.

2nd. The refusal to continue the case on account of the absence of alleged leading counsel.

The persistence with which the defendants have raised a multitude of Banquo's ghosts in this case, *since the Supreme Court's decision*, and named them Sections 10, Article 1, and the 14th Amendments, is utterly amazing and bewildering.

As to the point that the Circuit Court had no right to try at the June term, 1898, the affidavit of F. A. Critz shows that the defendants had due notice that the case would be called at the time it was called, and that there was an agreement, that if the case should be tried the testimony already in the record should be used to save the expense.

Special Record, pp. 142, 143.

And the record and proceedings show that the defendants' counsel were promptly on hand, but not chafing for the fray. The Circuit Court decided that it did have jurisdiction to proceed, and this was affirmed by the Supreme Court in the opinion of February 20th, 1899, and is conclusive on this Court, and not subject to review. This Court has no authority or inclination to prescribe the times and places of holding the State Courts. True Rec. p. 685-686

They say "the plaintiff did appear before the board, and was

heard by its counsel and through its officers, and the construction placed by the Supreme Court of the State on the act—a construction which is conclusive in this Court—is that the railroad companies are given the right to be present and to be heard."

Pittsburgh vs. Backus, 154 U. S. 426.

And as to the point that the failure to continue on account of the absence of leading counsel, etc., deprived the defendants of their property, without due process of law, the said affidavit of F. A. Critz, and the record also showed that Mr. Mayes, who was then present in Court, conducting the proceedings, had always prepared and filed all the pleadings and proceedings, and had personally been in the control and conduct of the case. Besides this affidavit, the record shows that the litigation has been close and prolonged, and that as a matter of fact it was argued three times before the Supreme Court, being twice remanded to the docket for that purpose, and that in allof these matters Mr. Mayes appeared for the defendants. It was also shown in said affidavit that there was an agreement, if the case was tried, to use the evidence already on hand.

Special Record, pp. 100, 101, 142, 143.

It is clear that if the absent counsel had been present they could not have legally induced the Circuit Court to overrule the Supreme Court, and it had been previously decided, both in this Court and in the State Court, that the absence of "favorite counsel" is no cause for continuance, under such circumstances.

Garnett vs. Kirkman, 41 Miss. 97-99.

Means vs. Bank of Randall, 146 U. S. 629.

We feel that it is a useless consumption of the time of this Court to dwell long enough to establish a residence on these questions.

These matters of practice in the State Courts raise no Federal question.

Hagar vs. California, 154 U. S. 639.

Lambert vs. Barrett, 159 U. S. 662, 663.

Iowa Cent. vs. Iowa, 160 U. S. 389.

Long Island vs. Brooklyn, 166 U. S. 685-688.

Besides bills of exception were taken in the Circuit Court to its action in all of these matters, and it was never intimated to that Court that its course would violate any provision of the Constitution of the United States.

All the questions raised related entirely to the State practice, and a Federal question cannot now be injected into it for the first time in the assignment of errors.

Special Record, pp. 115, 136, 143.

TENTH GROUND.

The State counties and towns not made parties.

Special R. p. 24.

It is true the statute, Annotated Code, of 1892, Section 4194, requires the Revenue Agent to sue in his own name, but "for the use of the State, counties and towns interested," and it also provides that "he shall not be liable for costs, and may appeal without bond," and we submit to this Court whether under this provision they can make the Revenue Agent liable for costs, or whether they will not have to have the real usees before them, so as to tax them with the costs, in case the judgment should be for the defendants in error. In other words whether, as the State has provided, that the Revenue Agent shall not be liable for costs, whether this Court can violate that statute, or whether their proper course would not be to render judgment for costs against the real litigants.

If the proper parties are not made, either under this or the next two succeeding heads, the proper course is to dismiss.

Wilson vs. Kiesel, 164 U. S. 251, 252.

ELEVENTH AND TWELFTH GROUNDS.

That the Railroad Assessors and tax collectors are not made parties, as required by section 4200 of said Annotated Code of 1892.

Have they not an interest in showing that they have not been in "wilful default," if this Court should take jurisdiction? And in sustaining this judgment? This section 4200 is as follows:

"In all suits against delinquent taxpayers, the assessor and tax collector shall be made parties; and if it shall appear that the failure of the tax payer to properly pay his taxes, was caused by any wilful default or negligence of the assessor or tax collector, judgment shall be rendered against the defaulter or defaulters for the amount of the compensation of the Revenue Agent."

Special R. pp. 25, 26.

THIRTEENTH, FOURTEENTH AND FIFTEENTH GROUNDS.

These are merely general grounds, and intended to cover any point that may suggest itself to the Court, which we have not touched on. In questions of jurisdiction this Court will notice *sua sponte* any vital point shown in the record.

If either the 10th, 11th or 12th ground is good, the case will be dismissed.

If the 3rd and 4th grounds relating to the petition for removal are good, then if either the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, or 8th ground is good a dismissal will follow, on the ground that if the decision of the State Court is based on any ground not involving a Federal question, the case will be dismissed, although there are other grounds which do raise such a question, or questions.

Hence we ask a dismissal for want of jurisdiction.

MOTION TO AFFIRM.

If this Court should be of opinion that the petition for removal, or any other claim set up in this cause, does raise a sufficient color of a Federal question to prevent an absolute dismissal, then we ask the Court to affirm, with damages for delay, under the authorities in this Court, that a motion to dismiss or affirm, when it appears that there is color for the motion to dismiss, and the contention of plaintiffs in error has often been determined adversely, the motion to affirm should be granted.

Sire vs. Ellithorpe, 137 U. S. 579.

The S. C. Tryon, 105 U. S. 267.

Hinkley vs. Morton, 103 U. S. 764.

St. Louis vs. Montana, 171 U. S. 650.

R. C. BECKETT.

Attorney for Defendant in Error.

N. 756 Ex. 2444 55 5614

OPINIONS OF THE SUPREME COURT OF MISSISSIPPI

App^r. to Brief of Beckett for Appellees (mo.)

Supreme Court of the United States,

OCTOBER TERM 1898.

Office Supreme Court U. S.
FILED
APR 5 1899
JAMES H. McKENNEY,
Clerk.

Filed April 5, 1899

No. 756

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, AND ILLINOIS CENTRAL RAILROAD COMPANY

PLAINTIFFS IN ERROR

VS.

WIRT ADAMS, STATE REVENUE AGENT

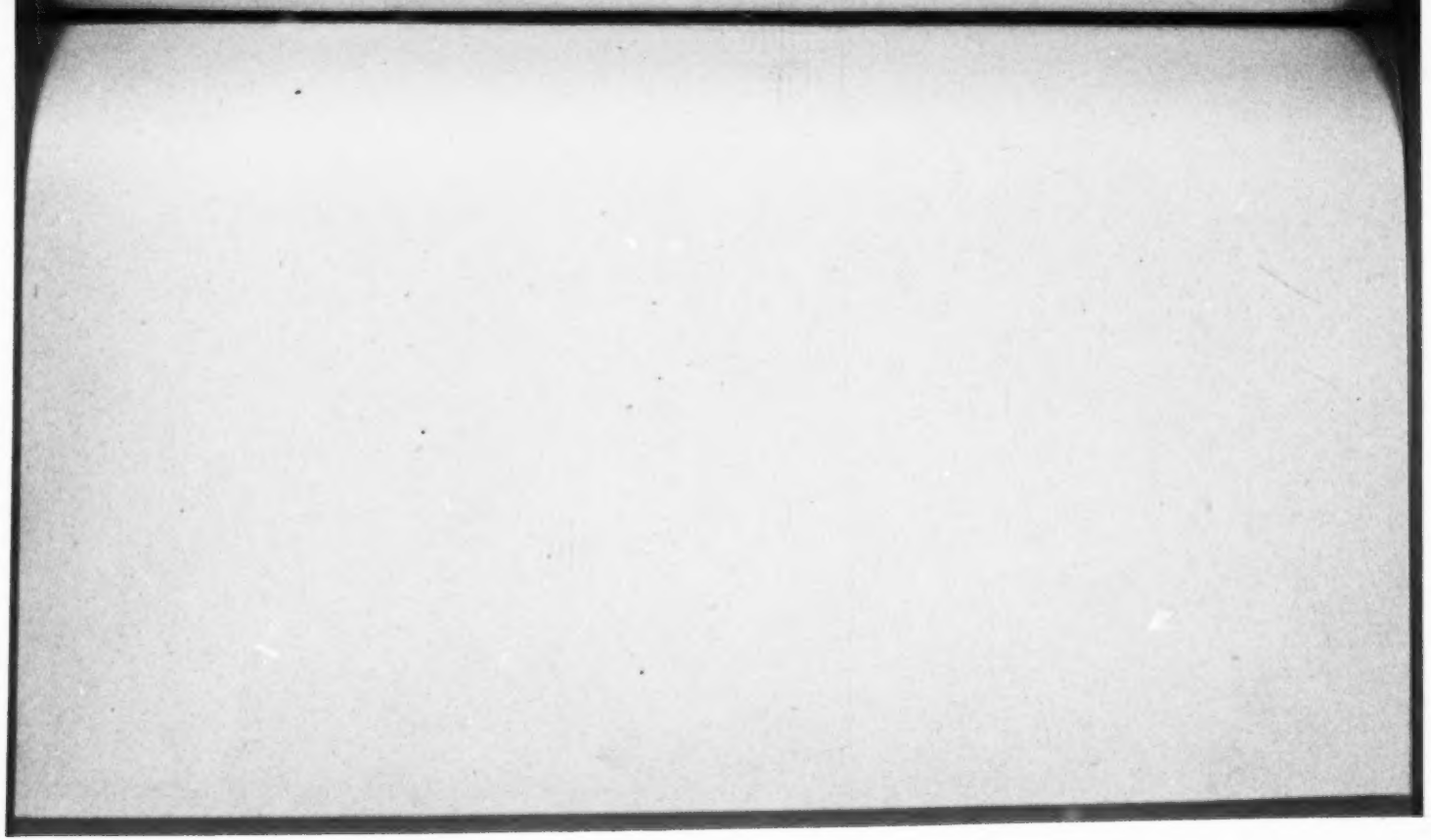
DEFENDANT IN ERROR

IN ERROR TO THE SUPREME COURT OF MISSISSIPPI.

ON MOTION TO DISMISS OR AFFIRM.

R. C. BECKETT,

Atty. for Appellees.



1.

SUMMARY OF COURT.

JUNE 20TH, 1898.

POOR COPY

8629. WIRT ADAMS, REV. AGT. v. V. & M. V. R. R. CO., ET AL.

Circuit Court, Hinds County; Robert Powell, Judge.

J. A. P. Campbell and Critz & Beckett for appellant; Mayes & Harris for appellees.

SUMMARY OF THE COURT'S HOLDINGS.

WHITFIELD, J. First. Because of the inconsistent, compromise verdict, the judgment is reversed, and cause remanded, on the appeal and the cross-appeal.

Second. The Lambert case is res adjudicata as to the taxes for the year 1892 on all the property that originally belonged to the N. J. & Columbus R. R. Co., which was in Adams county, and being res adjudicata, it is, as to that, beyond our power to over-rule it.

Third. The Lambert case is not res adjudicata as to any of the other taxes here involved, on the property that once belonged to the N. J. & Columbus R. R. Co., or on any of the other property here involved.

Fourth. The Lambert case did decide that §180 of the constitution of 1890, did not cut off the exemption from taxation asserted in this case, on the ground that this is a case of mere merger, and not of consolidation; that the resultant corporation was not a new corporation, and applied the principles of Whitworth v. Tennessee, 117 U. S.—which, is beyond

all controversy—a clear case of simple merger, and not of consolidation, taking merger proper to mean the absorption of one corporation, by another, the autonomy of the absorbing corporation being preserved, without the formation of a new company, and consolidation proper to mean such union of two corporations as results in a third new corporation, under whatever name. We hold that the clear Legislative purpose was—(using the words in the sense indicated)—*consolidation, and not merger*, yet consolidation in such sense as to result in the formation of a new corporation; and besides, that what was *actually* done here was necessarily the creation of a new corporation, and not mere merger; that, hence, the principles of the Whitworth case do not apply, but the principles of Keokuk v. Mo. 152 U. S. do apply; that, consequently the constitution of 1890, §180, cut off the exemption; that the Lambert case can not be upheld, and should be, and is hereby overruled. If it be conceded that the purpose aimed at by the articles of agreement of the R. R. Co. was mere merger, it is not to be permitted that the Co. could overthrow the purpose of the Legislature to authorize consolidation and not merger, nor to NAME THAT, merger, which the actual things done show, was consolidation. Consolidation is a privilege, to be exercised or not—not a contract. §181 of the constitution, and §279 of the schedule thereto, merely mean that so long as corporations existing at the adoption of the constitution having *then* exemptions, or other "rights," should have them "continue," so long as such corporations retained the *precise corporate existence they then had*. The new corporation here, takes its life as from a new grant of corporate life from the date of the consolidation.

But we hold further, that the 21st section of the Mobile & Northwestern R. R. Co.'s charter was an effort to secure—as is expressly recited in its face—an irrepealable grant of exemption, and violative of the constitution of 1869, §13, art. 12, and §20, art. 12, even as construed in Miss. Mills v. Cook, 56 Miss. The exemption claimed in Miss. Mills v. Cook HAD NO IRREPEALABLE feature.

But again, we hold, that such section violated said clauses of said constitution, even had it not been irrepealable. Miss. Mills v. Cook, turned upon some supposed magical distinction in the particular connection, between the words "SUBJECT" and "SUBJECTED," and sacrificed a great constitutional principle to a piece of mere verbal jugglery. Precisely the SAME clause, using precisely the SAME word "SUBJECT" occurs in the constitutions of Florida and Arkansas and the supreme courts of both States held, in precisely identical contention, that the clause forbade exemption from taxation of "corporations for pecuniary profit," and both of these decisions were on this identical proposition, affirmed by the U. S. supreme court. St. Louis &c. v. Berry, 41 Ark. 509, 113 U. S. 475; and L. & N. R. R. Co. v. Palmes, 19 Fla. 231 and 109 U. S. 253-254. And this construction is reaffirmed in Keokuk, &c. v. Missouri, 152 U. S. 310-311. The word "subject" should have been given its plain, popular signification, occurring in the connection it did, in a great popular instrument—the constitution—the very signification attached to it by the supreme court of the United States. We prefer to align ourselves now with that court in this matter, and overrule Miss. Mills v. Cook on that point.

It passes all understanding how the court could gravely hold, in Miss. Mills v. Cook, that a solemn declaration in the constitution of a State—its organic law — formulating FUNDAMENTALLY GREAT LINES OF PUBLIC POLICY—that "the property of all corporations for pecuniary profit" should be subject to taxation *the same as that of individuals*, added no new feature, but merely stated what was the law before and without the declaration, to-wit: that the "property of corporations for pecuniary profit" was *liable* to taxation. All the world knew that before!

Judge Campbell, in his dissenting opinion, in Beck v. Allen, 58 Miss., at p. 177, most wisely said: "Subtilty and refinement and astuteness are not admissible to explain away an expression of the sovereign will. The framers of the constitution, and the people who adopted it, must be understood to have intended the words employed in that sense most likely to arise from them on FIRST READING THEM." Doubtless the rule of stare decisis is a wise rule, and one not lightly to be infringed. But instances justifying its disregard find manifold illustration in the reports. And surely, stronger reasons for not applying it can never arise than, where, as here, to disregard it, restores to the sovereign the exercise of one of the highest attributes of sovereignty—the taxing power, and merely requires that corporations for pecuniary profit, constantly demanding and securing the protection of the government, shall also bear their just share of the burdens of taxation. We feel, therefore, confident of the propriety of over ruling, as we now expressly do—the Lambert case, and the case of Cook v. Miss Mills, supra. There are other views leading to the same conclusion, which we may embrace in the opinion yet to be filed. What we have said, is a mere summary of the holdings set forth.

Reversed and remanded.

WOODS, C. J. dissents and submits this mere outline of the grounds of his dissent. His dissenting opinion will be filed after the opinion of the majority of the court shall have been prepared and filed.

1. The decision of this court in the case of Natchez, Jackson and Columbus Railroad Co. v. James W. Lambert, tax-collector, 70 Miss., is *res adjudicata* as to the taxes sought to be recovered on the property of the N., J. and C. Rd. Co. for the years 1891-2. My brethren admit that that decision is *res adjudicata* as to the property of the railroad in the county of Adams. How they distinguish between the property in Adams county and that in the other counties through which the line of that railroad runs, is utterly incomprehensible. The question in the case was not whether the railroad's property in Adams county was exempt from taxation, but whether all the property of that railroad was liable for taxes.

2. The decision in the Lambert case is *res adjudicata* as to claim now propounded by the State for taxes on all the property of the N., J. and C. Railroad for the subsequent years 1893, 1894 and 1895. The parties to the former litigation and those to the present are the same, the issue—the question—is the same, the exemption or non-exemption of that railroad from taxation, and under all authorities in such case, a prior judgment is *res adjudicata*, and is a good defense to a second suit. But this very question was determined, in perfect accord with the foregoing view, by the supreme court of the United States in the case of New Orleans v. Citizens' Bank, 167 U. S. 571. No opinion of any court of last resort holding a contrary view has been unearthed by anyone after most exhaustive search.

3. As to the property, other than that of the Natchez, Jackson and Columbus Railroad, for which exemption is claimed in this suit, the sound doctrine of *stare decisis* is of striking application, under the decision of the Lambert case. That decision established a rule of property, and under the view entertained by my brethren, that rule is utterly disregarded, the rights of the defendant thereunder denied any recognition, and its property deliberately burdened in an enormous sum.

4. It may well be contended that, as to *all* the property of the Yazoo and Mississippi Valley railroad, for which exemption is claimed, the Lambert decision is *res adjudicata*. The parties in the Lambert suit and this are the same, and the issues the same. The questions in the Lambert case were, has the consolidation by merger of the L. N. O., and T., with the V. and M. V. Rd. (the N., J. & C., having been theretofore absorbed by the L., N. O. and T., by pur-

chase) destroyed the exemption claimed by the L., N. O. and T. railroad on its property; and was that exemption conferred by the charter valid, or violative of the constitution of 1869? Those are exactly the questions involved in the case before us now, and in a controversy between the same parties.

5. But that all the property of all of the railroads entering into and forming the Yazoo and Mississippi Valley railroad, whose charters gave them the exemption now claimed, should be protected from the imposition of taxes amounting to a half million of dollars, or more, under the righteous rule of *stare decisis*, seems to be too clear to the judicial mind to require argumentation. Not only the Lambert case, decided more than five years ago, but also the case of Mississippi Mills v. Cook, 56 Miss., decided more than twenty years ago, declared the exemptions claimed repealable at the will of the legislature, and not violative of section 13, article 12, constitution of 1869. In both cases, the charter exemptions were carefully considered and their character declared and the constitional provisions, with which they were supposed to conflict, expounded and clearly interpreted.

Since the decision of Cook's case, which, besides defining the character of the exemptions claimed, then and now, and distinctly declaring them not in violation of the constitution then in force declared a rule of property, the charters were granted under which the Y. & M. V. Rd. Company here claimsthe exemptions set up. It was undoubtedly, in large part, because of these exemption features in the charters thus granted, after the decision in the Cook case, and in reliance upon that decision, that the appellees constituent members, having such charter exemptions, came into the State, constructed long lines of railway and expended millions of their money. While the railroads knew, of course, that their exemptions were subject to repeal, they could not have foreseen that this repeal would be made, by judicial legislation. If ever there was a case in which the doctrine of *stare decisis* should be observed, this is the case.

It is worthy of serious consideration that the majority of the court should pay deference to the opinions of two courts of sister States in constructing the words "subject to taxation," contained in the constitutions of their States, and treat with almost contemptuous indifference the opinion of the very remarkably able court of this State which, twenty years ago, after elaborate consideration, in separate opinions of each of the judges, differently interpreted those words, all of the judges thoroughly agreeing that this exemption was not in conflict with that provision of the constitution of 1869, which declared that the property of corporations for pecuniary profit shall be subject to taxation the same as that of individuals. The spectacle thus presented to the legal mind is both humiliating and amazing, as it strikes me.

6. It will be difficult to harmonize the opinion of the majority of the court with the saving clause of the 181 section of our constitution of 1890. "Exemptions from taxation to which corporations are legally entitled at the adoption of this constitution, shall remain in full force and effect for the time of such exemptions as expressed in their respective charters, or by general laws, unless sooner repealed by the legislature" is the clear and explicit language of that 181 section. Undoubtedly, under the case of Miss. Mills v. Cook, and numerous later decisions following and reaffirming that case, this railroad company was legally entitled to the exemption claimed. The highest court in the State had so declared, and this saving clause was inserted by the constitutional convention with full knowledge of the Miss. Mills case, and those following it, and the exemption has never been repealed by the legislature.

Can this court do that by judicial legislation which the constitution declares shall be done by the legislature only?

7. The Lambert and the Cook decis-

ions are themselves supported by reason and authority, and should not be over-ruled. It is lamentable if no opinions, however supported in reason or by authority, and no matter what rights may have arisen under them, are to be permitted to stand simply because not in agreement with the personal views of succeeding judges. No greater reproach can be fixed upon the judiciary, no greater calamity can befall the State than to have it understood that, with every change in the mere membership of the court of final resort, the law as solemnly declared by former courts, composed of different membership, is to be unsettled, and again and again unsettled, by every succeeding court, simply to enable new judges to exploit their peculiar views, In such case, all notion of stabillity and fixedness is gone, and absolute uncertainty and endless confusion will be introduced into our jurisprudence.

From such a condition I recoil, and am therefore compelled to dissent from the conclusion reached by my brethren. I have the profoundest respect for my brethren, and I disclaim any desire or purpose to reflect upon them or their course, in any degree whatever. But I must follow the voice of my own conscience, and the command of my own judgment.

2.

FULL OPINION OF COURT.

NOVEMBER 22D, 1898.

OPINION FILED NOVEMBER 22, 1898.

JACKSON, MISS., SATURDAY, DECEMBER 10, 1898.

8629. WIRT ADAMS, STATE REVENUE AGENT, v. & ATS. Y. & V. R. R. CO., ET AL.

Circuit Court, Hinds County; Robert Powell, Judge.

Critz & Beckett and J. A. P. Campbell for appellant; Mayes & Harris for appellees.

WHITFIELD, J. The question which lies at the foundation of this case, is this: conceding for argument's sake, that the L. N. O. & T. R. R. Co., had an exemption from taxation, did the consolidation of that railroad with the Yazoo & Mississippi Valley R. R. Co., on October 24, 1892, create a new corporation, as of that date, and thus result in the cutting off of said exemption, by Sec. 180 of the Constitution of 1890? If this question be answered, in the affirmative then, obviously, the contention of the State must prevail throughout, without regard to any other questions in the case. The power to consolidate must be granted by the State, and permission to consolidate so granted, is not a contract, but a mere license.

Amer. v. Eng. Ency. Law (2nd edition), vol 6, p. 802.

Pearsall v. G. V. Ry. Co., 161 U. S. 667.

L. & N. R. R. Co. v. Ky., 161 U. S. 695.

Keokuk v, Mo., 152 U. S. 312.

These railroad companies were perfectly free to consolidate or not. The L. N. O. & T. R. R. Co., if it had a legal exemption, could have retained it, by simply retaining the precise corporate existence it then had. Sec. 181 of Con. of 1890. Consolidation was voluntary on their part, and effected subject to the law and constitution then in force. What the effect of consolidation is, depends upon the will and purpose—not of the corporations, but of the State speaking through the legislature.

Great stress has been laid upon the provisions of Sec. 5, Acts of 1882, p. 843, to the effect that the Y. & M. V. R. R. Co. might consolidate with other railroad companies "upon such terms as they may agree upon." But this simply meant "such terms as they the companies might agree upon," consistent with the law as announced in their charters, and otherwise. The charter of the Memphis & Vicksburg R. R. Co.—one of the constituents of the L. N. O. & T. R. R. Co.—expressly stipulates any consolidation shall be "on such terms as may be consistent with the powers conferred on said company." Substantially identical language with the language of Sec. 5, *supra*, occurred in the charters under consideration in Keokuk v. Mo., 152 U. S., at p. 309, top of the page, and R. R. Co. v. Ga., 98 U. S., at p. 361, and in many other cases. These words, "upon such terms as they may agree upon," are not new. They perhaps appear substantially in all grants of power to consolidate railroad or other corporations. As for example, in The Atlanta & Richmond Air Line Railroad Co. v. State, 63 Ga., at p. 486. They have no magic in them. They are plain every day phrases and relate alone to the mere administrative details attending the consolidation of corporations, which must of course be left to the officers of such corporations, and with which the legislature can not be burdened; and they convey no substantive powers or rights. These must be found, if anywhere, expressly set forth by the legislature in the charters in the first instance, and not delegated to the corporations, to be worked out under the gloss of these mere administrative phrases. Whether, therefore, the union of these two corporations resulted in consolidation and the creation of a new corporation, or in mere merger of

the L. N. O. & T. R. R. Co. with the Y. & M. V. R. R. is to be found not in this phrase so much relied on, but in the clear purpose of the legislature. The articles of consolidation are to be carefully looked to, of course, but they must conform in what they do, if valid, to the purpose of the legislature as to what the effect of the consolidation shall be.

Keokuk v. Mo., 152 U. S. 305; Central R. R. Co. v. La., 92 U. S. 660.

Let us inquire then what the effect of this consolidation was. And first, what railroads entered into this consolidation? The L. N. O. & R. R. Co. and the Y. & M. V. R. R. Co. What was the L. N. O. & T. R. R. Co.? It is described in the "Articles of Consolidation" as "The Louisville, New Orleans & Texas Railway Company, a corporation of the states of Tennessee, Mississippi and Louisiana of the first part," and it is further expressly declared in said articles that the consolidation is effected "under and by virtue of the charters of the respective states of Tennessee, Mississippi and Louisiana, in such case made and provided," etc. The two e ds of this railroad are in Louisiana and Tennessee. Now what were the laws touching consolidation in these states, "In such case made and provided?" Of course we deal here exclusively with the Mississippi corporation under our laws; but th laws of Louisiana and Tennessee are expressly referred to as having been held in mind in effecting this consolidation, and they will materially aid us in solving this question. The road with all its property was a unit in the three states. If the effect of the consolidation in Tennessee and Louisiana was known necessarily to be the creation of a new corporation, it hardly comports with reason to suppose that any different consolidation would have been sought at the hands of the Mississippi legislature or gra ted by it, if sought. And so we shall find it to be. The Act No. 157 of 1874 of Louisiana, set forth in 40 La. Ann., p. 385—a general law expressly provides that: "Any two business — companies — may consolidate said corporations, and form *one consolidated* company, holding, etc., all property, etc., belonging to each, and under such corporate name as they may agree upon; and a certificate of the fact of such consolidation with the name of the consolidated company shall be filed and recorded in the office of the Secretary of State." This is like the Ohio and Missouri statutes referred to in Keokuk v. Mo., 152 U. S. 308-310, and they were all held to provide for a consolidation resulting in a new corporation. Board v. Gaslight Co., 40 La. Ann. 384. The provisions of the Tennessee Code (Milliken & Vertress) 1884, Secs. 1263-1270, are stronger and more explicit still in necessitating the creation of a new corporation, Sec. 1270 expressly declaring that no exemption from taxation of any constituent company should pass to the consolidated company. The Tennessee and Louisiana ends of the L. N. O. & T. R. R. are integral parts now of the present Y. & M. V. R. R. As to these ends—under Louisiana and Tennessee law the present Y. & M. V. R. R. is undoubtedly a new corporation. How, then, can this corporation—the present Y. & M. V.—an entire corporation—be one new corporation, with stock of but one corporation, the new one, in Louisiana and Tennessee, and in Mississippi, not one new corporation, and having double stock of both constituent roads? As counsel very pertinently asks, "Which is Tennesse stock, which is Louisiana stock, and which is Mississippi stock?"

What now, are the provisions of Mississippi law, as to this consolidation? The L. N. O. & T. had itself no power to consolidate, and it is conceded that this consolidation of the L. N. O. & T. with the Y. &. M. V. did not take place under Sec. 1 of the Act of 1882—the charter of the L. N. O. & T.—but that the power of con-

solidation authorized by that section was exhausted in the consolidation of the Baton Rouge Railroad with the M. & V. R. R., forming the L. N. O. & T. R. R. The provisions of law we look to then as authorizing the consolidation under consideration are Sec. 16 of the Acts of 1870, p. 326, the charter of the Memphis & Vicksburg Railroad Co.; Sec. 25 of the Acts of 1882, p. 932, the charter of the N. O. R. R. V. & M. R. R. Co.—the Baton Rouge charter; and Sec 5 of the Acts of 1882, p. 842-3 the Yazoo & Miss. Valley Railroad charter. The language of said section 16 is as follows: "That said company shall have the right and power to *consolidate* the stock, property and franchises of the road with any other road or roads, in or out of this state, at any time that the president and directors of the road may deem proper, and upon such terms as may be consistent with the powers conferred upon said company." We understand the well settled rule of law as declared by the Supreme Court of the United States to be that a consolidation of *stock* results uniformly and necessarily in the creation of a new corporation.

Clearwater v. Meridith, 1 Wall. 25; R. R. Co. v. Ga., 98 U. S. 361, 363-4; Keokuk v. Mo., 152 U. S. 308; St. Louis v. Berry, 113 U. S. 466-473; Green's Brices Ultra Vires note at p. 538.

In 98 U. S. supra, at p. 362-4, the court say: "That, generally, the effect of consolidation as distinguished from a union by merger of one company into another is to work a dissolution of the companies consolidating, and to create a new corporation out of the elements of the former, is asserted in many cases, and it seems to be a necessary result. In McMahan v. Morrison, 16 Ind. 172, the effect of a consolidation was said to be a dissolution of the corporations previously existing and at the same instant, the creation of a new corporation, with property, liabilities and stockholders derived from those passing out of existence. So in Lanman v. The Lebanon V. R. R. Co., 30 Pa. St. 42, the court said: "Consolidation is a surrender of the old charter by the companies, the acceptance thereof by the legislature, and the formation of a new company out of such portions of the old, as enter into the new. This court, in Clearwater v. Meridith, 1 Wall. 40, expressed its approval of what was said in the former of these cases. It is true these expressions have not all the weight of authority, for they were not necessary to the decisions made, but they are worthy of consideration, and they are in accordance with *what seems to be sound reason.*" Justice Strong who delivered this opinion also delivered the opinion in 92 U. S., where at p. 671, he referred, in the spirit of criticism, to these cases. It is, therefore, noteworthy that three years later, after fuller consideration, he says, speaking for a unanimous court, "they are in accordance with sound reason." The authority in 98 U. S., p. 361, was to "consolidate their *stocks*, upon such terms as might be agreed upon by the directors, and ratified by a majority of the stockholders; and it was unanimously held that it was not merger, as in 92 U. S. 665, nor alliance or confederation, but consolidation resulting in the formation of a new company. Said the court, at p. 364: "When, as in this case, the stock of two companies is consolidated, the stockholders become partners, or quasi partners, in a new concern. Each set of stockholders is shorn of the power which as a separate body it had before. Its action is controlled by a power outside of itself. To illustrate: the stockholders of the Savannah & Albany Railroad Co. could not after consolidation have exercised any of the powers or franchises they had prior to their consolidation with the stockholders of the Atlantic & Gulf R. R. Co. They could not have built their road or controlled its manage-

ment. They could not therefore have performed the duties which, by their original charter, were imposed upon them; those duties could only have been performed by another organization composed partly of themselves and partly of others. Their powers, their franchises, and their privileges were therefore gone, no longer capable of exercise or enjoyment. Gone where? Into the new organization, the consolidated company, which exists alone by virtue of the legislative grant, and which has all its powers, facilities, and privileges by virtue of the consolidation act. What then, was left of the old companies? Apparently nothing. They must have passed out of existence and the new company must have succeeded to their rights and their duties; but the new company comes into existence under a *fresh grant*.

Not only its being, but its powers, franchises, and immunities, are grants of the legislature which gave it its existence. Since, then, a consolidation of the stock of two corporations means the creation of a new corporation, it necessarily follows that the power to consolidate given by this Sec. 16 supra did not authorize a merger, or any consolidation except such as resulted in the formation of a new company. The next source of power to consolidate is Sec. 25, Acts 1882, p. 932 supra: That provides: "That the company shall have power and authority to * * * consolidate the company with any other company, under the name" (not under the name *and charter* as in 92 U. S., p. 667) "of one or both; but when such * * * consolidation is effected, the said company shall be entitled to all the benefits, rights, franchises, lands and property of every description belonging to said road or roads so consolidated." The language here sharply distinguishes between the old companies and the new in a way that makes it perfectly clear the legislature meant the consolidation to result in the creation of a new corporation. Said company, that is the new consolidated company, may be under the name of one, but not the charter of one; on the contrary it, said company, shall be entitled to all the benefits, etc., etc., belonging to said *roads—all* of them *so* consolidated. Manifestly the legislative purpose here was the consolidation of two or more companies into one new company. No power can be found here for merger. The next source of power to consolidate is Sec. 5 of the Acts of 1882, p. 843, which provides: "Said company may consolidate with any other railroad company in or out of the State of Mississippi upon such terms as the consolidated company may agree upon; and upon any such consolidation the consolidated company shall have and enjoy all the property, rights, privileges, powers, liberties and immunities and franchises herein granted; but such consolidation shall not have the effect of exempting from taxation the railroad or property owned by such other consolidated company prior to its consolidation with the company hereby chartered; nor of exempting from taxation any property which the consolidated company may, after such consolidation acquire under the provisions of the charter of such other consolidating company." Clearly here also, it is consolidation and not merger which is provided for, and such consolidation as should result in a new company, a "consolidated company which should" enjoy all the property, etc., etc., of its previously existing constituent companies. It will not fail to be noted that in none of these acts is the word merger ever used. Always, and everywhere, it is "consolidation" alone that is authorized. If merger merely was intended, what was easier than to have used the words appropriate to manifest that intention? Why this careful and exclusive use of the word "consolidation?" And not of this word only, but of other terms indicating

a clear intention to create a new consolidated company? We conclude, therefore, on a review of the statutes authorizing the consolidation under review that so far as the purpose of the legislature was concerned, it was its clear purpose that consolidation and not merger should occur, and such consolidation as should result in the creation of a new corporation.

Counsel for the railroad company relies on three authorities especially to show that what the legislature here intended was merger.

Tomlinson v. Brouch, 15 Wallace 460:

The Central R. R. Co. v. Ga. 92 U. S. 666; and

Meyer v. Johnson 53 Ala. 313.

But in Tomlinson v. Brouch Mr. Justice Bradley properly characterized what was done as "amalgamation" which is merger and not consolidation p. 463 15 Wall,, and the act of the legislature expressly provided for merger. It provided p. 463 that "the said South Carolina Canal & R. R. Co., shall be *Merged* in the said South Carolina R. R. Co." and provided expressly that the South Carolina R. R. Co. should retain its autonomy and previous existence. There was no room for construction in this case and it was conceded on all hands that what occurred was merger. So in Central R. R. Co. v. Ga. it was expressly provided —92 U. S. p. 671—that the union should take place under "the name and *charter* of the Central R. & Banking Co." merger was clearly provided for: p. 671-3. And in Meyer v. Johnson 53 Ala., the court lay stress upon the word "Unite" p. 318, "were *united* with those of the Alabma company and vested in it so as to enable it, (*called* in the contract the consolidated company, because their franchises were consolidated *with* its)" etc. etc, —a case again of merger. The authorities are wholly inapplicable to a case like this, where the statutes all sedulously avoid the word merger, exclusively use the word consolidate, and accompany that word—definite enough in itself—with other provisions which leave no doubt that consolidation resulting in the creation of a new corporation was intended. Turning now from the legislative purpose, let us see what was actually done in pursuance of this power to consolidate.

First, the stock of the two companies was consolidated. Learned counsel for the railroad insists that the testimony of Welling shows that the stock was never exchanged. He is mistaken in this. Welling does so state, but on cross-examination expressly declares on this very point, "I do not know as to that question, I do not recall the fact just what was done"—and he is a witness for the railroads. This falls far short of showing that the stock was not exchanged, the other testimony shows it was.

Second. The deed of consolidation on its face provides for and creates a new organization and new officers, see articles 4, 5, 6, 7; and article 8.

Third. The fifth article of consolidation conveys all the "rights—property etc., etc., etc., of every kind belonging to *either* of the parties,—to the Consolidated Company, without any further act deed or conveyance" distinguishing clearly between the two previous companies—"either of the parties"—and the new company, the grantee, the "Consolidated Company."

Fourth. The articles of incorporation themselves, on their face declare that doubt exists as to the effect of what has been done and conclude most significantly. "But whatever may be the legal consequence of the consolidation herein provided for, this agreement is to stand and be effective." This is pregnant with meaning. The R. R. companies knew that the only power the legislature had given was to so consolidate as to create a new corporation, and that under Sec. 180 of the Constitution of 1890 the exemp-

tion if any existed would be cut off. They knew the only word used was "consolidate" in all the legislative acts, and that merger and consolidation are very distinct and different things. And yet—not conforming to the power, but seeking to carry the exemption in spite of it—they used the words "unite, merge, and consolidate,' and say that "such consolidation shall be effected by uniting or merging the stock, property and franchises of the L. N. O. & T. R. R. Co. with and into the stock, property and franchises of the said Yazoo & Miss. Valley Railroad Company without disturbing the corporate existence of the last named company, or the formation of any new distinct corporation, unless such result shall be necessary to give legal effect to this agreement; but whatever may be the legal consequence of the consolidation herein provided for, this agreement is to stand and be effective." Doubtless they desired to merge; but the legislature had only authorized consolidation and such consolidation as necessarily resulted in the creation of a new corporation, and they could only lawfully do, what the legislature, in fact, authorized: not what they might wish to do. And the words "consolidate upon such terms as they might agree upon," means that the thing done must be consolidation but the mere administrative details of uniting the two into one new corporation were left to the companies; names count for nothing. It is substance courts look to. Consolidation resulting in the creation of a new corporation is what the legislature authorized: is what the articles of consolidation actually effected, and it is utterly beyond the power of the railroad companies to change the essential nature of what was done by calling it "merger."

We have not adverted to all the considerations sustaining this view. The closer the analysis of the articles of consolidation and of the action of the authorities of the two companies the more indisputably it appears that such consolidation as resulted in the creation of a new corporation was precisely what was effected. The notice for a meeting of the stockholders called for August 1, 1893, is a meeting of the stockholders of the Y. & M. V. R. R. Company. The minutes recite that it was a meeting of the stockholders of the Y. & M. V. Railroad Company and gives the number of shares and names of the holders, and all this is true also of the meeting of stockholders of October 4, 1893. Again, on August 1, 1893, a resolution was passed "that the stock, property and franchises of said two corporations had been merged or united in *one single corporation* under the corporate name of the Y. & M. V. Railroad Company. Another resolution was passed reciting that the Y. & M. V. Railroad Company was the "Successor" or assignee of the L. N. O. & T. Railroad Company. Of course the mere *name*—Y. & M. V. Railroad Company— is utterly immaterial in determining whether it is attached to the same old company known as the Y. & M. V. Railroad Company or to the consolidated company, the new company, and this action of the stockholders as well as the articles of consolidation pointed clearly to the same result—consolidation and not merger. The new company was the successor or assignee of the two old companies and the language of Mr. Justice Brown of of the Supreme Court of the United States in Keokuk v. Mo. 152 U. S. 309, fits in here as if uttered for this case: "It is impossible to conceive of a corporation existing without stock or certificates representing the interests of the corporators in the organization. Now if the act provides (the deed in the case at bar) that these certificates shall be surrendered and certificates in another company issued in their place, what becomes of the prior companies? Who are their stockholders?

Who their officers? (The deed in this case appoints an entirely new set of officers. See Charter Book pp. 731-732) If the stock in the new company is sold what interest in the prior companies passes by the sale? There can be but one answer to these questions. The property and franchises of the prior companies are gone, as much as if they had surrendered their charters. The new company doubtless received by transmission from its constituent companies their property, rights, privileges and franchises including any immunity from taxation: but it receives them as an heir receives the estate of his ancestor, or as a grantee receives the estate of a grantor, by inheritance, succession or purchase. The result is not a mere union or partnership of two companies nor the merger of franchises of one in another, but the extinguishment of one and the creation of another in its place. It follows from this that when the new corporation came into existence it came precisely as if it had been organized under a charter granted at the date of the consolidation, and sublect to the constitutional provisions then existing." To the same effect also is St. Louis v. Berry 113 U. S. 469-475. Article 2 of the articles of consolidation is as follows: "The corporate name of the said Consolidated Company shall be the Yazoo & Mississippi Valley Company. Articles 3 to 8 inclusive are as follows:

"Article 4. Every holder of the stock of either of the said companies now outstanding, shall be entitled to cast *one vote* for *each* share of stock, held by him in the stockholders meetings of the Consolidated Company, which vote may be cast either in person or by proxy, and shall have all the rights of a stockholder of the Consolidated Company, as fully as if new shares of the Consolidated Company had been issued and exchanged therefor; and in case the *Consolidated Company* shall determine to issue new shares such shares shall be exchangeable at par for the now outstanding shares of *each* of the *constituent* companies; and the remainder of the capital stock of the Consolidated Company shall be issued from time to time and upon such terms and conditions as may be prescribed by the Board of Directors of said company.

"Article 5. All and singular the rights, powers, privileges, immunities and franchises, and all the railroads, real and personal estate, easements, fixtures equipments choses in action, and property and assets of every kind, nature or description belonging to either of the parties hereto, shall be vested in and become the property of the said *Consolidated Company*, without any *further act, deed* conveyance or assurance being required in the premises.

"Article 6. The affairs of the Consolidated Company shall be managed by a Board of Directors which shall consist of such a number of members not less than five. as the company may determine from time to time, each of whom shall be a stockholder, and one of them a resident of the State of Mississippi, one of Tennessee and one of Lonisiana. The members shall be divided into three equal classes as nearly as practicable. Successors, for the term of three years, shall be chosen for those belonging to the first class at the first annual meeting of the stoskholders held after this consolidation shall have been effected; for those who belong to the second class at the next annual meeting; and for those belonging to the third class at the next succeeding annual meeting of the stockholders. Each director successively chosen shall continue in office until his successor is elected. Vacancies in the Board caused otherwise than by expiration of term for which the retiring director was chosen, may be filled by a vote of a majority of the directors remaining, such appointee to continue in office until the next

regular election of directors by the stockholders.

The first Board of Directors shall be composed of the following members divided into three classes as follows:

First Class. Stuyvesant Fish, Adolph Schreiber, W. C. Craig, Chas. A. Peabody, Jr.

Second Class. John W. Auchinloss, Walther Luttgen, Edward H. Harriman, J. T. Harahan.

Third Class. S. V. R. Cruger, R. P. Neeley, R. C. Shepherd, John C. Welling.

Article 7. The Board of Directors of said Consolidated Company shall choose one of their number president whose term of office shall be one year, or until his successor shall be chosen or qualified. They may also appoint such other officers and agents as they may deem necessary from time to time and prescribe their duties and compensation; and may provide, by the by-laws to be adopted, such rules and regulations relating to the affairs and business of said company as may be necessary or proper. The said Board shall also have power to appoint an Executive Committee, of whom the president shall be one ex-officio, who shall possess and exercise all the powers and duties of the Board of Directors, when the Board is not in session. Until otherwise ordered the corporate seal of the said Consolidated Company shall be that of the Yazoo & Mississippi Valley Railroad Company.

Article 8. The said *Consolidated Company* shall be and the same is hereby authorized and empowered in such a manner and upon such conditions as are permitted by law, to issue its bonds and secure the same, as well as all bonds heretofore issued by *either* of the *constituent* companies, or that have been heretofore or may be hereafter issued by any other railroad company, by mortgage or deed of trust, upon all or any of its railroads, rights, franchises and property, real and personal, wherever the same may be situated, and whether the same may be owned by said company at the time this consolidation is effected or may be hereafter acquired; and may also exercise any and every other corporate right, or power now vested in, or which might have been heretofore lawfully exercised by *either* of said *constituent* companies."

It will be seen that said Article 5 itself conveys all the property, rights and franchises, etc., belonging to either constituent to the *consolidated* company without any further act, "deed, conveyance or assurance being required in the premises," and in this regard is substantially identical with the provisions in St. Louis v. Berry, 113 U. S., 475, and Keokuk v. Mo., 152 U. S., 308, both of which cases hold that a new corporation was created. It will be noticed also that Article 6 creates a new organization and actually names a new set of directors for the consolidated company who are under Article 7 to elect officers for the Consolidated Company. It will be noticed that Article 8 authorizes the new Consolidated Company to "issue its bonds and secure the same as well as all bonds heretofore issued by *either* of the *constituent* companies," and further provides "that the Consolidated Company shall exercise any and every other corporate right or power now vested in or which might have been heretofore lawfully exercised by *either* of said *constituent* companies," clearly drawing the distinction between the *two* previous *constituent* companies and the *new Consolidated* Company; and it will further be specially noticed and to this we direct the closest attention; that Article 4 provides "That every holder of the stock of *either* of the said companies now outstanding shall be entitled to cast *one* vote for *each* share of stock held by him, in stockholders meetings of the Consolidated Company and shall have all the rights of a stockholder of the Consolidated

Company as fully as if new shares of the Consolidated Company had been issued and exchanged therefor." Now it is clearly admitted by both sides that the L., N. O. & T. Railroad Company was dissolved and became extinct. The L., N. O. & T. Railroad Company had 50,000 shares of stock; the Y. & M. V. had 6,000 shares of stock, and if anything is certain, it is, undoubted, that it is a metaphysical and legal impossibility that a corporation with 6,000 shares of stock could absorb one with 50,000 shares and allow *one* vote to *each* share. It is well said by counsel for the Revenue Agent: "The voting power of the latter is more than eight times that of the former and it could absorb the former and seven more like it, and no legislative declaration or judicial dictum could alter this fact; for it is founded in the nature of things. The deed of consolidation provides for the contingency and says whatever the effect that consolidation shall stand and be effective. What is then effected? If the L., N. O. & T. Railroad Company is extinguished and the voting power of each share of stock is equal and extends equally over all the property, rights, operations and franchises of the Consolidated Company you may put in what name or call it what you may, but the actual result is a complete and perfect consolidation with the combined voting power of both. One cannot absorb 8 1-3, but one and 8 1-3 can make 9 1-3, a NEW number."

We have thus far been discussing two things: the purpose of the legislature in authorizing the consolidation and what was actually done in pursuance of that authority, and it is perfectly clear that what the legislature authorized and what was actually created in fact in pursuance of that authorization was consolidation of such character as resulted in the creation of a new company under the name of the Y. & M. V. Railroad Company; that the Y. & M. V. Railroad Company with which we now deal is not the old Y. & M. V. Railroad Company—one of the constituent members—but is the NEW Y. & M. V. Railroad Company, a new consolidated company taking its grant of corporate rights from date of said consolidation October 24, 1892, some two years after the constitution of 1890 went into effect. This leaves for solution on this branch of the case a single inquiry, did section 180 of the Constitution of 1890 cut off the exemption claimed by the L., N. O. & T. Railroad Company, conceding now for the purpose of argument, that it ever had any such exemption. That section is in the words following:

Section 180. "All existing charters or grants of corporate franchise under which organizations have not in good faith taken place at the adoption of this constitution shall be subject to the provisions of this article; and all such charters under which organizations shall not take place in good faith and business be commenced within one year from the adoption of this constitution, shall thereafter have no validity; and every charter or grant of corporate franchise hereafter made shall have no validity, unless an organization shall take place thereunder and business be commenced within two years from the date of such charter or grant."

It is too clear for argument that the "power to consolidate is the grant of a corporate franchise". 2nd Morawetz Priv. Cor. Sec. 954 p. 905; Ashley v. Ryan, 153 U. S. 436-463. It is not a right but a mere license as heretofore shown. It takes effect not as of the date of the charter, but as of the date of the deed of consolidation. Keokuk v. Mo. 152 U. S. 308. A corporation can have no status or existence until organized. 1 Morawetz Priv. Corp., 288. Unless therefore the present Y. & M. V. R. R. Co. had been organized at the date of the adoption of the constitution it is settled that it could not possibly have been legally entitled

to an exemption at that time. Planters Fair, etc., v. State, 161 U. S. 192. A corporate franchise is the right to exist as a corporation. It is the franchise invested in the individual stockholders before a corporation is authorized authorizing them to form such corporation by organization. This is the precise corporate franchise meant by Sec. 180 of the constitution. There is an exact analogy between this corporate franchise authorizing individuals to organize themselves into a corporation, and the franchise authorizing constituent corporations and artificial persons to organize themselves into a Consolidated Company. and in the one case as in the other, the result of the organization must be a new company. There are various other franchises which may belong to corporations such as the right to be and operate a railroad after the corporation is organized, receive tolls, etc., but this belongs to the corporation as an artificial person. It is clear, therefore, that the corporate franchise referred to in sec. 180 is the right to exist as a corporation. It is thoroughly settled by the United States Supreme Court that the effect of sec. 180 of the constitution of 1890 was to cut off any exemption claimed if it ever existed. St. Louis v. Berry 113 U. S. 475: Keokuk v. Mo. 152 U. S. 308.

Learned counsel for the railroad companies insist that under sec. 181 of the constitution and sec. 279 in the schedule of the constitution this exemption was continued. These sections are in these words:

"Sec. 181. The property of all private corporations for pecuniary gain shall be taxed in the same way and to the same extent as the property of individuals, but the legislature may provide for the taxation of banks and banking capital, by taxing the shares according to the value thereof (augmented by the accumulations, surplus, and unpaid dividends), exclusive of real estate, which shall be taxed as other real estate. Exemptions from taxation to which corporations are legally entitled at the adoption of this constitution, shall remain in full force and effect for the time of such exemptions as expressed in their respective charters or by general laws, unless sooner repealed by the legislature."

Section 279 is as follows:

Section 279. All writs, actions, causes of actions, proceedings, prosecutions, and rights of individuals and bodies corporate, and of the State, and charters of incorporation shall continue; and all indictments which shall have been found, or which shall hereafter be found, and all prosecutions, begun, or that may be begun, for any crime or offense committed before the adoption of this constitution may be proceeded with and upon as if no change had taken place."

This is a wholly mistaken view of these provisions of the constitution: Sec. 181 preserves only such exemptions as corporations fully organized prior to the constitution, were LEGALLY entitled to, at the adoption of the constitution. Its meaning plainly was that if corporations organized and existing at the date of the adoption of the constitution should retain the precise corporate existence they *then* had, such exemptions as they *legally* had should continue whilst their corporate organizations remained as they were. It has nothing to do with the preservation of exemption to any corporation existing at the date of the adoption of the constitution which ceased to retain its said precise corporate existence, and became consolidated with another corporation, thereby ceasing to exist. Section 279 meant the same thing, to-wit: That, Charters of Incorporation belonging to corporations at the date of the adoption of the constitution were not in any way to be infringed by the constitution so long as such corporations retained their precise previous corporate organization.

This, and this only, is the whole scope of the two sections. Their plain meaning is in harmony with the whole spirit of the chapter on corporations in the constitution, and cannot be frittered or pared away by ingenuity or refinement.

It was well said by Mr. Justice Brown in Keokuk v. Mo. 152 U. S. at p. 312, "But the decisive answer to this objection is that the legislature had no power, in 1869, to extend to a new corporation created by the consolidation an exemption contained in an act passed in 1857, before the constitution was adopted, and hence, under the terms of this act, we cannot hold that immunity from taxation passed as a franchise or privilege to the consolidated corporation. The construction claimed by the defendant would be directly in the teeth of the constitutional provision that no property shall be exempted from taxation. While, as heretofore observed, an exemption from taxation contained in a charter previously granted could not be taken away by this constitutional provision without the impairment of the obligation of a contract, it doubtless applies to all corporations thereafter formed either by original charter or by the consolidation of prior corporations under the act of 1869."

It is further clear that if the different charters relied upon had expressly provided by the use of the word "immunity" or by direct declaration to that effect, that the alleged exemption of the L., N. O. & T. should pass into the Consolidated Company, section 190 of the constitution of 1890 still cut off the exemption, since the constitution is the paramount law of the land,—the consolidation having taken place some two years after its adoption. It is so expressly held in the L. & N. Railroad Company v. Ky. 161 U. S. 695, and Pearsall v. G. N. Railroad Company 161 U. S. 167. And, in this view, it of course becomes immaterial whether the position of learned counsel for the railroad that the exemption passes by *general law* into the Consolidated Company without *express declaration* is correct or incorrect, though we understand the Supreme Court of the United States to have distinctly held that the sovereign right of taxation does not so pass unless there be either express declaration to that effect or the use in statutes authorizing the consolidation of the word "Immunity". And that court has distinctly held as "the later and best considered view, sustained by the weight of authority," that the use of the word franchise or privilege or any other word than the word immunity is not sufficient to embrace an exemption from taxation.

Phoenix Ins. Co. v. The State, 161 U. S. 176;
Keokuk v. Mo., 152 U. S. 304;
Covington v. Sanford, 164 U. S. 586;
Norfolk v. Pendleton, 156 U. S. 172;
Pickard v. Railroad, 130 U. S. 640;
Railroad Co. v. Palmes, 192 U. S. 451;
me Ins. Co. v. The State, 161 U. S. [illegible].

On this very point Mr. Justice Peckham in Phoenix Ins. Co. v. Tennessee, 161 U. S., p. 178 says: "The inference is sought to be drawn in favor of exemption if the legislature did not *affirmatively* grant the right to tax. We cannot assent to any such view and we could come to no such conclusion from an examination of the general statutes cited by counsel. It is a complete *over-turning* of the *universal rule* in *regard to taxation*. The power and the right to tax are always presumed, and the exemption is to be clearly granted. Mere silence is the same as a denial of exemption." Nothing certainly can be clearer than this. Indeed the opinion of Mr. Justice Peckham in this case is so clear and forcible that we quote from it to adopt the following passages on this particular proposition:

"In Wilson v. Gaines, 9 Bax. 546, it was held by the Supreme Court of Tennessee that as the State in its constitution (article 11, sec. 7, constitution

1834) used in the same connection all the words "rights", "privileges", "immunities" and "exemptions", each of these words was to be given, in interpretation, a meaning so limited as not to include anything expressed by the others and that when any one of them is found in a statute the legislature must be conclusively presumed to have used it in its restricted sense. This decision of the Tennessee court tends very strongly to the idea that the words "immunity" or "exemption" would have been required to secure the exemption to a company in a case like this. It is true that this view was not assented to by this court as being the correct one in Tennessee v. Whitworth, 117 U. S. 139, 146, and it is simply cited for the purpose of showing what the Tennessee court did decide in regard to the meaning of its own constitution in reference to this subject.

That the legislature was, about the time, freely incorporating various companies and granting them exemption from taxation with considerable liberality, is not a sufficient reason to induce this court to depart from the universal and well established rule making a claim for exemption a matter to be *proved beyond all doubt*. The circumstance which we regard as very significant and which has already been alluded to, consists in the omission of the word "immunities" in the grant to plaintiff in error. That omission we attach great weight to, and the least that can be said of it is that it involves the question in doubt.

It can not be denied that the decisions of this court are somewhat involved in relation to this question of exemption. It is difficult in some cases to distinguish the language used in each so far that the different results arrived at by the court can be seen to be founded upon a real difference in the real meaning of such language. The question has sometimes arisen upon the consolidation of different companies, and sometimes upon a sale under a mortgage foreclosure. Among the former is the case of Keokuk & Western Railroad v. Mo., 152 U. S. 301, where under the laws of Missouri (sec. 4 of the Act of March 2, 1869) there was a provision that the Consolidated Company should be "subject to all the liabilities and bound by all the obligations of the companies within this State" and "be entitled to the same franchises and privileges under the laws of this State, as if the consolidation had not taken place". The question was said to admit of doubt, whether under the name "franchises and privileges" an immunity from taxation passed to the new company. Various cases are cited in the opinion which was delivered by Mr. Justice Brown showing the grounds taken by this court in such cases. In Chesapeake & Ohio Railway v. Miller 14 U. S. 176, (a foreclosure case) it decided that an immunity from taxation enjoyed by one railroad company did not pass to the purchaser under the foreclosure of a mortgage, although the act provided that the purchaser should forthwith become a corporation, "and should succeed to all such franchises, rights and privileges as would have been had by the original company but for such sale and conveyance". The case followed that of Morgan v. La., 93 U. S. 217 (also a foreclosure case) where it was held that the words "franchises, rights and privileges" did not necessarily include a grant of exemption or immunity from taxation. See also, to same effect, Memphis & Little Rock R. R. v. Railroad Commissioners, 112 U. S. 609. The case of Pickard v. Tennessee, etc., Railroad, 130 U. S. 637, 642, may also be referred to, upon the point that exemption, although it might be granted must be considered as a personal privilege not extending beyond the immediate grantee unless otherwise so declared in express terms; and it was therein declared that such immunity would not pass merely by a conveyance of the prop-

erty and franchises of a railroad company, although such company might itself hold property exempt from taxation. In that case Mr. Justice Field, speaking for the court said: "It is true there are some cases where the terms 'privileges' has been held to include immunity from taxation, but that has generally been where other provisions of the act have given such meaning to it. The later, and we think, the better opinion, is that unless other provisions remove all doubt of the intention of the legislature to include an immunity in the term franchise, it will not be so construed. It can have its full force by confining it to other grants to the corporation." This language is referred to by Mr. Chief Justice Fuller in the case of Wilmington & Weldon R. R. v. Alsbrook 146 U. S. 279, where, at page 297 he says: "We do not deny that an exemption from taxation may be construed as included in the word 'privileges', if there are other provisions removing all doubt of the intention of the legislature in that respect", citing the Pickard case.

Looking at the other side, we find the case of Humphrey v. Pegues, 16 Wall. 244, where there was a grant to a railroad company of "all the rights, powers and privileges" granted by the charter of another company which exempted the property of such other company from taxation, and it was held that the property of the first company was thereby also exempted. Mr. Justice Hunt in delivering the opinion of the court said that: "A more important or more comprehensive privilege than a perpetual immunity from taxation can scarcely be imagined". It contains the essential idea of a peculiar benefit or advantage or special exemption from a burden falling upon others". Again, in Tennessee v. Whitworth, 117 U. S. 139, it was held that a right to have shares in its capital stock exempt from taxation within the State was conferred upon a railroad corporation by a State statute granting to it "all the rights, powers and privileges", or granting it "all the powers and privileges" conferred upon another corporation named if the latter corporation possessed by law such right of exemption. The question in that case arose as to the meaning of certain statutes passed by the legislature of Tennessee resulting in the consolidation of certain railroads therein mentioned. In the course of his opinion Mr. Chief Justice Waite cites the case of Philadelphia, Wilmington & Baltimore Railroad v. Maryland, 10 How. 376, 393, where Mr. Chief Justice Taney speaking of a statute which authorized the union company to have "the property, rights and privileges which that law or other laws conferred on them", (the separate companies or either of them), said that such language extended to the union company the exemption from taxation contained in the charter of one of the united companies. Mr. Chief Justice Waite, continuing in his opinion said: "As has already been seen the word "privilege" in its ordinary meaning when used in this connection includes an exemption from taxation". The decision of this last case should be *confined* to the *peculiar language* used in the various statutes therein cited, wherein, aside from the word "privilege", it may be argued that, considering all the language used in those statutes, the intention of the legislature to exempt the company named from taxation may fairly well be made out.

The later cases of Pickard v. Tennessee, etc., Railroad Co., 130 U. S. 637, and Wilmington, etc., Railroad v. Alsbrook, 146 U. S. supra., show that there must be other language than the mere word "privilege" or other provisions in the statute removing all doubt as to the intention of the legislature before the exemption will be admitted. The case of Mobile & Ohio Railroad v. Tennessee, 153 U. S. 486 adds nothing to the discussion on

either side. The particular point was not in that case, but it seems to be cited by counsel for plaintiffs in error for the purpose of showing what was the general condition of the State at the time of the adoption of the constitution in 1834, and what was the policy of the State in regard to internal improvements which the constitution declared ought to be encouraged. The incorporation of an insurance company would hardly come within the most liberal meaning of the term "internal improvements". If this were an original question, we should have no hesitation in holding that the plaintiff in error did not acquire the exemption from taxation claimed by it, and we think at the *present time the weight of authority* as well as the *better opinion*, is in favor of the same conclusion which we should otherwise reach."

It is impossible for us to add to the elegance, clearness or force of this reasoning. It will be noted too that the court says that the case of Tennessee v. Whitworth, 117 U. S. 139, "must be confined to the language used in the various statutes therein cited, wherein, aside from the word privilege, it might be argued that considering all the language used in those statutes the intention of the legislature to exempt the company named from taxation may fairly well be made out." Tennessee v. Whitworth seems fairly to be shaken as authority by the later decisions of the Supreme Court of the United States, and whether it is sound or unsound cuts no figure in this case, since in that case no new constitution intervened. The material fact, that in this case a new constitution does intervene, constitutes the decisive difference between this case and Tennessee v. Whitworth, and makes this case fall within the principle of Keokuk v. Mo., and St. Louis v. Berry, supra. See also Morgan v. La., 93 U. S. 223, M. & O. Railway Company v. Miller, 114 U. S. 186. We therefore reach the conclusion that the consolidation of the L., N. O. & T. with the Y. & M. V. Railway Co. resulted in the creation of a new corporation, the present Y. & M. V. R. R. Co., and *that* consolidation having been effected October 24, 1892, some two years after the constitution of 1890 went into effect, section 180 of that constitution effectually cut off the exemption claimed. We entertain no doubt whatever of the entire correctness of of this view, but if the doubt existed the same result must follow in accordance with the well settled principle that all doubt must be resolved in favor of the taxing power. This principle has never been more emphatically declared than in Yazoo & Mississippi Valley Railroad v. Thomas, 132 U. S. 174, in the following clear-cut language: "Exemptions from taxation are regarded as in derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact and express requirement of the language used, construed strictissimi juris." It necessarily follows from these views that on this ground alone, standing by itself, apart from all other considerations in this case we must, and do hold the railroad company not entitled to the exemption claimed except in the particular hereinafter to be mentioned, and this independent ground of decision disposes of the case regardless of all other grounds. It will be observed that we have in reaching this conclusion treated consolidation not, as in itself, meaning necessarily that a new corporation must be created, but have allowed it the latitude of definition sometimes given it, very loosely and improperly, as we think, according to which consolidation may mean merger, the absorption of one corporation by another. Taking the word even in that sense as we have done thus far throughout this discussion, we have nevertheless found that the purpose of the legislature was such consolida-

tion as meant not merger but the creation of a new corporation and that the articles of consolidation together with the action of the stockholders and directors of the two companies show that what was actually effected was the creation of a new corporation. It is not necessary therefore to say that the term consolidation, ex vi termini, imports a creation of a new corporation, though in our judgment such is its true meaning as shown by the best considered cases. The loose phrase—"consolidation by merger"—is too vague and confusing to signify anything clearly; one might as well say merger by consolidation and that equivalency of phrase would give us the equation consolidation = merger, which manifestly is nonsense. The term consolidation where such phrase as consolidation by merger occurs, has as it seems to us, been carelessly confounded with the term amalgamation as used in England. Amalgamation in the English sense probably means about what merger does with us, but it is not consolidation in any proper sense of the term; it is in the interest of clearness of definition that consolidation should be limited to signify such union of two or more corporations as necessarily results in the creation of a third new corporation, and as we understand the decisions, this is what is known as the American Doctrine and the better view. Thus in Green's Brice's ultra vires, p. 538, Mr. Green says, summing up in a most learned note: "The term 'amalgamation' is seldom applied to corporations in this country. That which takes its place as much as any is "consolidation". But, though it is difficult accurately to define amalgamation as commonly used in English Law, it certainly has a wider meaning than consolidation has with us. Consolidation would, e. g., be inapplicable to a union of two or more companies. in such way that one of the original corporations only was continued in existence, while the other were merged or absorbed in it. The absorption of one corporation by another would, according to some of the decisions, be an amalgamation in England; but it *would not be a consolidation here.* In McMahan v. Morrison, 16 Ind., 172, a case frequently cited with approval in the later decisions, it was said, that the effect of the consolidation 'was a dissolution of the three corporations named, and at the same instant, the creation of a new corporation, with property, liabilities and stockholders derived from those then passing out of existence'. Similarly, in Lanman v. Lebanon, etc., Railroad Company, 30 Pa. St. 42, consolidation is said to amount to "A surrender of the old charters by the companies, the acceptance thereof by the legislature, and the formation of a new corporation out of such portions of the old as enter into the new". Where by the terms of the statute and deed, the first corporation was extinguished, the second only continued in existence, this was held not to be "an amalgamation or consolidation of the two corporations into one". Powell v. Northern Missouri R. R. Co., 42 Mo. 63. In the American view, therefore, it would seem that the *dissolution of all* the old corporations and the creation of *one new one* are *essential* to *consolidation*".

Mr. Chief Justice Fuller in Railroad Company v. Alsbrook, 146 U. S. 279, clearly has this view of consolidation. He says: "And although the transaction is called by the legislature, in the act of 1875, a consolidation, it amounted rather to a merger or an amalgamation, and need not be held to have resulted in a new corporation." Clearly distinguishing between consolidation on the one hand and merger or amalgamation on the other hand as two things in their essential nature wholly different from each other, as undoubtedly they are. So the Supreme Court of Arkansas distinctly hold in St. Louis v. Berry, 41 Ark., at p. 518, afterwards affirmed by

the U. S. Supreme Court, saying: "And in the absence of a contrary intention clearly expressed in the law authorizing it the legal effect of a consolidation is to extinguish the constituent companies and to create a new corporation with property, liabilities and stockholders derived from those then passing out of existence", citing

McMahan v. Morrison, 16 Ind. 172;

Lawman v. Lebanon R. R. Co., 30 Pa. St. 42;

Clearwater v. Merridith, 1 Wall. 25;

Shields v. State, 26 Id. 86;

Same case on error, 95 U. S. 319;

Central R. R. Co. v. Ga., 92 Id. 665; R. R. Co. v. Maine, 96 Id. 499;

Railroad Co. v. Ga., 98 Id. 359.

Mr. Justice Strong says in Central R. R. Co. v. Ga., 98 U. S., 360, that this view of consolidation accords with sound reason. And to the same effect is the Arkansas Milling v. Berry, 44 Ark., 22; Atlanta, etc., v. Ga. 637, 486. As before remarked, however, it is not necessary for us to hold that the true definition of the word consolidation is such union of two or more corporations as necessarily results in the creation of a new corporation; we merely remark upon what we think the true definition of the word should be held to be, in the interest of clearness and definiteness in legal phraseology, adding the authorities which restrict its signification as indicated above. But it is most earnestly insisted by learned counsel for the railroad company that the case of Railroad Company v. Lambert, 70 Miss., 781, is res adjudicata of this entire controversy. Except in the single particular to be hereinafter mentioned, this position is wholly untenable. The rule laid down by Mr. Justice Field of the United States Supreme Court in Cromwell v. Sac. County, reaffirmed in Keokuk v. Mo., supra, and in New Orleans v. Citizens Bank, 167 U. S., 397, and in So. P. R. R. Co. v. U. S., 168 U. S., at p. 48, is this, "that where the parties are the same and the subject matter and cause of action are the same, the estoppel extends not only to what was decided, but to all that might have been decided in that case; but where the parties are substantially the same but the cause of action different it only extends to what was necessarily involved and was actually decided in the first suit;" which is the doctrine laid down in the Duchess of Kington's case. The parties in the Lambert case were the Natchez, Jackson & Columbus Railroad Company and the sheriff of Adams county, and the subject matter or cause of action was the tax, state and county, on the part of the Natchez, Jackson & Columbus Railroad within Adams county; the exemption asserted was under the charter of the Natchez, Jackson & Columbus Railroad Company. In this case the parties are the Illinois Central Railroad Company and the Yazoo & Mississippi Valley Railroad Company on the one hand and the State Revenue Agent on the other, and the subject matter is State and County taxes of an entirely different railroad, the L., N. O. & T. railroad, and an exemption is claimed under the charter of the L., N. O. & T. Railroad Company, an entirely different charter. It is perfectly manifest therefore that neither the parties nor the subject matter are the same, except in the particular to be hereafter mentioned. The thing adjudged in the Lambert case was that State and County taxes were not due on that part of the Natchez, Jackson & Columbus Railroad Company lying within Adams county. It is true the principle of the decision would extend to the exemption of the whole property of the Natchez, Jackson & Columbus R. R. Co., but that was not the thing adjudged, and that feature of the decision is persuasive under the doctrine of stare decisis, and not binding as an estoppel, under the doctrine of res adjudicata. It is also true that to claim the benefit of res adjudicata as estoppel, in the strict and technical sense, it must be

pleaded or offered in evidence. It is further to be remarked that it is not the reason which a court gives for its decision which constitutes estoppel, but the thing it adjudges; this is well settled in Buckner v. Calote, 28 Miss., 432. The property adjudged by a court to a litigant is his thence forward under the doctrine of res adjudicata as a rule of property as against the parties in that same litigation; but the reasons which the court may give for the decision are thereafter simply persuasive under the doctrine of stare decisis and not in themselves to be invoked as the estoppel. It is a mere confusion of thought to blend these two wholly different principles, underlying these legal doctrines, and thus practically treating them as the same. Nor are the taxes of any one year, the same cause of action as the taxes of any other year, in the only proper technical signification to be given to the term res adjudicata. It is so held by the United States Supreme Court in Keokuk v. Mo., supra, and in Phoenix Ins. Co. v. Tennessee, 161 U. S., at p. 186. A decision for the taxes of any one year may be invoked under the doctrine of stare decisis, where the taxes of any other year are involved under the same claim. But certainly NEVER, on any clear thinking or correct reasoning, under the doctrine of res adjudicata.

On this very subject the Supreme Court of Iowa said, in the City of Davenport v. the C., R. T. & P. R. R. Co., 38 Iowa, p. 639-640: "Each year's taxes constitute a distinct and separate cause of action, and the determination of the matters, involved in the injunction, reached no further than the taxes for the years then in question. The cases are unlike those where two causes of action, (as two promissory notes) forming the subject matter of successive actions between the same parties both growing out of the same transaction, in which a defense set up in the first suit and held good will conclude the parties in the second.

But the taxes of separate years do not in any just sense grow out of the same transaction. They are like distinct claims on two different promissory notes, made from two distinct and separate though similar transactions between the same parties. A judgment on one of such notes, it is quite clear, would not be of any force as an estoppel in an action on the other note between the same parties. In support of these views see the following cases"; citing twelve cases, Mr. Justice White says in New Orleans v. Bank, 167 U. S., p. , that this was practically overruled in Goodenow v. Litchfield, 59 Iowa. But Seevers, chief justice in that case says, at p. 236, that the cases are not in conflict. And Rothbroch, judge, in delivering the opinion of the court in the Goodenow case says at p. 234: "That (the case in 38 Iowa) was a direct proceeding by the *taxing power to collect its revenue*, and it may well be questioned whether *any decree* could operate *upon future assessments and levies*" —the very principle announced in Keokuk v. Missouri, 152 U. S.

It will, however, be distinctly observed, and we direct emphatic attention to this statement, that whether the decision for taxes of one year is res adjudicata as to taxes for another year preferred under the same claims as held in New Orleans v. Citizens' Bank, 167, 397, is wholly immaterial here, since the parties to this litigation are not the same with the parties to the litigation in the Lambert case, except perhaps as hereafter indicated. There is therefore no res adjudicata arising out of the Lambert case, except as will be indicated; and that exception is this: perhaps the State Revenue Agent as to the taxes, state and county, on the property of the Natchez, Jackson & Columbus Railroad Co. in Adams county, for the year 1892, may be regarded properly and substantially as the same

party with the sheriff of Adams county, and the Natchez, Jackson & Columbus Railroad Co., as to the same taxes on the same part of its property may properly be regarded as substatially the same party with the Yazoo & Miss. Valley Railroad Co., into which the property of the Natchez, Jackson & Columbus Railroad Co. has been integrated. Substantially, in this small particular, as to the state and county taxes for the year 1892 on that part of the property of the Natchez, Jackson & Columbus Railroad Co. lying in Adams county, the parties may be said to be the same and the cause of action the same; and we hold accordingly that as to that the Railroad Company is entitled to claim the exemption under the Lambert case as res adjudicata. Except as to this a one there is clearly, as we think, no right to invoke the Lambert case as res adjudicata for the reason that the parties are not the same without reference to other considerations. And let it be further specially noted that the Lambert case went off on demurrer and the evidence in this case was not before the court. It is well said by the Supreme Court of the United States in Keokuk v. Mo., 152 U. S. 313, in an opinion of unusual clearness and power that "it is not to be tolerated that the State should be forever debarred of its taxes by an erroneous decision," p. 316. But it is said if the Lambert case is not res adjudicata it should control this case under the doctrine of stare decisis. There is one view of the Lambert case which authorizes the appeal to the doctrine of stare decisia; it did distinctly decide that what occurred between these companies was merger and not consolidation, and that no new corporation was created thereby, applying the principles of the Railroad Company v. Maine, 96 U. S. 499, to the facts of this case which are, in our judgment, wholly different from the facts in the Maine case. It did not decide of course—holding that the case was one of merger—whether section 180 of the Constitution of 1890 would have cut off the exemption had there been a consolidation creating a new corporation. Holding, that it was a case of mere merger, the court very naturally held that section 181 of the Constitution of 1890 had no effect on the exemption claimed, *in that view*. The court most emphatically did *not* decide that, had there been a consolidation resulting in the creation of a new corporation after the Constitution of 1890 went into effect, such new corporation could claim that an exemption belonging to one of its constituents prior to that constitution, as the property of the absorbed company alone, was continued by virtue of section 181. There is no process of interpretation by which the decision in the Lambert case can be so distorted as to mean any such thing. The court proceeded throughout upon the proposition that it being a mere case of merger, the Yazoo & Miss. Valley Railroad Co. absorbing the L. N. O. & T. Railroad, section 181 had no effect upon the exemption, and that such exemption passed to the the Y. & M. V. Co. so far as the property of the Natchez, Jackson & Columbus Railroad Co. was concerned. If it had *been* a mere case of merger, as held by the court, we think it clear, as hereinbefore pointed out, that *that* exemption did not pass, and that the court was in error in so holding, because of the well settled proposition hereinbefore stated and supported by the authorities that under the *general law* alone, without reference to the constitution, an exemption will not pass in a case of merger to the absorbing company which attached to the property of the company merged alone, unless the legislation authorizing in such case merger either *expressly* declared that the exemption shall pass, or used the word "immunity," or an equivalent word; it was correct in fact to say

that the exemption of the property of the Natchez, Jackson & Columbus Railroad Co. passed to the L. N. O. & T. Co. by virtue of the word "immunities" used in the Act of 1890, authorizing a sale or consolidation of the Natchez, Jackson & Columbus Railroad Company with the L. N. O. & T. Railroad (laws of 1890, p. 675) provided always that exemption was *legal* in its origin, the validity of which exemption was not contested but conceded in the Lambert case, but which was clearly invalid as we shall show later in this opinion. The power of the word "immunities" in said act to pass such exemption to the L. N. O. & T. Railroad under said Act of 1890 was exhausted by that consolidation, and had no virtue to carry that exemption into the new company, the present Y. & M. V. Railroad Company, resulting from the consolidation, even had Section 180 of the Constitution of 1890 not been adopted. We have most carefully considered the Lambert case, giving all due weight to the doctrine of stare decisis, and as to the two propositions that what occurred here was merger and not consolidation creating a new corporation, and that the exemption consequently of the Natchez, Jackson & Columbus Railroad properly passed to the Y. & M. V. Railroad Company, even in the view of merger under the *legislation alone*, we hereby expressly overrule the Lambert case. Exemptions, where proper, should be expressly granted—not stealthily referenced in.

Second. We turn now to a second ground of decision, wholly independent of, and disconnected from, all that we have said in the first ground, from which we think the same result must follow. The exemption asserted here is that contained in the 21st section of the Mobile & Northwestern Railroad Company's charter, which is as follows:

"Sec. 21.—Be it further enacted, That in consideration of the construction of the railroads provided for herein, and of the great benefit which the state will receive in the development of its agricultural resources by means of said Railroads as works of internal improvement, and also of the increased value which will thereby be added to the property of the State, thus enabling the State to greatly increase its revenue without additional and burdensome taxation upon the people, the State hereby agrees with said Company (*and which agreement is irrepealable*), that all taxes to which said Company shall be subject for the period of thirty years are hereby appropriated and set apart, and shall be applied to the payment and debts and liabilities which the said Company may have incurred in the construction of said road, or for money borrowed by said Company upon lands or otherwise, to be used in constructing the same: and it shall be the duty of the Tax Collector in every county, in each and every year, to give to said Company a receipt in full for the amount of said taxes upon receiving from said Company an affidavit, made by the President or Cashier of said Company, that the amount of said taxes have actually and in good faith been paid and applied by said company during the year in payment of the debts incurred, or money borrowed as aforesaid, and which receipt so given shall be in full of all taxes, county, state and municipal, to which said Company shall be subject; provided, however, that whenever the profits of said Company shall enable it to declare and pay to the stockholders an annual dividend of eight per cent. upon its capital stock over and above the payment of its debts and liabilities, then the appropriation of the taxes aforesaid shall cease, and said taxes shall be paid by said Company to the Tax Collector, to be by him paid over as required by law."

That act was passed in 1870, after the Constitution of 1869, Sec. 13, Art. 12, and Sec. 20, Art. 12, had been

adopted, and it is expressly decided in Lambert's case, 70 Miss., p. 786 and 789, that this was "a thin disguise to evade constitutional restraint apprehended to be contained in said section 13, article 12, of said constitution," and the Lambert case further declares—what is manifest—that the pretended exemption was irrepealable on the face of said section. Unquestionably said 21st section did provide for an *irrepealable exemption on its face*, and we hold it, *therefore*, to have been in violation of section 13, article 12, and section 20, article 12, of the Constitution of 1869.

The case of Mississippi Mills v. Cook 56 Miss. p. 40 expressly held that the legislature had no power to grant an irrepealable exemption and under that decision, the exemption claimed under this section is manifestly unconstitutional. Section 13, article 12 of the constitution of 1869 is in these words; "The property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals." Section 20 is in these words; "Taxation shall be equal and uniform throughout the State; all property shall be taxed in proportion to its value to be ascertained as directed by law." Mississippi Mills v. Cook decided that the property of private corporations for pecuniary profit was and should remain subject to taxation; it expressly held that while an exemption might be granted, yet it might at any time be repealed by the legislature, and further that no exemption could be granted to any private corporation for pecuniary profit by a special act extending a special exemption to that special corporation alone; but that in order to make any such exemption valid it must be extended to all corporations for pecuniary profit of the same class and in the same situation. And the precise exemption asserted in that case was asserted distinctly under the Acts of April, 1872, and 17th of April 1873 amendatory thereof set out at pages 42-43 of 56 Miss. The Mississippi Mills did not claim that it had a valid exemption by virtue of a special Act granting such special exemption to the Mississippi Mills alone, but that it had such exemption in common with all other factories similarly situated by virtue of said general law. The exemption set up here under the 21st section of the Mobile and Northwestern charter is wholly different. The claim here is that this particular railroad is entitled to this special exemption which it is conceded is not now, and never was, extended to all other railroads similarly situated in this state. And further this exemption is irrepealable on its face, and the Mississippi Mills case decided no irrepealable exemption was constitutional; it is certainly obvious from these considerations alone that the Mississippi Mills v. Cook is no authority to sustain the exemption set up here. It is further clear that the constitutionality, under the constitution of 1869, of a legislative grant of exemption to private corporations for pecuniary profit if it embraced all of the same class,—the property of individuals being at the same time taxed—was not argued, considered or decided in Mississippi Mills v. Cook, but was conceded by the attorney general and the judges who wrote the majority opinions. One of the vices of the decision in Mississippi Mills v. Cook is that it did not hold that all the property of private corporations for pecuniary profit was required to be taxed by the terms of the constitution, sections 13 and 20, article 12, just as, and when, the property of individuals was. Instead of doing this the court decided that all such property was free from taxation unless the legislature expressly subjected it to taxation, even though the property of private individuals was taxed, inverting the rule of the constitution. It was certainly an idle performance to declare, as the court did declare, that the whole effect of

the constitutional provision was to render the property of private corporations for pecuniary profit liable to taxation; that everybody knew: and to so limit the constitutional declaration was to emasculate it. More than 35 years had intervened between the previous constitution of the State and the constitution of 1869: when that previous constitution was adopted—in 1832—the State was young, and had had little experience with the grasping demands of corporations for grants of exclusive privileges; but the experience of more than 35 years had taught it wisdom in this regard, wisdom learned long prior by older commonwealths like California and Iowa, from the constitution of which latter state the provisions of the constitution of 1869 in question were doubtless borrowed; and so section 13 of article 12 was put in the organic law of the land, beyond the reach of legislative control, for the express purpose of formulating a fundamentally great line of public policy prohibiting any difference in the exercise of the taxing power between the property of individuals and the property of private corporations for pecuniary profit. The court in Mississippi Mills v. Cook at pp. 51-52 looked too narrowly at the mere word "Subject," it should have taken broadly the whole section into view and deduced from all its terms the meaning of the provision. Judge Campbell in Beck v. Allen, 58 Miss., 177, most wisely said: "Subtlety and refinement and astuteness are not admissible to explain away the expression of the sovereign will. The framers of the constitution and the people who adopted it must be understood to have intended the words employed in that sense most likely to arise from them, *on first reading them.*" This is the doctrine announced by Cooley & Story and our construction of the meaning of section 13, to-wit: that it required the property of private corporations for pecuniary profit to be taxed just as when—"the same as"—the property of individuals, so that one would not be exempt and the other taxed, is the identical construction placed upon the same words by the Supreme Court of the United States, of Alabama, Arkansas, California, Florida and Iowa. We prefer now to distinctly align ourselves with the Supreme Court of the United States on this important question, and overrule Mississippi Mills v. Cook in so far as it held that the property of private corporations for pecuniary profit was not, by the constitution of 1869, sections 13 and 20, of article 12, expressly directed to be taxed just as the property of individuals. The decisions of the United States Supreme Court to which we refer are as follows: Louisville v. Palmes, 109 U. S., 248; St. Louis v. Berry, 113 U. S., 475; Schurz v. Cook, 148 U. S., 408; Keokuk v. Mo., 152 U. S. 303, and 310-312.

The decisions of the State Supreme Courts to which we have referred are as follows: 38 Iowa, 635; 34 Cal., 432; 25 Ark., 289; 19 Fla., 231, which collates the constitutions of Wisconsin, Missouri, Illinois, Kansas, Mississippi, Alabama, Arkansas and Louisiana. In 53 Ala., 570, Mobile v. Stonewall, Judge Brickell in a most masterly opinion says: "The constitutional provision supposed to have been offended by the enactments under which the appellee claims immunity from the taxation the appellant seeks to recover, has a history which must be consulted, in determining its just interpretation. Its purpose was not an adaptation only of the organic law to the changed political condition of the people, and to conform it to the new relations springing from the amendments of the Federal Constitution, and the conditions imposed by congressional enactment. It was intended also to cure defects time had developed in former constitutions—to narrow and restrain legislative power in the instances experience had shown it most liable to abuse. Under

former constitutions the taxing power was not defined, qualified or restrained by any other provision than the simple declaration: "All lands liable to taxation in this state shall be taxed in proportion to their value." There can not be a just interpretation—an interpretation which will consummate the intent of the people in the adoption of these and other constitutional provisions—which is not deduced, not only from their *language*, but from their *history*—from the causes to which they owe *origin*—the *mischief* they were intended to *remedy*. In respect to the constitution of the United States, it is said "the safest rule of interpretation is to look to the nature and objects of the particular powers, duties and rights, with all the lights and aid of cotemporary history, and to give to the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed." In the creation of the greater part, if not all, of the private moneyed or commercial corporations which were created prior to 1861, a commutation of taxation was a prominent feature of the charter. Entire or partial exemption from taxation temporarily has been frequently granted corporations formed to pursue branches of industry, the encouragement of which it was believed a wise public policy required. All exemptions from taxation necessarily increase the burdens imposed on the property not exempt, and are directly injurious to the taxpayer. The incidental benefits which it is supposed may result to him, in common with the community at large are speculative, and not often a compensation for the immediate injury sustained. Invidious exemptions or discriminations, by which the property of an individual, or of a corporation, is relieved from bearing a just proportion of the common burden taxation is intended to discharge, are violative of the equality of right of the citizen, which is a fundamental principle of our institutions. To prevent any exemption or discrimination in favor of corporations, to subject their property to the same rate of taxation to which the property of individuals of the same kind is subject, is the purpose of the constitutional provision clearly expressed: "The property of corporations now existing, or hereafter created, shall forever be subject to taxation, the same as property of individuals," etc. The argument of appellee, that it was intended only to reserve to the legislature the *power of subjecting* corporate property to the taxation imposed on individuals, and to avoid the introduction into charters of irrepealable exemptions, or discriminations, *can not be supported*. Reading these constitutional provisions in the light of their history, and with a due regard to the words in which they are expressed, it is impossible for us to doubt that it was not competent for the general assembly, in the imposition of taxes, to distinguish or discriminate in favor of corporate property subject to taxation. If property of a particular kind is subjected to taxation, and owned by a corporation it must bear the rate of taxation imposed on individuals. While the constitution inhibits the exemption or discrimination in favor of corporations, it equally inhibits a discrimination against them. Equality in bearing a common burden, which is natural right and equity, is secured alike to the corporation and to the citizen.

The constitution of Iowa contains a provision identical in meaning if not in words, with the provision of the constitution of 1868, under consideration. It reads; "The property of all corporations for pecuniary profit shall be subject to taxation, the same as that of individuals." In The City of Davenport v. C. R. J. & P. R. R. Co., 38 Iowa, 633, it was the subject of construction, and was declared mandatory, requiring the legislature to pro-

vide for taxation of the property of corporations for pecuniary profit the same as that of individuals. A statute releasing railroad companies from certain taxation to which individuals were subject was declared violative of it. The Court says: "What are we to understand to be intended by the language 'the same as that of individuals?' We need not determine whether this language requires that corporate property shall be taxed in the same manner as that of natural persons. It seems, however, quite clear that it was intended by this language to require the legislature to impose the burdens of taxation upon the property of corporations for pecuniary profit, the same as, or equally with, that of individuals; that each shall be taxed for the same objects, and in the same degree, so that individuals shall not be required to pay any taxes on their property which have not also been assessed and laid upon the property of corporations of the class named, or in any greater proportion. When the legislature provides for taxing the property of individuals, this clause of the constitution requires it to tax the property of corporations for pecuniary profit to the same extent and for the same purposes. If the property of individuals be taxed for state, county, school, and municipal purposes, the property of this class of corporations must be subjected to the same taxes, and at the same rates. *The one can not be exempt, and the other liable.*"

It will thus be seen that on the particular holding of Mississippi Mills v. Cook which we now overrule this court stood absolutely alone; its decision in direct conflict with all the decisions we have just above cited. So much for the mere inaccuracy of that holding.

We turn now to the proposition that the overruling of Mississippi Mills v. Cook as to the holding which we have particularized overturns a rule of property and destroys a vested right on which the railroad company has a right to rely. The alleged vested right is this: that the 21st section of the Mobile & North Western charter containing this alleged exemption has been declared repeatedly in this state by the Miss. Mills v. Cook and other cases down to and including the Lambert case, not to have been violative of the constitution of 1869. This statement is wholly inaccurate and is the result alone of a careless study of the decisions of this court. There are some primary rules on the subject of stare decisis to which we shall first call attention, they are formulated by the Supreme Court of the United States as follows:

1. The court is not bound by expressions in former decisions on points which were not contested. Cross v. Burk, 146 U. S. 86.

2. The doctrine of stare decisis can not be invoked in favor of decisions on former statutes which were merely similar to but not identical with the one under review. Wood v. Brady, 150 U. S. p. 20. This rule was relied upon by the Supreme Court of the United States in the celebrated Income-tax case. Pollock v. Farmers Loan & Trust Co., 157, 574, the court pointing out that whilst the language of former decisions was sometimes very broad, yet the exact points involved in all former decisions were different.

3. It is expressly held that a decision that a statute constitutes a contract and that an Act repealing it is void is not an estoppel to a subsequent decision holding that the former *statute itself* is *unconstitutional*, and this is the exact case now before us. Boyd v. Ala. 94 U. S. 645.

Keeping these principles steadily in mind a review of the decisions of this court will show that no charter identical with that of the Natchez, Jackson & Columbus R. R. was ever passed on in this State until January, 1891, a period subsequent to the purchase of that road by the L., N. O. & T. Rail-

road Company; from which it necessarily follows that THAT purchase could not have been made on the faith of that decision rendered in 1891. It will further be seen that the question whether the 21st section of the charter of the Mobile & North Western Railroad Company violated the constitution of 1869, as we hold it did, has never been passed on in this State up to this time. The cases in this State relied on to show the opposite of these views are as follows: Mississippi Mills v. Cook, 56 Miss. p. 40, decided at the April term, 1878, where the sole question was, *according to the opinion*, whether exemption under general law was repealable or irrepealable; the constitutionality of the exemption was not argued or decided. But much more than this is to be said about Mississippi Mills v. Cook. An examination of the original record in Mississippi Mills v. Cook shows that it was a bill for injunction by the Mississippi Mills v. Cook, tax collector averring the establishment of its factory after and on the faith of the acts of 1872-1873 granting an exemption in consideration of the construction of factories, etc., and that Cook was willing to accept the affidavit for the taxes of the mill proper, but refused to accept the affidavit for taxes on outlying land, and the bill prayed an injunction v. Cook prohibiting the sale of its property for these taxes assessed on outlying lands on the ground that they were essentially part of the Mill property for wood, etc. The bill averred that under the Act of 1877 Cook himself insisted on collecting these taxes on these lands; there was a general demurrer to the bill sustained by the court below and the bill was dismissed, and an appeal taken to the Supreme Court. The sole question involved, therefore, as thus clearly shown *by the record itself*, arose under the general exemption law applicable to all the factories of the class described, and not to a special grant a special exemption to a particular corporation. All, therefore, that appears in the opinion beyond what would relate to the right to collect these taxes on outlying land, *is mere dictum;* for in determining what has been *adjudged* courts look to the decree and the record, and are not controlled by the mere opinion. Herman on res adjudicata p. 470. Another striking difference between the exemption claimed in that case and in this, is that the Act of 1872, under which that exemption was asserted, did not attempt to perserve exemptions granted to corporations or individuals establishing factories under its provision from legislative repeal; whereas, in the Act of 1870 this 21st section, is declared in the Lambert case a miserable attempt to evade the constitution of 1869 and secure an irrepealable grant of exemption, and that, too, to a particular corporation. The next case is McCulloch v. Stone, 64 Miss., 378, decided in 1886, in which the only question involved was whether outlying lands of a railroad company were embraced in an exemption contained in that charter, the court holding that they were not. The next case is the Yazoo & Miss. Valley Railroad Company v. Thomas, 65 Miss., 553, decided in 1887, in which the only question involved was whether the property was exempt before completion of the railroad to the Mississippi river. The charter provided for a 20 years' exemption after such completion, the court holding that it was not exempt. The next case is the Vicksburg Bank v. Worrell, 67 Miss., p. 47 decided at October term, 1889, where the legislature had provided for what the court calls a privilege tax on all banks in the State, and the question was whether this violated Article 12, section 20, of the constitution of 1869, providing that taxation shall be equal and uniform and in proportion to value, and the court held that it did not. The next case is Attala County v. Kelly, 68 Miss., 44, decided at October term, 1890, a case in

which the bank had paid in advance a commutation tax of $1,000 called by the court a privilege tax, and the legislature in the same year repealed that law and provided for an advalorem tax. The court held it was liable to the advalorem tax notwithstanding it had paid the commutation tax, and that was the only point involved. The next case is the Louisville, New Orleans & Texas v. Taylor, 68, Miss., 361, decided at October term, 1890, not actually decided, however, till January 26, 1891, as the records of this court show. No question was raised in that case by counsel or the court as to the constitutionality of the exemption contained in such section 21 of the M. & Northwestern charter, the sole question involved was the right to exemption of a gravel pit claimed by the L., N. O. & T. Railroad Company under the charter of the Vicksburg, Pensacola & Ship Island Railroad Company,—afterwards the M. & Sh. I. R. R. Co.—which never was a part of the L., N. O. &. T. Railroad Company, and the court decided that the exemption should be allowed under that charter!! This was a most extraordinary mistake, for it is now conceded by counsel for the railroad and everybody else that the charter of the Vicksburg, Pensacola & Ship Island Railroad Company, afterwards the M. & Sh. I. R. R. Co., had nothing on earth to do with the charters of the L., N. O. & T. Railroad Company nor was that railroad any constituent of the L., N. O. & T. Railroad Company. It appears that the court was led into this mistake by an assumption of counsel to that effect in the case. Certain it is that it was a tremendous mistake of fact and one against the sovereign right of taxation. It is perfectly obvious that this case is wholly fictitious and is of no authority for any purpose. It is further to be observed, however, that inasmuch as the L., N. O. & T. Railroad Company purchased the Natchez, Jackson & Columbus Railroad Company in March, 1890, and the decision in the Taylor case was not rendered until Junary 26, 1891, the L., N. O. & T. Railroad Company could not possibly have made said purchase on the faith of the Taylor case, nor on the faith of section 181 of the Constitution of 1890, because that was not adopted until November 1st, 1890, and then continued only legal exemptions to corporations retaining the precise identity they had before the constitution was adopted. The next case is State v. Simmons, 68 Miss. 361, decided at October term, 1890, which involved the mere question as to whether the capital stock was exempt under the charter and the court held that it was not. The next case, and the last, is the Natchez, Jackson & Columbus Railroad Co. v. Lambert, 70 Miss. 779, decided at the March term 1893, and the question contested in that case was whether the exemption of the Natchez, Jackson & Columbus Railroad Co. v. Lambert, which had been purchased by the L. N. O. & T. Railroad Company, passed to the Y. & M. V. Railroad Co., the court deciding that it did. The question whether that exemption violated the constitution of 1869 was not argued by counsel or considered or decided by the court. These are the cases on which so much reliance has been placed to show a vested right—a rule of property—and it is perfectly manifest that in *none* of them was it proper to have decided upon the constitutionality of this section 21, unless in the Taylor case and the Lambert case, because in none of the other cases was that question *involved*, and they could all have been decided without reference to that question, and consequently, under the authority of Pollock v. Trust Co., 157 U. S., and Boyd v. Ala., 194 U. S., supra, they are not binding, under the doctrine of state decisis even, on this court in this case. And whilst the question of the constitutionality of said section 21 was in-

volved in the Taylor case and the Lambert case, the constitutionality of the exemption was *conceded* on all hands, and *not contested*, and not having been contested, these cases as held in Cross v. Burk, 146 U. S., supra, are of no force on us in this case under the doctrine of stare decisis. It will thus be clearly seen (1) that the exemption claimed in the Miss. Mills v. Cook was one claimed under a general law applicable to all the factories in the State of the same class; whereas, the exemption claimed here, to-wit., the 21st section of the charter of the Mobile & Northwestern Railroad Co., is an exemption attempted to be granted to this special corporation, and not to all the other railroads in the State, a special privilege under a special charter to a special corporation. (2). That the Miss. Mills had established their factory after the passage of the Act of 1872-1873, on the faith of those acts as a rule of property; whereas, the L. N. O. & T. Railway Company never came into existence, as admitted by counsel for the railroad until the 12th day of August, 1884. by the consolidation of the Baton Rouge Railroad and the Vicksburg and Memphis Railroad, after the construction of the road had been practically finished in July, 1884. (3). That the exemption claimed in Miss Mills v. Cook had no irrepealable feature whereas the exemption set up under the said 21st section is on its face irrepealable, and was so judicially declared to be, in the *Lambert case itself*. (4). That the L. N. O. & T. Railroad Co. claims under charters granted in 1882 and 1884, asserting as its exemption this 21st section, the unconstitutionality of which, as violative of section 13 of article 12 of the constitution of 1869, was not only *not* considered, argued, or decided, in Miss. Mills v. Cook, but which, by virtue of its irrepealable feature and its special grant of an exclusive privilege to a special corporation, would have been *condemned by the reasoning of that very case*. (5). And not only is it true that the particular exemption claimed here, under this 21st section, was not argued, or decided, in Miss. Mills v. Cook, but no other decision was ever rendered in this State in which the constitutionality of this 21st section was *even involved*, until McCulloch v. Stone, decided in 1886, four years *after* the grant of the charter of the L. N. O. & T. Railroad Co. (6). From which it necessarily follows, that *that* road was not built on the faith of any decision ever rendered in this State up to the time of the grant of its charter, which *even involved* the constitutionality of said 21st section, and that the claim that it was organized or built on the faith of such decision operating as a rule of property *is utterly unfounded and absurd!* (7). That the Taylor case was neither more nor less than a fictitious case which misled the court by the misstatement of fact that the Vicksburg, Pensacola & Ship Island Railroad, afterwards Gulf & Ship Island Railroad, was one of the constituent members of the L. N. O. & T. Railroad, and its charter was a constituent charter of that railroad, and that the Taylor case is authority for nothing. (8). That the Lambert case was decided at the March term 1893, ELEVEN YEARS after, not before, the grant of the charter of the L. N. O. & T. R. R. Co. And it is hence utterly incomprehensible to the legal mind how anybody could invoke that case under the doctrine of stare decisis as affording a rule of property to a company constructed under a charter granted BEFORE it was rendered. Such claim becomes more incomprehensible still when the further facts are recalled that the consolidation of the L. N. O. & T. and Y. & M. V. into the present Y. & M. V. R. R. Co. took place October 24, 1892, long BEFORE the decision in the Lambert case."

Let us get out of the realm of idle and reckless assertion into the realm

of fact, and inquire more particularly and accurately exactly what was decided, even in the opinion of the court, which went far beyond the record, in the Miss. Mills v. Cook. The vice of that decision is, that it looked exclusively to the word "subject" in section 13, article 12, and failed to give force and effect to the words, "the same as that of individuals." When we say that the court's construction of the word "subject" attributed to it some supposed magical effect, we are simply reiterating the language of Chalmers, Justice. He said, p. 5956 Miss.: "I find no such *magic* as my colleague in the words 'shall be subject to taxation the same as that of individuals.' To me they have no meaning other than that which would be conveyed by the equivalent phrases shall be treated or shall be dealt with the same as that of individuals, or shall be liable to taxation the same as that of individuals. This, and many similar phrases, which might perhaps be suggested convey one and the same idea, namely: That the law-giver in the imposition of taxes shall *know no difference between the property of individuals* and *that of corporations for pecuniary profit.*" The opinion of the court declares as its gist that section 13 was not mandatory upon the legislature to tax the property of private corporations for pecuniary profit whenever the property of individuals was taxed. It distinctly put the property of such private corporations as to the power to tax them, or exempt them, in a class by themselves distinct from the class of individuals. In other words, it held that although the property of individuals might be taxed, yet the property of such corporations might be at the same time exempted by the legislature from taxation; provided, such exemption extended to all corporations of the same class in the State. We think it is perfectly manifest that the language "the same as the property of individuals" imperatively commanded the legislature whenever they tax the property of private individuals, to tax also the property of such corporations, and under the same rules of equality and uniformity. It was well said by Campbell, Justice, that this provision of section 13 "sprang from the experience that corporations were in the habit of asking and obtaining legislative exemption from liability to taxation." That experience the State had acquired in the 35 years lapsing between the constitution of 182 and the constitution of 1869, and that experience was wisely availed of to put an end to the grant of exclusive privileges to such corporations. It marked a new era in the history of corporate taxation in this State; it laid down a fundamental new line of great public policy, one that will be found essential to the preservation of the rights of the people, as is abundantly attested by the experience of older States dealing with such corporations. It is that feature of the decision thus holding that this section 13 merely permitted the taxation of such corporations, but did not require that taxation whenever the property of individuals was taxed, and in just the same manner, in all respects as the property of private individuals was taxed, which we now condemn and overrule. In no other respect do we interfere with the decision in that case. That case decided, and properly decided, that under the constitution of 1869 the legislature had the power to select for exemption from taxation certain designated kinds of property, such as the agricultural implements of farmers, the tools of the mechanics, etc., etc. Such exemption of particular kinds of property, for reasons of public policy, the constitution allowed the legislature to grant, and when granted, it applied to such property, whether owned by individuals or such corporations. And to permit such exemptions was perfectly

consistent with holding that said section mandatorily required the legislature to tax the property of such corporations whenever and just as it taxed the property of individuals. The vice of the holding of the court was in disregarding and repudiating the correlation by the constitution of the property of such corporations and the property of private individuals in the same category as to the *right* to tax and the *duty* to tax, and in declaring that under that section the legislature might put into operation a scheme of taxation which taxed property of all the private individuals in the state, and at the *same time*, at the will of the legislature exempt all property of such corporations from any taxation whatever. The constitution plainly and clearly *yoked together indissolubly* the property of such corporations and the property of individuals and subjected both alike to the same taxation to be imposed under the same rules of equality, or uniformity. The legislature might not exempt all the property of private corporations for pecuniary profit and tax all the propey of private individuals, but it might exempt cerain selected kinds of property in pursuance of a wise public policy, whether that property belonged to such corporations or to private individuals. One other observation. The case before us most emphatically does NOT present a claim to exemption under a charter identical with the charter in the Miss. Mills v. Cook, nor the case of any corporation which has acted on the faith of a decision construing a charter identical with the charter in the case of Miss. Mills v. Cook. and which might thus be said to constitute, for such corporation, acting on it and investing its capital on it, a rule of property. It will be time enough to decide that precise question when that question shall be presented. Whence did we get section 13 Article 12, of the constitution of 1869 ? It is said in the Miss. Mills v. Cook that we get it from the constitution of Iowa; the clauses in the constitution of Iowa and constitution of Mississippi 1869 are identical on this subject, and the Supreme Court of Iowa in the City of Davenport v. Railroad Co., 36 Iowa 635 and the City of Dubuque v. Illinois Central R. R. 39 Iowa, expressly decided that this identical section prohibited the legislature from exempting the property of corporations from the same taxes imposed on the property of individuals, and that the property of corporations must be taxed whenever that of individuals was taxed. The constitution of Alabama in Mobile v. Stonewall Ins. Co. 53 Ala. 70 declared that the provision was in itself self-executing without the aid, in fact in restraint of, legistive power,—subjecting corporate property to the taxation imposd on individuals, and expressly declared further that if property of a particular kind is subjected to taxation and owned by a corporation, it must bear the rate of taxation imposed on individuals.

The constitution of California contains an identical provision, and in the case of People v. McCrary decided at January term 1868, the Supreme Court of California announced the same construction held in Iowa and Alabama expressly overruling early decisions to the contrary, just as we do here. The constitutions of Arkansas and Florida contain similar provisions and the Supreme Courts of those States announced the same construction which we here announce. When therefore section 13 of the constitution of 1869 was adopted in this state it was written in the organic law of our land, bringing with it the *same meaning precisely*, under well settled rules of construction, which it had in the State *from which it came here*. And the same construction was unamously approved by the Supreme Court of the United States in four concurring de-

cisions rendered in November 1883, March 1885, April 1893 and March 1894 towit: Louisville etc. v. Palmer, 109 U. S. 248-254. St. Louis etc. v. Berry, 113 U. S. 475. Schurz v. Cook, 148 U. S. 408. Keokuk v. Mo., 152 U. S. 303-304 and 310-312.

In overruling this feature of the decision in Mississippi Mills v. Cook, therefore, we were announcing a rule of construction supported by four decisions of the United States Supreme Court and by the decisions of five State Supreme Courts, as against a rule of construction announced in *no case in this Union except Mississippi Mills v. Cook.*

We have all proper respect for the doctrine of stare decisis, but it is a doctrine not inflexible and departed from over and over by the wisest courts in proper cases.

And if the doctrine of stare decisis can be disregarded in proper cases, where the question is one merely of *property rights* between *individuals*, how much stronger is the reason for disregarding it when, so to do, results as herein merely restoring to a sovereign State the right to tax corporations and make them bear their just share of the burdens of that government whose protection they so constantly and persistently invoke. This distinction is not one of our invention. It is well settled in the law and it was voiced in words which we quote to approve by Chief Justice George in Lombard v. Lombard, 57 Miss., p. 177, who said: "Speaking for myself alone, I would say that on *constitutional* questions, where the former decision refused a right reserved to individuals as against the power of the government, or where it impaired the powers of the people or their representatives to prevent maladministration by their officers and agents, or sanctioned an *alienation by the legislature of powers conferred for the public good*, I should feel little hesitation in departing from it, when satisfied of its incorrectness." And in Beck v. Allen, 58 Miss. 173, Judge George delivering the opinion of the court, overruled two previous decisions on the same point, justifying departure from the rule of stare decisis, by the very distinction here referred to, the case being one involving the taxing power. In concluding this ground of decision we repeat that it is wholly independent of the first ground of decision hereinbefore elaborated, and whether we are right or wrong in the view announced in this second ground, the exemption must be denied looking to the first alone.

In our summary of the holdings in this case, we said there were other views leading to the same conclusion, which we might embrace in the opinion. We proceed to notice these. We come now to a third ground of decision, and that is this: that the exemption claimed here under said 21st section of the Mobile and North Western charter whether applied to the property of the Natchez, Jackson & Columbus Railroad alone, or to the other property of the L., N. O. & T. R. R. Co. has been repealed by legislation, certainly since the code of 1892 went into effect. It was declared in the Lambert case, 70 Miss. 787, through Judge Campbell,—the author of the code of 1880,—that by the code of 1880, each railroad in this State was subjected to taxation. That code, therefore repealed all railroad exemptions then existing. The Lambert case further held that by the act of 1884, p. 29, the exemption of the Natchez, Jackson & Columbus Railroad was restored, and that by the act of 1890, p. 12, if it then existed, it was continued. An examination of all the statutes on the subject, which are as follows: Code of 1880, Sec. 596-606, inclusive, and Secs. 607 and 608; Acts of 1886, Sec. 6, p. 23; Acts of 1888, p. 49; Acts of 1890, p. 12; Code of 1892, Secs. 3379 and 3875, and Sec. 3744;—will show that the scheme propounded by the legislature was, up to the code of 1892, this: That railroad companies should

pay ad valorem taxes unless they should accept the conditional exemption provided in the privilege tax law in lieu of the ad valorem tax and manifest their acceptance of the law providing this conditional exemption from ad valorem taxation by putting such acceptance in writing and annually paying the privilege tax specified. The provisions of law respecting such conditional exemption from advalorem taxation by accepting the privilege tax imposed in lieu thereof and paying it run side by side through all the legislation from the code of 1880 to the code of 1892. The scheme was that advalorem taxes should be paid by all railroads in the state, but that any railroad should be exempt from such advalorem taxes which would pay the privilege tax provided in the various Acts, provided it manifested its acceptance of such exemption in writing and paid such privilege tax. As to the Natchez, Jackson & Columbus R. R. Co. the code of 1880, as shown, repealed its special exemption in its special charter by Sections 597 through 606, and placed its conditional exemption from advalorem taxation upon acceptance manifested, in writing, and upon payment of the privilege tax thenceforward, under the *general law* of the state, thus *withdrawing* any right that railroad company had to claim a special exemption under this special charter. And whether it had an exemption from advalorem taxes thenceforward was to be determined not by reference to a special charter but by reference to the general law, on the subject of privilege taxes enacted from time to time. The Act of 1884 in fixing the privilege taxes did, however, restore by recognition to the Natchez, Jackson & Columbus R. R. Co. the exemption of its charter according to the opinion in the Lambert case. As the Act of 1884 did not pretend to affect Secs. 597 through 606 code of 1880 in imposing advalorem taxes but only Secs. 606-608 relating to the privilege taxes, it is to our mind quite doubtful whether the Act of 1884 did have the effect to restore the charter exemption; but conceding that it did, it is strange that the court in the Lambert case overlooked the Act of 1886, Sec. 6, p. 23, amending the privilege tax chapter, code of 1880, fixing the privilege taxes to be paid by each railroad in the state, and expressly declaring, "That hereafter said railroad companies shall pay privilege taxes respectively 25 per centum greater per mile than is fixed in said Acts" without once alluding to any exemption of the Natchez, Jackson & Columbus Railroad, or any other railroad. Clearly if the exemption of the N., J. & C. R. R. Co. was restored by the act of 1884 it was repealed by said Act of 1886 and was not in existence from that time until the Act of 1890 was passed. The Act of 1890, p. 12, amended the Act of 1884 and then re-enacted it as amended; this seems to have been an ingenious effort on the part of some one who knew that the Act of 1886 had repealed the exemption of the Natchez, Jackson & Columbus R. R. Co. recognized in the Act of 1884, to again restore it by an effort to repeal the Act of 1886 without disclosing the fact or referring to the Act of 1886. But the holding in the Lambert case is that the Act of 1890 continued the exemption, if it existed, and since it is clearly shown that no exemption existed when the Act of 1890 was passed, there was no exemption to be continued, and the Act of 1890 under the rules of construction with reference to taxation most certainly can not be held to have created then *anew* such exemption. It follows from this that when the constitution of 1890 was adopted the Natchez, Jackson & Columbus Railroad had no exemption and consequently section 181 of the constitution had no effect to continue the exemption which was not then in existence. When the code of 1892 was adopted the legislature carrying out the man-

date of the constitution of 1890, paragraph 90 (h) expressly provided in Sec. 2379 that the privilege tax should be imposed on all railroads without a suggestion of any exemption to any, and this code was a revision of all general laws on the subject and wholly omitted all the provisions of the Acts of 1884 and 1890 in respect to exemptions. The scheme of the taxation up to the code of 1892 was that railroad companies might escape advalorem taxation by accepting the provisions of the law as to privilege taxes, in writing, and paying the same. The scheme of taxation under the code of 1892 changed all this and repealed all former exemptions of all railroads from taxation by said section 3379 and said section 3875. A consideration showing that this was the purpose of the legislature is the smallness of the privilege tax under Sec. 3379 no longer in lieu of advalorem taxes as compared with its amount under former laws. The code of 1892 provides for the exemption of all property which is to be exempt in Sec. 3744 and railroads are not mentioned in that section; the provision of that section is as follows: "The following property and NO OTHER shall be exempt from taxation" which declaration is as positive and emphatic an exclusion of all railroad exemptions as language can furnish. But not only did section 3379 of said code impose privilege taxes but section 3875 imposed advalorem taxes. By that section every railroad company in the state without exception was required to return all its property within and without this state with its value so that the assessors might know what value should be the basis of state, county and municipal taxation and the section further declares as to railroads that all of its property, real and personal, taxable and non-taxable shall be included. The word Non-taxable in this connection does not mean exempt property but property like government bonds that are not taxable at all, and this is made plain by the provision at the close of the section "that if the said property is claimed to be exempt from taxation it shall be separately stated and the law cited under which the claim is made." In other words, they were to return three classes of property, taxable property, non-taxable property, that is, property that could not be taxed in its nature, and exempt property, if any, citing the law for the exemption. The word non-taxable therefore *creates* no exemption and does not describe exempt property which is otherwise provided for but means merely, as stated, property like government bonds that can not be taxed at all. So that we hold that certainly since the code of 1892 went into effect, and as we think, since the Act of 1886 the exemptions set up by the railroad company in this case were repealed by the legislature, and on this ground independently of any other ground, heretofore set out, the exemptions must be denied.

4th. Counsel for the State Revenue Agent presents another very ingenious view to this effect that the 21st section of the Mobile and North Western charter was plainly prospective and inte ded to carry the benefit of the exemption therein provided only to a company which should build a railroad after the grant to it of the exemption. We think it is entirely clear that said provision was prospective and that the consideration to the state for the grant of the exemption was that recited in the Act, to-wit: "The construction of the railroads provided for therein and the great benefit which the state would receive in the development of its agricultural resources by means of said railroads as works of internal improvement, and also the increased value which would thereby be added to the property of the state thus enabling the state to greatly increase its revenue without burdensome taxation upon the people." That was th

consideration to the state: that clearly was the reason and object of the statute. So far we agree with counsel. Counsel's argument then proceeds to claim that the Act of March 3, 1882, authorized the Memphis & Vicksburg Railroad Company and Mississippi Valley and Ship Island R. R. Co. to consolidate, and that the object was to construct a railroad from Memphis through Vicksburg to Ship Island—a scheme well known to be dearly cherished by the people of Mississippi for years back. Counsel then proceeds to claim that section 1 of the Act of March 3, 1882, in providing that the consolidated company should have all the rights, property, immunities, etc., NOW possessed by the companies which may enter into such consolidation merely meant such rights, etc., as belonged to the companies existent at the date of the passage of the Act: that as the Baton Rouge R. R. Co. was not chartered until March 9, '82, it was not contemplated that THAT company should be a constituent member of the consolidation and that section 5 of the Acts of 1882, p. 1015, was meant by the legislature to extend the exemption of said 21 section to such road only as the Consolidated Company—the L., N. O. & T. R. R. Co.—might build AFTER it came into existence; and that as said company did not come into existence until after the road from Memphis to New Orleans was completed, it is a perversion of the spirit and purpose of the legislature to allow the L., N. O. & T. R. R. Co. to blanket this exemption over a road which was never built by it, and in the construction of which it incurred no indebtedness. This is certainly very persuasive, but we do not now decide whether it is a correct contention or not. Another contention of counsel for the Revenue Agent, worthy of serious consideration, is this: that taking the charter of the Baton Rouge Company and the Memphis and Vicksburg Company as written into the charter of the L., N. O. & T. Co. as part thereof, the legislation of the state shows that it was the purpose of the legislature to extend this exemption of the 21st section to the company created by the FIRST consolidation, the L., N. O. & T. R. R. Co., but to exclude it from the present Y. & M. V. R. R. Co., the result of the SECOND consolidation. Counsel's argument on this point is about as follows: That conceding that the first section of the Act of March 3, 1882, the L. N. O. & T. charter—contained the word "immunity" and that by virtue thereof the exemption of the said 21st section passed to the L. N. O. T. R. R. Co., the only authority for any future consolidation of the said L. N. O. & T. R. R. Co. with the Y. & M. V. R. R. Co. is to be found in section 16 of the Baton Rouge charter and section 25 of the Memphis and Vicksburg charter and that in both these sections the legislature intentionally omitted the word "immunity" and any other words equivalent thereto, and that this omission conclusively shows that it was the purpose of the legislature to limit the existence of the exemption provided by said 21st section to the L. N. O. & T. Railroad Co., the result of the consolidation of the Memphis & Vicksburg Railroad Co. and the Baton Rouge Railroad Co.—only so long as it retained its existence as the said L. N. O. & T. R. R. Co., and not indefinitely to pass this exemption along to all future consolidations. Counsel has so succinctly stated the facts on this subject that we cannot do better than to quote that part of his brief, which is as follows: "All of these sections thus put in the same charter, demonstrate that it was the purpose of the legislature to pass the exemption into the L. N. O. & T. under the word *immunities* but to withhold it from any future consolidation by omitting the word *immunities*, in said sections 16 and 25; and by using therein no words to indicate the intention

of passing the exemption to any future consolidation. But, in this connection, the court will bear in mind that the Act of 1890 as to the sale of the N. J. & C. R. R., on which the Lambert case is based, used the word *immunities*, as elsewhere shown. When the legislature passed the Act of March 3, 1882, the L. N. O. & T. charter, it necessarily had in mind the provisions of the charters of the M. & V. Co. and the Miss. Valley and Ship Island Co., because both of these companies are mentioned in the very beginning of the Act, and it was passed for their express benefit; and the legislature made these charters necessary parts of the Act because, by its terms, it could not be made effectual without the charters of said Consolidated Company be taken and held to be parts of this Act." "Said M. V. & S. I. R. R. Co. was incorporated in 1871, Acts 1871 p. 237, as the Vicksburg Pensacola & Ship Island R. R. Co. In 1873 its name was changed to M. V. & S. I. R. R. Co. Acts 1873 p. 562. The 15th section of the original charter of this company gave the power of consolidation (Acts 71 p. 247) but omits the word *immunities* and gives no power to vest in the consolidated company the exemption from taxation contained in the 21st section of the charter. Besides the amedatory Act of 1873 which vested this exemption from taxation in the charter as amended. uses the word *immunities*, in Sec. 1, p. 562, Acts 1873. The charter of the Y. & M. V. Co. uses the word *immunities*, to embrace exemption from taxation, Acts 1881, p. 343 Sec. 5. The amendment of the Y. & M. V. Co. charter, Acts 1884, sec. 3, p. 985 uses the word *immunities* for the same purpose. The amendment of the L. N. O. & T. charter, Acts 1884 p. 936 uses the word *immunities* for the same purpose. All these things were in the mind of the legislature as parts of said Act of March 3, 1882, and show they used the word *immunities* advisedly, and did not intend that any exemption should pass into any FUTURE consolidation, after the formation of the L. N. O. & T., and this section 15 of the M. & V. & Sh. I. R. R. Co expressly provided that any consolidation should FORM ONE COMPANY and have a JOINT COMMON stock."

Certainly the significance counsel seeks to have attached to the omission of the word "immunity" in the Act referred to seems fully borne out by the opinion of Mr. Justice Peckham in Phoenix Ins. Co. v. Tennessee 161 U. S. at p. 177; but we decline now to pass definitely upon this contention. There is also much force in another view presented by counsel for the Revenue Agent to the effect that since 1888, the proof in the record shows that the railroad company had been able to declare and pay the annual dividend of 8 per cent upon even its fictitious capital stock over and above its fixed charges on the proper construction debt. But to go into this would protract this opinion beyond anything necessary for present decision. There is a rather curious proposition of counsel for the railroad companies in his brief at pp. 118 et seq. The argument is that what was provided by the 21st section of the North Western charter was not an *ordinary exemption* at all, although counsel admits that the Lambert case expressly so decided, but that it was a *contract* of *appropriation irrepealable* in its nature, and not an exemption at all. If counsel's contention as to this is sound, then it is perfectly plain that the claim of rule of property and vested right under former decisions of this court falls at once to the ground; for no one will contend that this court has ever treated the said 21st Section as an appropriation by contract irrepealable in its nature. Counsel's construction is therefore utterly inconsistent with the reiterated claim that the view we take is trenching upon any rule of property laid down in any previous

decison rendered by this court. This is the first time that such a construction was ever presented to this court or asserted in any form.

Finally, all the judges concur that because of the inconsistent compromise verdict, the judgment must be reversed both on appeal and the cross-appeal.

The judgment is reversed both on appeal and the cross-appeal, and verdict set aside, and the cause remanded for a new trial.

NOTE: The above opinion having been filed since the meeting of the court, Woods, C. J., has been unable to prepare his dissenting opinion, but will do so as soon as possible.

3.

MOTION TO STRIKE OUT.

NOVEMBER 28TH, 1898.

8629. WIRT ADAMS, STATE REV. AGT. v. ATS. Y. & M. V. R. R. CO., ET AL.

On motion.

Mayes & Harris for motion; J. A. P. Campbell and Critz & Beckett, contra.

Appellee and cross appellants—the railroads—made a motion to "strike from the files in said cause the document herein filed on the 22nd day of November, 1898, which purports to be the opinion herein of a majority of this court for the reasons following:

1st. For that the same is filed too late, being filed after the said cause was remanded to the lower court to be tried anew; and that the same did not and could not constitute any part of the mandate of this court to the court below, and could not be and was not attached to said mandate; and that the said document was not, and could not be, furnished with said mandate, for the use of the court below and of these parties at the June Term, 1898, of said court below; and at said June Term, these parties, defendants below, were forced into trial of said cause, and to final judgment therein, from which judgment these parties did on the — day of ——, 1898, and before the filing of said document, prosecute their appeal to this court, which appeal was pending herein on said 22nd of November, 1898; and that said document announces decisions on points of law alleged to be controlling in this cause and in said appeal now pending, additional to and different from any decision announced in the abstract of a proposed opinion which was filed herein on the 20th day of June, 1898, and certified to the court below with the mandate as the opinion of this court, all of which is in violation of the statutes of this State in such case provided.

2nd. For the further reason that the filing of such document on the 22nd of November, 1898, under the facts and circumstances hereinbefore set forth, and the affecting this cause therewith as the decision of this court, is in violation of the Fourteenth Amendment to the Constitution of the United States, not being due process of law."

WHITFIELD, J. Section 4352 and section 4381 of the code of 1892 were fully complied with by the summary of holdings handed down in June last, certified to and used in the circuit court on the trial of the case after it was remanded.

Every reason for decision contained in that summary is also set out in the opinion filed recently, insisted on and enforced. The court has receded from no position in that summary announced. It has added one new reason, and one only, for the decision: That the exemption was repealed by legislation, to-wit: The act of 1886 and the provisions of the code of 1892. With this single exception the reasons given for decision in the summary are identical with the reasons given in the opinion now on file. And it is too plain for argument that had the new reason for de-

cision now set out in the opinion been also set out in the summary the circuit court would merely have had one more reason for sustaining the action it took. The railroad companies were not and could not possibly have been prejudiced by the fact that the summary did not contain this additional reason. Nor is it now nor can it be prejudiced now by the fact that the opinion does not contain this one additional reason for our decision.

Other views of counsel are adverted to in the opinion, but it is distinctly declared that as to them we decide nothing—not adopting them in any wise as reasons for decision. Moreover, we distinctly stated in the summary, "there are other views leading to the same conclusion which we may embrace in the opinion yet to be filed. What we have said is a mere summary of the holdings set forth." And at the last term of this court a motion was made to have a fuller opinion handed down then before the trial in the circuit court based on section 4352, code 1892, which we overruled on the ground that the summary was a sufficient compliance with that section and should stand as the opinion of the court for the time being. The argument made then, and repeated now, as to this was that the law requires the opinion to accompany the mandate and that the court below could not proceed without both. This point was disposed of adversely to this contention in Foster v. Gordon, 54 Miss., p. 510, the court saying: "This is an erroneous conception of the province of the mandate. It is the judgment of this court reversing and remanding a case which gives the lower court authority to enter upon a new trial." And the opinion of this court is not more necessary to the jurisdiction of the circuit court than the mandate. Both are mere matters of practice. Beyond this the scope of the motion is to assert the proposition that this court has not the power after the trial of a remanded cause in any way to revise, add to or take from the mere reasons for its decision, even though the reason added or taken away in no wise affected the party losing in the lower court prejudicially.

That, precisely and exactly, is the proposition asserted. It is hardly necessary to say that this wholly novel and extraordinary proposition is untenable. This court, of equal and co-ordinate dignity with the legislative and executive departments in matters judicial, "uttering the voice and registering the will of the State," is reduced to no such pitiable plight. The very question here presented has been settled by authority over and over again. In Houston v. Williams, 13 California, 24, Mr. Justice Field, afterwards on the supreme bench of the United States, says for an unanimous court after citing the statute there relied on which provided that "all decisions given upon an appeal * * * shall be given in writing with the reasons *therefor* and filed with the clerk of the court." It will not be impertinent to say a few words as to the control of the courts over its opinions and records. There are some misapprehensions on the subject, arising chiefly from a confusion of terms and from a misconception of the relations of the different departments of government to each other and the entire independence in its line of duties of the judiciary. The terms 'opinions' and 'decisions' are often confounded, yet there is a wide difference between them and in ignorance of this or by overlooking it, what has been a mere revision of an opinion has sometimes been regarded as a mutilation of a record. A decision of a court is its judgment. The opinion is the reasons given for that judgment. The former is entered on record immediately upon its rendition and can only be changed through a regular application to the court upon a petition for rehearing or a modification. The latter is the property of the judges subject to their revision, correction and modification in any particular deemed advisable until, with the approbation of the writer, it is transcribed in the records. * * *

All these errors whether in language from or *substance* should be corrected

before a publication is permitted as an authoritive exposition of the law and as such binding upon the court. In no civilized State except California has the existence of this power ever been doubted. Every judge from the chief justice of the supreme court of the United States down, claim and exercise without question the right of revision including thereby *modification* and *partial suppression of his opinions.* * * * When the opinions have been revised and finally approved and recorded, then they cease to be the subject of change."

There has been no suppression here. The majority of the court have receded from no position announced in the summary but positively affirm every one of them in the opinion. And that this is so we here make part of this opinion that summary in its entirety so that a comparison of it with the opinion now on file may show the facts as they are. That summary is as follows:

SUMMARY OF THE COURT'S HOLDINGS.

WHITFIFD, J. First. Because of the inconsistent, compromise verdict, the judgment is reversed, and cause remanded, on the appeal and the cross-appeal.

Second. The Lambert case is res adjudicata as to the taxes for the year 1892 on all the property that originally belonged to the N. J. & Columbus R. R. Co., which was in Adams county, and being res adjudicata, it is, as to that, beyond our power to over-rule it.

Third. The Lambert case is not res adjudicata as to any of the other taxes here involved, on the property that once belonged to the N. J. & Columbus R. R. Co., or on any of the other property here involved.

Fourth. The Lambert case did decide that §180 of the constitution of 1890, did not cut off the exemption from taxation asserted in this case, on the ground that this is a case of mere merger, and not of consolidation; that the resultant corporation was not a new corporation, and applied the principles of Whitworth v. Tennessee, 117 U. S.—which, is beyond all controversy—a clear case of simple merger, and not of consolidation, taking merger proper to mean the absorption of one corporation, by another, the autonomy of the absorbing corporation being preserved, without the formation of a new company, and consolidation proper to mean such union of two corporations as results in a third new corporation, under whatever name. We hold that the clear Legislative purpose was—(using the words in the sense incidated)—*consolidation, and not merger*, yet consolidation in such sense as to result in the formation of a new corporation; and besides that what was *actually* done here was necessarily the creation of a new corporation, and not mere merger; that, hence, the principles of the Whitworth case do not apply, but the principles of Keokuk v. Mo. 152 U. S. do apply; that, consequently the constitution of 1890, §180, cut off the exemption; that the Lambert case cannot be upheld and should be, and is hereby overruled. If it be conceded that the purpose aimed at by the articles of agreement of the R. R. Co. was mere merger, it is not to be permitted that the Co. could overthrow the purpose of the Legislature to authorize consolidation and not merger, nor to NAME THAT, merger, which the actual things done show, was consolidation. Consolidation is a privilege, to be exercised or not—not a contract. §181 of the constitution, and §279 of the schedule thereto, merely mean that so long as corporations existing at the adopton of the constitution having then exemptions, or other "rights" should have them "continue," so long as such corporations retained the *precise corporate existence they then had.* The new corporation here, takes its life as from a new grant of corporate life from the date of the consolidation.

But we hold further, that the 21st section of the Mobile & Northwestern R. R. Co.'s charter was an effort to secure —as is expressly recited in its face—an irrepealable grant of exemption, and violative of the constitution of 1869, §13, art. 12, and and §20, art. 12, even as con-

strued in Miss. Mills v. Cook, 56 Miss. The exemption claimed in Miss. Mills v. Cook HAD NO IRREPEALABLE feature.

But again, we hold, that such section violated said clauses of said constitution, even had it not been irrepealable. Miss. Mills v. Cook, turned upon some supposed magical distinction in the particular connection, between the words "SUBJECT" and "SUBJECTED," and sacrificed a great constitutional principle to a piece of mere verbal jugglery. Precisely the SAME clause, using precisely the SAME word "SUBJECT occurs in the constitution of Florida and Arkansas and the supreme courts of both States held, in precisely identical contention, that the clause forbade exemption from taxation of "corporations for pecuniary profit," and both of these decisions were on this identical proposition, affirmed by the U. S. supreme court. St. Louis &c. v. Berry, 41 Ark., 509, 115 U. S. 475; and L. & N. R. R. Co. v. Palmes, 19 Fla. 231 and 109 U. S. 253-254. And this construction is reaffimed in Keokuk, &c. v. Missouri, 152 U. S. 310-311. The word "subject" should have been given its plain, popular signification, occurring in the connection it did, in a great popular instrument—the constitution—the very signification attached to it by the supreme court of the United States. We prefer to align ourselves now with that court in this matter, and overrule Miss. Mills v. Cook on that point.

It passes all understanding how the court could gravely hold, in Miss. Mills v. Cook, that a solemn declaration in the constitutionof a State—its organic law — formulating FUNDAMENTALLY GREAT LINES OF PUBLIC POLICY—that "the property of all corporations for pecuniary profit" should be subject to taxation *the same as that of individuals*, added no new feature, but merely stated what was the law before and without the declaration, to-wit: that the "property of corporations for pecuniary profit" was *liable* to taxation. All the world knew that before!

Judge Campbell, in his dissenting opinion, in Beck v. Allen, 58 Miss., at p. 177, most wisely said: "Subtilty and refinement and astuteness are not admissible to explain away an expression of the sovereign will. The framers of the constitution, and the people who adopted it, must be understood to have intended the words employed in that sense most likely to arise from them on FIRST READING THEM." Doubtless the rule of stare decisis is a wise rule, and one not lightly to be infringed. But instances justifying its disregard find manifold illustration in the reports. And surely, stronger reasons for not applying it can never arise, than, where, as here to disregard it, restores to the sovereign the exercise of one of the highest attributes of sovereignty—the taxing power, and merely requires that corporations for pecuniary profit, constantly demanding and securing the protection of the government, shall also bear their just share of the burdens of taxation. We feel, therefore, confident of the propriety of over ruling, as we now expressly do—the Lambert case, and the case of Cook v. Miss. Mills, supra. There are other views leading to the same conclusion, which we may embrace in the opinion yet to be filed. What we have said, is a mere summary of the holdings set forth.

Reversed and remanded.

But the California case is not the only authority. In the appendix to 131 U. S., at p. 18, it is said: "Judges frequently correct their opinions in the hands of a reporter after a printed copy has been filed with the clerk." * * * If one curious in such things would know how far back this corrective practice has existed let him look as far back as the 7th of Cranch, 1st edition, where he will find corrections made by Mr. Justice Story in the opinion of the court delivered by him in Barnitz v. Casey, 7th Cranch, at p. 456. In later editions the changes are incorporated in the text. We have examined this first edition and it is there stated on the page following the table of cases cited in that volume as follows: "*Since this volume was printed*, Mr. Justice Story has re-

quested that the following corrections and *additions* should be made in the opinion delivered by him." So that illustrious judge actually corrected and added to his opinion in 7th Cranch after the official volume of reports had been published. So far as due "process of law is concerned," it is too obvious for discussion that it cannot be involved in mere matters of practice of the courts.

We conclude with these words of Judge Field in the case cited:

"The power over our opinions and the records of this court we shall exercise at all times, while we have the honor to sit on the bench, against all encroachments from any source, but in a manner we trust befitting the highest tribunal in the state." The motion is denied.

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FEBRUARY 20TH, 1899.

VOL. II. JACKSON, MISS., SATURDAY, FEBRUARY 25, 1899. No. 11.

9251. Y & M. V. R. R. Co., ET AL v. ADAMS, REV AGT.

Circuit Court, Hinds County; Robert Powell, Judge.

Mayes & Harris and Cooper & Waddell for appellants; J. A. P. Campbell and Critz & Beckett for appellee.

WHITFIELD, J. The petition for removal of the cause to the federal court was properly denied. The decisions of the United States Supreme Court cited in briefs of counsel for appellee put this at rest. K. C. R. R. v. Doughty, 138 U. S., 303; Ten v. Bush, 152 U. S., 454; Galveston v. Texas, 170 U. S., 226.

The application for continuance was properly over-ruled. The court's action in striking out the special pleas stricken out was correct, for the obvious reason that they presented no defense to the action, in whole or in part. The former opinion of this court in this case settled definitely and conclusively all the issues involved, and the special pleas are in effect, nothing else than an effort to have the circuit court disregard that opinion. The futility of that sort of pleading needs no comment.

These matters of practice and procedure and all the other assignments of error touching matters of practice and procedure were correctly settled by the court. The former opinion of this court in this cause, and its opinion on the motion to strike that opinion from the files disposed effectively of such of these matters as are not here specifically adverted to.

So far as concerns the argument that the appellants relied on the case of Mississippi Mills vs. Cook, 56 Miss., and that if the over-ruling of that case is correct, nevertheless the appellants should be protected from taxation accruing before the over ruling of that case, it is enough to say that question is not material here, since all the taxes here sued for, accrued after the consolidation of October 24 1892, and the appellants were expressly held to have lost their exemption, if any they had, by their own voluntary act of consolidation. That was the first and main ground on which our former opinion was distinctly rested. It must be too clear for serious disputation, in this view, that all discussion of the case of Mississippi Mills vs. Cook is wholly unavailing as to these taxes. Moreover, the twenty-first section of the Mobile and Northwestern charter was not passed on in Mississippi Mills vs. Cook, and we held in our former opinion that its constitutionality was never squarely presented, as to the point for decision,

until the judgment in the case. Whatever merit there may be in this line of argument in a proper case, it is clear that here it has, by reason of the fact of the consolidation when and as it occurred, no room for play.

The last proposition which we notice is the one that the Lambert case, in 73 Miss., was erroneous and ought not to be followed, in its announcement that the code of 1880 repealed the exemption here claimed. It was said, *inter alia*, that the Mobile and Ohio Railroad company had an identical exemption with the twenty-first section of the Mobile and Northwestern charter, and that section 598 of the code of 1880 by providing for a "sworn statement of the capital expended in the construction of its road," recognized the exemption, and meant by this section 598 to furnish the State with the means of knowing when the M. & O. Railroad company should become liable to taxation; and that since it recoguized the M. & O. Railroad company's exemption, of course, it must also have recognized the alleged identical exemption of appellants. Such was the argument gravely pressed upon the court. It is singular that learned counsel overlooked the easy and overwhelming answer springing from the fact that the twenty-first section of the Mobile & Northwestern charter was granted by an act of the legislature passed in 1870, *after* the constitution of 1869 was apopted, while the charter of the Mobile & Ohio railroad company was granted in 1848, twenty-one years before that constitution was adopted, at a time when the legislature had full power to grant, so far as any constitutional restriction was concerned, an irrepealable exemption.

But it is said that section 8 of the Code of 1880 provides that "no private act, not revised and brought into this code, shall be affected by its provisions," and that general laws as to taxation ought not to be held to repeal private grants of exemption, unless expressly so stated. The principle is correct enough. But we think the alleged exemption of the Natchez, Jackson & Columbus Railroad company, expressly repealed. There were two bills of injunction in the Lambert case—rather there were two cases. The court distinctly held that this exemption from taxation was an exemption both from ad valorem taxes and privilege taxes. Now the scheme of railroad taxation provided by the code of 1880 was primarily to subject, "each railroad owning and operating a railroad in this state" to ad valorem taxes. That scheme is set forth in sections 597-606, code of 1880, inclusive. But secondarily, and as a substitute each railroad was permitted by sections 607 and 608 of that code, to escape ad valorem State and county taxes by paying the privilege tax named in section 608. Now the Natchez, Jackson & Columbus railroad company is expressly named in section 608, and required to pay a privilege tax of $30 per mile, if it would escape ad valorem State and county taxes. Manifestly no one can be found who would dispute the proposition that the exemption from privilege taxes of that railroad was expressly repealed by section 608. But since this privilege tax was provided only secondarily, and as a means of escaping the ad valorem State and county taxes due by each railroad in the State, primarily imposed by section 597 *et seq.*, it is plain that all the sections taken together expressly provide that the N. J. & C. R. R. Co., was to pay ad valorem taxes, State and county, unless it embraced the conditional exemption therefrom by paying the privilege tax assessed by section 608 *eo nomine*, against it. There is no escape from this reasoning. If it be asked why, if the N. J. & C. R. R. Co., was expressly named in section 608, it was not so named in section, 597 *et seq.*, the obvious reason is that it was necessary to expressly name it in imposing privilege taxes, since each railroad paid a different privilege tax; but it was unnecessary to name it in imposing ad valorem taxes, since the rate there was the same for all. And this leaves out of view

whatever of force there may be in the suggestion that the phrases "each railroad," "every railroad," etc., might be effective to include this railroad with all others as fully as if named in section 597. But as to this we say nothing.

Finally it is said that this twenty-first section was given the L. N. O. & T. R. R. Co., by independent grant in 1882, by its proper charter, after the code of 1880 had been adopted. But if the code of 1880 had the effect, as held in the Lambert case, to repeal by its provisions this section as applied to the N. J. & C. R. R. Co., then *a fortiori*, did the more emphatic provisions of the code of 1892, have the effect to repeal the same section as applied to the L. N. O. & T. R. R. Co. This last company could not be named in the code of 1880, since it did come into existence till 1882.

It will be remembered that this third ground of our former opinion—that this alleged exemption was repealed by legislation if it ever had a valid existence—was wholly uninfluential with the circuit judge, on this second trial below, since it was for the first time made part of the opinion, when the opinion in full was written and filed, which was several months after the trial in the circuit court. It is perfectly obvious, therefore, that the mere adding a new reason for the decision which reason did not influence the second trial of the case, in no respect prejudiced the appellants in the trial.

We discover no error and the judgment is affirmed.

C. J. Woods, while recognizing the authority of the former decision to the effect that the consolidation cut off the exemption under section 180 of constitution of 1890, and not, therefor dissenting, adheres to the view formerl expressed by him.

~~9294. MOORE v. M. & O. R. R. Co.~~

~~Circuit Court, Monroe County. E. O. Sykes, Judge.~~

No. 244. 35

Motion to advance

SUPREME COURT U. S.
FILED
OCT 6 1899
JAMES H. McKENNEY,
Clerk.

Filed Oct. 6, 1899.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 244.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY ET AL., PLAINTIFFS IN ERROR,

vs.

WIRT ADAMS, STATE REVENUE AGENT.

MOTION TO ADVANCE.

R. C. BECKETT,
Attorney for Defendant in Error.

(17,341.)

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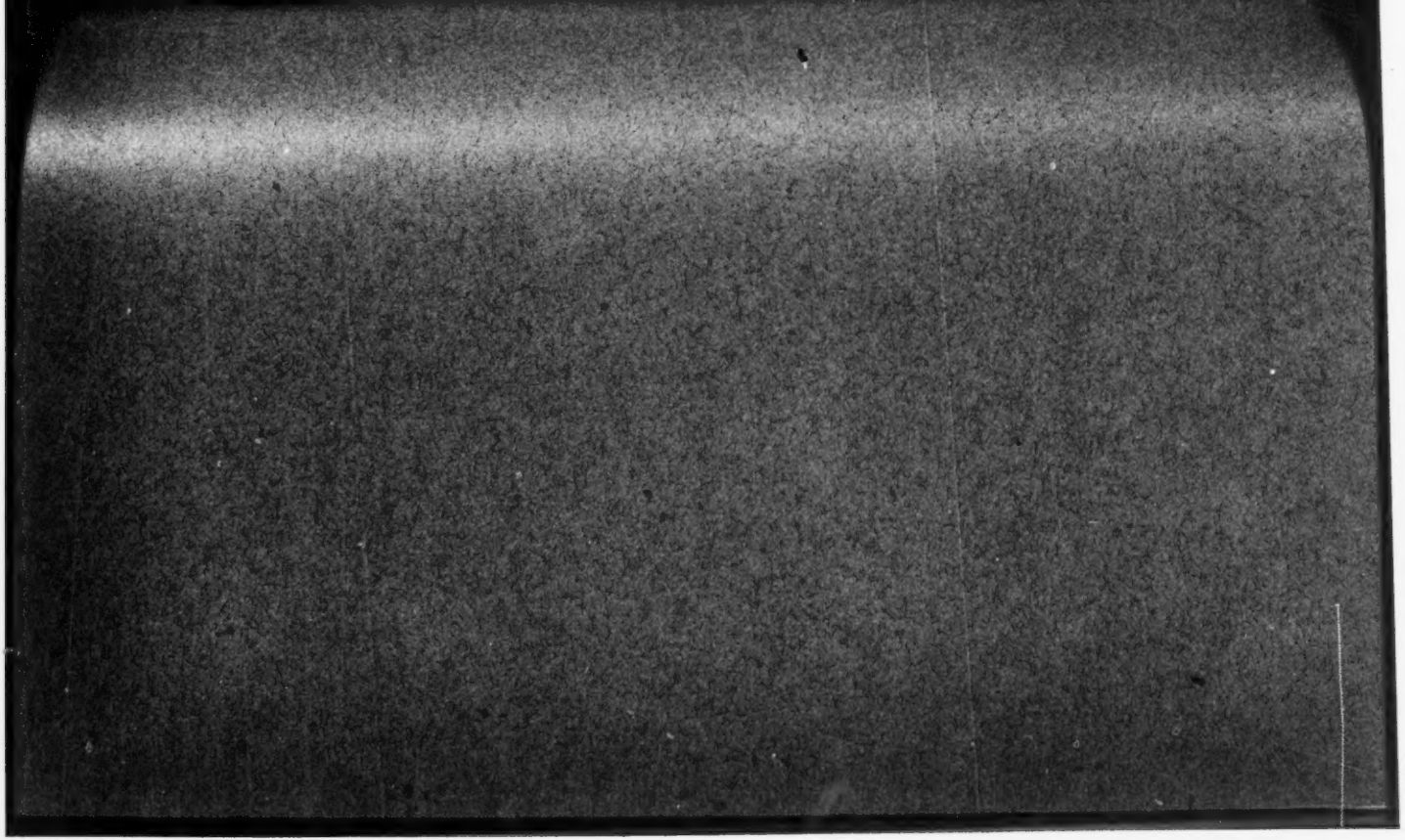

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

No. 244.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY ET AL., PLAINTIFFS IN ERROR,

vs.

WIRT ADAMS, STATE REVENUE AGENT, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

MOTION TO ADVANCE.

Comes the defendant in error herein, by his attorney, and moves this honorable court to advance this cause upon the docket and hear it at as early a day as the convenience of the court will permit, and for the reasons therefor states as follows:

First. That in his said office as State revenue agent and defendant in error here he represents the State of Mississippi,

as well as the towns and counties named in this suit, under the provisions of section 4194 of the Annotated Code of Mississippi of 1892 and the amendatory act of February 7th, in Laws of 1894, sections 2, 3, and 4, on pages 29 and 30, which authorize him to bring the suits for the use of said State and said counties and towns.

Second. That besides this suit for taxes, State, county, and municipal, for about $600,000, there is another suit still pending in the chancery court of Hinds county, in said State, for more than $400,000 of taxes on the same property, which has not been reduced to judgment, and taxes before judgment do not bear interest in Mississippi, and these suits, besides the State taxes, involve the county and town taxes in fifteen counties, of which the State taxes are nearly one-half, the public schools in Mississippi being almost entirely supported out of the State taxes.

Third. The towns of Vicksburg, in Warren county, and Greenville, in Washington county, have issued, which are now outstanding, bonds in aid of this railroad to the amount of $100,000 each, on which they are annually paying interest at the rate of 6 per cent. per annum, and the county of Bolivar similar bonds to the amount of $150,000, bearing the same rate of interest.

Fourth. There are also pending suits for thirteen years' taxes against the Canton, Aberdeen and Nashville Railroad Company and its lessee, said Illinois Central Railroad Company, for State, county, and municipal taxes, and similar suits for thirteen years' similar taxes against the said Yazoo

and Mississippi Valley and Illinois Central Railroad Companies on what was formerly the said Natchez, Jackson and Columbus railroad, so much spoken of in this litigation, the former being in the counties of Attala, Choctaw, Oktibbeha, Clay, and Monroe and the latter in Adams, Claiborne, Copiah, Jefferson, and Hinds counties, and there is pending a similar suit for similar taxes for thirteen years on the Gulf and Ship Island railroad in the counties of Harrison and Perry; so that it may be said that the State, county, and municipal taxes are involved in twenty-seven counties, and, counting the Riverside division, in this suit in about thirty counties, besides some taxes of State and national banks and factories and other enterprises.

Fifth. And the State of Mississippi has an old-fashioned State-house or capitol building, in which is located the offices of the governor, secretary of state, auditor, treasurer, attorney general, State superintendent of education, land commissioner, and State revenue agent, and the supreme court room and their consultation-room, and a valuable law library and literary library, besides valuable records in the offices of the auditor of public accounts and secretary of state, a few dollars in the State treasury, and the State senate and house of representatives also meet there biennially, their next meeting being on the first Tuesday after the first Monday or 6th day of January, 1900, and the building is in a very unsafe and dangerous condition, so much so that public meetings can no longer be held there, and at the last session contractors and experts employed by the legislature have reported that the building can no longer be properly repaired, but that an entirely new building is necessary, and the

pendency of these suits, and this one in particular, is a great embarrassment to the State, because the legislature is exceedingly anxious to build a new State-house or capitol building, and the members of the legislature can form no idea of the money or price the State is able to expend for that purpose. They wish to erect a modern and creditable building, and cannot tell what can be used for that purpose until this suit is decided, and in anxiety and expectancy they are waiting, and all the time the lives of all said State officers are being continually endangered and imperiled, besides the loss of and injury to many valuable books and documents. The State-house has the walls split and cracked and, besides being propped, has the floors supported by large and long unsightly wooden columns standing inside.

And the defendant in error says that said cities and counties and said State of Mississippi, which is also paying interest on a large State debt, are all seriously embarrassed by any further delay in this suit, and also in these matters, and that as a matter of pure justice and equity this cause should be advanced on the docket and heard as soon as practicable.

WIRT ADAMS,
State Revenue Agent,
By his attorney, R. C. BECKETT.

Before me, S. T. Sykes, deputy circuit clerk of the United States for the eastern division of the northern district of Mississippi, this day personally appeared the above-named R. C. Beckett, attorney of the defendant in error in the above-styled cause, well known to me as such, and, being by me duly sworn, deposes and on oath says that the statements

in the motion and petition to advance said cause are true as therein stated, according to the best of his information, knowledge, and belief, and that the reason this affidavit is not made by said Wirt Adams is that he has just left Jackson, Mississippi, where his home and office is, on account of the spread of yellow fever there, and affiant does not know yet where he has gone.

R. C. BECKETT,
Agent and Attorney for said Wirt Adams.

Sworn to and subscribed before me this October 3, 1899.

[SEAL.]

GEO. R. HILL, *Clerk*,
By S. TURNER SYKES,
Deputy Circuit Clerk.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, A. D. 1899.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY ET AL., *Plaintiffs in Error*, *vs.* WIRT ADAMS, *State Revenue Agent, Defendant in Error.*	No. 244.

In error to the supreme court of the State of Mississippi.

NOTICE OF MOTION TO ADVANCE.

To

Attorneys of Record for Plaintiffs in Error in the Above-entitled Cause:

You are hereby notified that the defendant in error in said cause will, on Monday, the 16th day of October, A. D. 1899, on the meeting of the Supreme Court of the United States on that day, or as soon thereafter as counsel can be heard, submit for the consideration of the court the attached motion to advance this cause on their docket for reasons therein stated.

R. C. BECKETT,
Attorney for Defendant in Error.

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No. 35

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Brief of Beckett & Critz for D. E.

Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed Oct. 19, 1899

No. 244.

Office Supreme Court U. S.
FILED
OCT 19 1899
JAMES H. McKENNEY,
Clerk.

THE YAZOO AND MISSISSIPPI VALLEY R. R. CO. ET AL., PLAINTIFFS IN ERROR,

vs.

WIRT ADAMS, STATE REVENUE AGENT.

ANSWER TO MEMORANDUM OF PLAINTIFFS IN ERROR UPON DEFENDANT IN ERROR'S MOTION TO ADVANCE.

R. C. BECKETT,
FRANK A. CRITZ,
Counsel for Defendant in Error.

(17,341.)

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 10-17-'99

IN THE

Supreme Court of the United States

OCTOBER TERM, 1899.

No. 244.

THE YAZOO AND MISSISSIPPI VALLEY R. R. CO. ET AL., PLAINTIFFS IN ERROR,

vs

WIRT ADAMS, STATE REVENUE AGENT, USE, &C., DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

ANSWER TO MEMORANDUM OF PLAINTIFFS IN ERROR UPON DEFENDANT IN ERROR'S MOTION TO ADVANCE.

We suggested no time in asking the advance of this case on the docket, for the reason that we were utterly misled about the plaintiffs in error making any resistance at all to the motion.

Mr. Edward Mayes has all the time expressed to us a willingness to advance the case to the earliest practicable

moment, and that the railroads would not resist the motion, and he has been the leading attorney for the railroads since the inception of this litigation in 1893, and Judge Fentress has never been present nor represented the railroads in any particular whatever in any of the courts in the State. The supreme court of Mississippi once postponed the cause in order that he might be present and make an argument, but he never came, nor did he file any brief.

It will be noticed that Mr. Edward Mayes' name is not signed to this memorandum of opposite counsel, nor even that of Judge Jas. Fentress, but only the name of Mr. Wm. D. Guthrie, who least of all has any reason to resist the advancement to the time we herein suggest.

Now we will refer to certain documents to show this. By reference to the brief of Mr. Guthrie, which we do not know as a fact, but understand was prepared by him, he states as one of the grounds of his opposition to dismiss or affirm that it was a very important case and that "the argument on the merits can be advanced for hearing and an ample supersedeas bond had been furnished to protect the State." See in first half of page 2 of their brief, in opposition to our motion to dismiss or affirm, No. 756, October term, 1898, and No. 244, of this term.

Further, Mr. Mayes did not expect the motion to be resisted, and for a reason showing why he would not sign this memorandum we are forced to file the original letter received from him by R. C. Beckett, one of the attorneys in this case, which shows the same agreement and understanding at other times, which is as follows:

"ILLINOIS CENTRAL RAILROAD COMPANY,
"OFFICE OF DISTRICT ATTORNEY,
"JACKSON, MISS., *June* 10, 1899.

"Hon. R. C. BECKETT,
"*West Point, Miss.*

"MY DEAR SIR: Yours of the 8th inst. has been received. So far as the exhibit of the record in the Federal courts,

which is referred to in the answer and made a part of the same, is concerned, it has been, and is my intention to file the same before or by the time when the cause is to be called before the chancellor. I did not file the same, at the same time with the answer, for the reason that I had to have some papers copied in order to constitute a part of that exhibit. As a mere matter of pleading, I do not agree with you, that the proceedings in the appellate or any other court, are necessary part of a plea in abatement. I think it is sufficient that a properly certified copy of the record is produced to sustain the plea in abatement as evidence, if any issue is taken on the same. In other words: My idea is that the record is evidence and not pleading, and I do not think that the case in 13 Wallace, holds that it is pleading. But the difference between us on this point is not material, for the reason that as you see by my answer, I propose to make the whole record a part of the plea by rendering it, as an exhibit thereto.

"There will be no difficulty about this matter, as to putting it in shape, and you need not take any trouble about it. I will refer to the mandate in the Federal court here, and get the exact date of the decision on the application for a rehearing, and I will write down to McKee, and make him send me a copy of the orders in the court of appeals, all of which I will work into the exhibit.

"I suppose it would be better to dispose of the two cases in the circuit court down here, separately.

"Now in regard to the request you make about producing a statement of the net and gross profits of the railroad for 1898; my own idea about that is, that your request is premature, and I must respectfully decline to call upon the railroad company to take the trouble to make out elaborate statements, involving troublesome researches into facts, until the issues in the case, where those statements will be needed, have been made up. It is not yet apparent that the statement which you have called on me to furnish, will be at all material in the case. I do not desire to delay you in getting your judgments in this matter, because, as I said to you on several occasions before, I am willing to expedite the matter, and have the judgments rendered, and let the whole thing go to the Supreme Court and be disposed of this fall. At the same time, I am not disposed to call on the company, as I said before, to make elaborate statements, in respect to

matters that are not in issue, and so far as I see, will not be in issue between us.

"I do not see how or why we shall ever go to the question of net profits in these matters, holding, as the supreme court of this State has held, in your favor.

"In respect to the time for taking up the cases in the circuit court, suppose we fix Thursday of the first week? I mention that day for the reason that I have an important case in the chancery court at Clarksdale, which meets on the 19th, and it will be necessary for me to attend that court. So that if we select Thursday, I will have full opportunity to go and get back, in time to meet you here, and I am like yourself, I want to get rid of all these cases at as early a date as practicable, for the personal reason that I want to knock off work, and get a little rest. I have not been at all well for the last three or four weeks.

"Yours very truly, EDWARD MAYES."

(Said R. C. Beckett says it is a fact that he received said letter in due course of mail, and we all say that we are perfectly familiar with the signature of Mr. Edward Mayes, and that the signature to said letter is his, and the original is filed in this case for inspection by the court.)

And we had no right or reason before serving notice of our motion to advance the case that there would be opposition, and only a few days ago did we get notice from Mr. Guthrie that he intended to resist it, except to January 6, and we were not notified of the points on which he relied until just a few moments before the time for the court to convene, and then only through the kindness of the clerk, who gave us Mr. Guthrie's memorandum, which had just been filed. Hence we had no time to answer, but simply time to glance over it.

Mr. Guthrie's memorandum, it will be noticed, is not sworn to, and leaves him ground to overdo himself instead of us. But our motion is founded on a petition sworn to, and not a single fact stated in the petition is overdrawn or untrue, including the capitol or State building and fi-

nances. The fact is, that for the last two years the State of Mississippi has had to make an additional levy for taxes of one-half mill on all taxable property to meet the pressing, ordinary expenses of the State government.

In regard to the second paragraph of the answer about Mr. Mayes' child being sick, his little boy did become sick in July last in Memphis with what he said, and it was no doubt true, typhoid fever. But he returned home in August, and after conducting business there for some time went, as we understand, to New York to consult with Mr. Guthrie, and returned home before any yellow fever had been announced at Jackson. So we contend and state on our information and belief that Mr. Edward Mayes has been in the actual conduct of the suit from its beginning, and that he has recently left New York, having remained there as long as Mr. Guthrie wished, and, besides, at no time have the mails ever been quarantined between New York and Jackson, Mississippi, or Memphis, Tennessee, and at no time has it been impossible for Mr. Mayes to go to New York when he thought it was necessary or Mr. Guthrie desired a conference with him—no, not since the motion in April has he been denied this privilege. We besides state as a fact that Mr. Guthrie filed a brief in opposition to our motion to dismiss or affirm, and has had actual notice from the printed record of all the matters involved, which was over six months ago, including notice of motion. Mr. Guthrie having seen in our motion to advance that the legislature of the State meets on Monday, the 6th January, 1900, has, as a curious coincidence, asked this court to advance, or, rather, postpone, the case to about that time.

In the State of Mississippi the representatives of the people elected to the house and senate always like to get the opinions and wants of their constituents before the legislature meets. They only sit two or three months, and to then find out what kind of a state-house was needed or what amount of money they could reasonably invest, and

then get plans and specifications and contractors and the necessary bills through, would consume almost all, if not the entire session. Besides, there are two other cases, No. 318 and No. 320, to be submitted on the first Monday in November, being the 6th day. One, No. 318, being by agreement, having been noticed for October 23, and the other by notice so as to conform to this same time, November 6. These cases embrace many of the points involved in this case, and on oral argument in this case it would be of much assistance to the court in the consideration of Nos. 318 and 320.

We therefore respectfully ask that this case be advanced to Monday, the 6th day of November, or as soon thereafter as the convenience of the court will permit, preferably said 6th November, as that will give the court some time to consider and decide it before the meeting of the legislature, or at least shortly thereafter. We think this request eminently just and as fully meeting the statute and all the rules of this court on that subject.

One of the signers of this counter-statement is Judge F. A. Critz, who was admitted to practice in this court on the 16th instant, who for the past six years has been a member of the house and senate of the legislature of Mississippi, and has been for the last four years chairman of the committee on railroads, and knows the truth of the statements about the capitol or state-house and the anxiety of the legislature to get an early decision of these cases, and especially this one. He knows that said statements are not overdrawn.

Wherefore defendant in error asks that this cause be advanced and set for hearing on November 6, 1899, or as near thereto as the convenience of the court will permit.

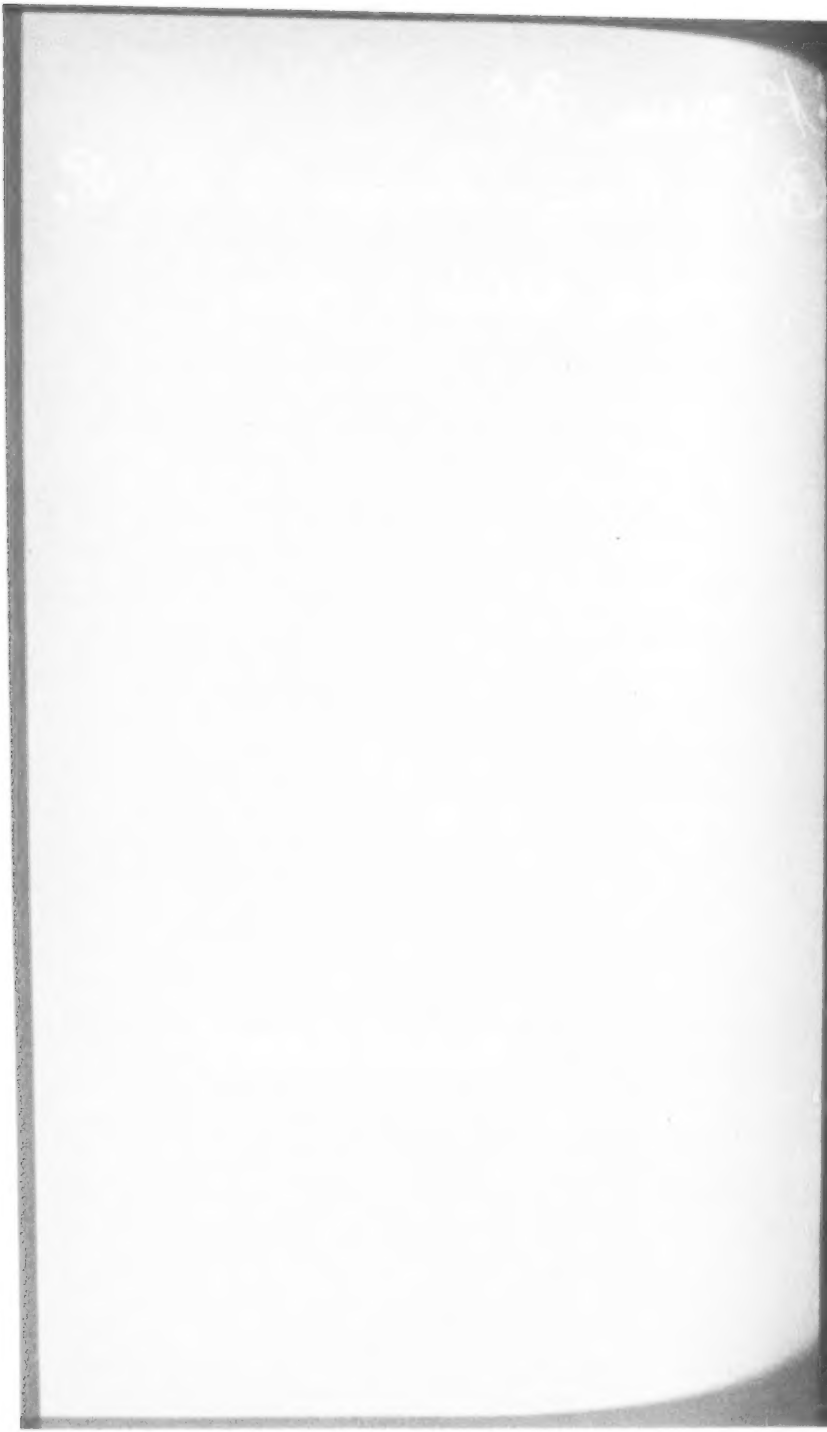
R. C. Beckett.
Frank A. Critz.
Wirt Adams.

Subscribed and sworn to before me this 17th day of October, 1899.

[SEAL.] JAMES D. MAHER,
Notary Public, District of Columbia.

Respectfully submitted.

R. C. BECKETT,
FRANK A. CRITZ,
Counsel for Defendant in Error.



Office Supreme Court U.S.
FILED
APR 7 1900
JAMES H. McKENNEY,
Clerk.

No. 244 35

Br. of Crity v Beckett for D. C.

BRIEF.

Filed April 7, 1900.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, A. D., 1899.

No. 244.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, ET AL.

PLAINTIFFS IN ERROR,

VS

WIRT ADAMS, STATE REVENUE AGENT,

DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

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Frank J. Crity &
R. C. BECKETT,

ATTORNEY FOR DEFENDANT IN ERROR.

LEADER Job Print, West Point, Miss.

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, A. D., 1899.

No. 244.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, ET AL.

PLAINTIFFS IN ERROR,

VS

WIRT ADAMS, STATE REVENUE AGENT,

DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

STATEMENT AND BRIEF FOR DEFENDANT IN ERROR.

STATEMENT:

There were two appeals to the State Supreme Court in this litigation. We believe it is the rule of this Court that the writ of error only brings up the proceedings after the first appeal. The plaintiffs, in error, also voluntarily withdrew all their pleadings filed before the mandate. Hence it is only necessary here to give a mere outline of the proceedings previous to that time. The statement of the subsequent proceedings will be much fuller. This is a consolidated suit for the taxes, state, county and municipal, on the part of the Yazoo & Mississippi Valley Railroad formerly belonging to the Louisville, New Orleans & Texas Railway Company, and which became the property of the former by and through a consolidation of the latter with the original Yazoo & Mississippi Valley Railroad Company under the name of the latter on October 24, 1892, and it and the said Illinois Central Railroad Company, the other plain-

tiff in error, are charged in the declarations as being the present owners of the property and liable for the taxes.

Record, pp 5, 71, 99, 611, 623.

The suit is composed of two parts. There were three successive suits by the State Revenue Agent, Wirt Adams, for the taxes of 1892, of 1893 and 1894, combined in one, and of 1895 respectively. The Circuit Court numbers of these suits were 2788, 2916, and 3018, brought respectively on December 7, 1893, December 18, 1894 and January 1, 1896, and these were by a consent order, consolidated on July 21, 1896.

Record p 106

There were two other suits for the taxes of 1896 and 1897, forming the second part, but we will follow this first consolidated suit now. There was a verdict and judgment, partly for the plaintiff and partly for the defendants, on July 25, 1896, from which an appeal was taken by the plaintiff and a cross-appeal by the defendants to the State Supreme Court, which on June 20, 1898, reversed the case on both the appeal and cross-appeal, and remanded it to the Circuit Court with a summary of their holdings.

This summary was under the following provisions of the "Annotated Code of Mississippi" of 1892:

"4352 (1413) * * In all cases settling important principles, in cases to be remanded, and in all cases where the judgment or decree of the court below is reversed, the opinion of the Supreme Court shall be in writing, stating the reasons upon which the decision is made; and the opinion shall be recorded by the clerk in a wellbound book to be kept for that purpose."

"4381. Copy of opinion certified to court below. In all cases in which the Supreme Court shall reverse the judgment or decree of the court below, and remand the cause to be proceeded with in such court, or remand a cause for further proceedings, the clerk of the Supreme Court shall prepare and certify a copy of the opinion of the Supreme Court, and send it, with the certificate of the judgment or decree rendered in the cause by the Supreme Court, to the clerk of the court from which the cause was brought, or to which it shall be remanded; and the fees of the clerk for certifying the opinion shall be a part of the taxable costs of the case in the Supreme Court; and

the copy of the opinion furnished shall be preserved by the clerk to whom it is delivered, for the use of the court and parties in the case."

On June 27, 1898, the defendants filed a suggestion of errors in the Supreme Court under their Rule 10, which is as follows:

"Petition for Re-argument—Suggestion of Error. Applications for re-argument shall be presented in open court by petition, and noted on the minutes of the court on or before the Monday succeeding the delivery of the opinion; and no re-argument shall be granted upon any point or question not distinctly made and insisted upon at the original hearing or submission of the cause. No extension of the time for making such application will be granted except on account of sickness or other extreme cause. The court will, at any time during the term at which a judgment is rendered, consider a written suggestion of error of law or fact therein, and will take such action as may seem proper."

See 70 Miss R, p XXII

This suggestion of error was overruled orally, and handed back to the clerk by the court without any formal order, as is usual in such cases, as the clerk certifies. It was overruled July 1, 1898, and the Court adjourned the same day.

Record, pp 527, 549, and see written agreement on file.

Thereupon the clerk on July 4, 1898, made out and transmitted to the Circuit Court the certificate or mandate from the Supreme Court, with a copy of the opinion or summary of the Court's holdings attached, and this was filed in the Circuit Court while it was in session on said July 4, 1898.

Record, p [redacted]-529, 682-683,

The summary of the Court's holdings does not appear with the mandate on record page 528–529, supra, but it was omitted in making up the transcript by written agreement of the parties to save unnecessary padding of the record.

Record, p 528-683

And the special bill of exceptions shows that it was filed with the mandate.

Record, pp 529–530, 549

In this summary, the Court hold substantially as follows:

I.

On account of the inconsistent compromise verdict, the judgment is reversed both on the appeal and cross appeal.

II.

That the Lambert case is res-adjudicata for the taxes of 1892 on that part of the N J & C Railroad in Adams county, and as to that the Court could not overrule it.

III.

That the Lambert case is not res-adjudicata as to any other property of the N J & C Railroad Company, and not res-adjudicata as to any of the property herein involved.

IV.

That under both the law and the facts, the consolidation of October 24, 1892, created a new company and any alleged exemption was prevented from passing into it by section 180 of the Constitution of 1890.

V.

That the alleged exemption or 5th section of the charter of the Louisville, New Orleans & Texas Railway Company, a reenactment of the 21st section of the Mobile & Northwestern Railroad Company being expressly recited to be irrepealable on its face is void, as violative of sections 13 and 20 of article 12 of the Constitution of 1869, even under the construction in the Mississippi Mills vs Cook case in 56 Miss p 40.

VI.

That said alleged exemption was unconstitutional under the Constitution of 1869, even if it had not been in terms irrepealable, citing St Louis vs Berry, 41 Ark, affirmed by this Court in 113 U S 475, and L & N Railroad Company vs Palmes, 19 Fla 231, affirmed by this Court in 109 U S, 253-254 and the

Mississippi Mills and Lambert cases are expressly overruled.

This all occurred together with, and anterior to the mandate, over all of which we claim this Court has no jurisdiction, which is only before it as a part of the history of the case, and which it has no power to review.

The writ of error could only bring up the proceedings subsequent to the mandate, and they were substantially as follows:

After the decision on June 20, 1898, the plaintiff's attorneys, on June 23, 1898, gave notice to the attorneys for the defendants, that they would insist upon a trial at that term of the Circuit Court, and had the case set for trial on July 4, of which they gave defendants' attorneys due notice.

Record, p 549

I.

Then on July 4, 1898, counsel for defendants appeared in court, and objected to a trial at that term because the Supreme Court had reversed and remanded the case after the commencement of the term of that Circuit Court, and because the Supreme Court had sent down with the mandate only a summary of its holdings, instead of a full opinion, which it had in this summary reserved the right to afterwards make and file. This objection was overruled, and the defendants excepted, but said nothing about the United States Constitution.

Record, p 529-530

II.

The defendants then presented a petition and bond for removal of the case to the Circuit Court of the United States for the Southern District of Mississippi on the ground that "this cause as between the plaintiff and both the petitioners, is one arising under the Constitution and laws of the United States, as your petitioners will now proceed to show." This petition was refused and defendants excepted.

Record, pp 531-543, 544

III.

The defendants then applied for a continuance on account of the absence of whom they claimed to be leading counsel. In

support of this, they introduced an affidavit, and the plaintiff introduced a counter affidavit to the effect that three counsel were present, one of whom had always attended personally to the case, and that the absent counsel had never been present, nor taken any part in it. Thereupon the Court overruled the application, as shown in the bill of exceptions, "for the reason that, in the opinion of the Court, the interests of the defendants are not imperilled by the absence of the counsel referred to in said affidavit, the counsel present being sufficiently able, and fully familiar with the matters and things herein involved." Nothing is said in the affidavit, or application for continuance, or in the bill of exceptions about the Constitution of the United States.

Record, pp 544–550, 550–551

IV.

As shown by a special bill of exceptions, the counsel for defendants then "requested of the Court to grant them time until the morning of Wednesday, the 6th day of July 1898, in which to prepare pleas to meet the new aspect put upon the case, in their opinion, by the decision of the Supreme Court, certified with the mandate herein, and this request the Court granted.

On Wednesday morning the court convened at 9 o'clock, July 6th 1898, and this case being called, all counsel were present, and the court inquired of counsel for defense, if their pleas were ready? Whereupon counsel for defense replied that they were, and produced the same and handed them to the clerk of the Court in the presence of the counsel for plaintiff, and without any objection by them. The clerk thereupon marked the same filed before they were submitted to the Court, or the counsel for the plaintiff and without any leave of the Court to file the same other than as stated above. The counsel for the plaintiff then obtained said pleas from the clerk, after the same had been marked filed by him, and asked time until three o'clock in the afternoon to consider the same, which was granted by the Court.

Whereupon, in the afternoon of said day, the counsel filed

their motion which is herein of record, to strike from the files the 2nd, 3rd, 4th, 5th, 6th and 7th pleas of each of the defendants, which were all the pleas aforesaid.

On this day, being Thursday, the 7th day of July, 1898, a day of said week and term, this case being called, the plaintiff amended his motion by striking therefrom, the figures and letters, 2nd, which occurs in the written third line thereof, between the words, 'files the,' and the expressions, 3rd, 4th, etc., announcing that they withdrew their motion as to the said second pleas of each defendant, and would reply to the same. The defendants then confessed the motion as to the two 7th pleas, stating that they had forgotten what the records herein do show, that at the former term of this court the plaintiff had dismissed this case as to the taxes defended against by said 7th pleas. The court thereupon sustained the said motion as to said 3rd, 4th, 5th and 6th pleas of the said two defendants respectively and struck them from the files. Whereupon the defendants excepted and tendered this, their special bill of exceptions, which is hereby signed and made a part of the record of this cause, this, the 7th day of July 1898."

There is nothing said in this bill of exceptions about any claim being made that this action of the Court in striking out said pleas would be or was any violation of any provision of the Constitution of the United States.

Record p 608-609.

The Yazoo & Mississippi Valley and Illinois Central Railroad Companies each filed separate pleas, but they are mere duplicates of each other, except in the names of the defendants. They appear in the record, pp. 551-578 and 579-606.

The plaintiff took issue on the 2nd pleas.

Record p 609 610.

These second pleas were similar to the first pleas which merely set up a compliance with the requirements of charter, and the plaintiff denied even this, and was willing to go to trial on it, thereby waiving all other questions.

Record p 85-87, 551-554, 578-582.

But the defendants, thereupon, on said July 7th 1898, withdrew all their pleas left on file in the following written withdrawal:

"In this cause, the Court having stricken from the files the pleas of the two defendants, respectively numbered 3, 4, 5 and 6, filed by them in order to meet the new aspect put upon the case by the decision of the Supreme Court herein rendered on the 20th of June, 1898, the said defendants hereby withdraw the joint plea heretofore filed before that decision, and also withdraw the two pleas filed by them respectively at this term, numbered 2, and decline to plead further herein."

Record, p 610

In the meantime after the first trial and judgment on July 25th, 1896, and while the first appeal was pending in the Supreme Court, the Revenue Agent had brought two other suits on December 18th 1896, for the taxes of 1896, and on December 24th 1897 for the taxes of 1897.

Record, p 611-618, 622 629

And on July 8, 1898, these two suits numbered 3059 and 3142 were consolidated with the other consolidated cause by the following consent order:

"On the 21st day of July 1896, causes numbered 2783, 2916, 3018, the suits of the plaintiff against defendants for the taxes of the years 1892, 1893, 1894, 1895 respectively, were consolidated, and after that were proceeded with as one case under said number 2788, and now by consent of all parties, said consolidated cause, embracing said three cases, is further consolidated with cases numbered 3059 and 3142, the suits of plaintiff against defendants for the taxes of the years 1896 and 1897 respectively, and hereafter all of said suits shall proceed as one suit under said number 2788, and it is ordered that all the orders, proceedings and pleadings in one shall be appropriated to each and all of said cases, with the proper changes in dates and amounts for each of said years 1892, 1893, 1894, 1895, 1896, 1897. This order is made to save the expenses and inconvenience of separate pleadings and trial in each case, and is not to be construed to the prejudice of either party, and all objections and exceptions are reserved which could be reserved if said orders, proceedings and pleadings were all separate. This order, at the request of all parties, is entered as of the 4th day of July 1898, and shall take effect as of that date, at which date the same was made."

Record, p 610-611

Thereupon on the same day, July 8, 1898, a judgment NIL DICIT was entered, the material parts of which are as follows:

"This day came on to be heard this cause, the same embracing cases No 2788, 2916, 3018, 3059, 3142, heretofore consolidated, and the plaintiff and defendants appeared by their respective counsel, and the defendants, the Yazoo & Mississippi Valley and the Illinois Central Railroad Companies, withdrew each and all of their joint and several pleas on file, not including, however, the pleas which have been stricken out by the Court, and said nothing further in bar of this action; it is therefore considered, and so ordered and adjudged that the plaintiff have judgment nil dicit against the defendants for the amounts sued for in said consolidated cause," etc. etc.

Record, p 629-630

The striking out of the 3rd and 7th pleas above mentioned, is not made ground of complaint in the assignment of Errors either in the State Supreme Court or in this Court, but only the striking out of the 4th, 5th and 6th pleas.

Record, p 683-684, 703-704

These 4th, 5th and 6th pleas were substantially as follows:

I.

The 4th plea set up the exemption, or 5th section of the charter of the Louisville, New Orleans & Texas Railway Company, which was a re-enactment of the 21st section of the charter of the Mobile & Northwestern Railroad Company, and section 13 of article 12 of the Constitution of December 1, 1869, which is in these words: "The property of all corporations for pecuniary profits shall be subject to taxation the same as that of individuals."

They then set up that at the April term 1878, the Srpreme Court of the State in the case of the Mississippi Mills vs Cook, 56 Mississippi Reports, held and determined that this provision of the Constitution did not prohibit the legislature from granting exemptions from taxation, but only irrepealable exemptions, and this construction had been followed in subsequent decisions, and acquiesced in by all departments of the government,

and that the charter of March 3, 1882, was granted and accepted by the Louisville, New Orleans & Texas Railway Company under this construction, (record p 558-560) and has never been repealed by the legislature, (record p 565-566) but that the Supreme Court of Mississippi in this case, on the first appeal had "held and adjudged on June 20, 1898, that said section 13 of article 12 of the Constitution of 1869 meant that the property of corporations for pecuniary profits should be actually taxed, and not merely subject to taxation, at the will of the legislature; that the said 21st section of the said Mobile & Northwestern charter, and said section five, of the said act of 1882 were void AB INITIO, and the case of the Mississippi Mills vs Cook aforesaid, was expressly overruled, and all of the subsequent cognate cases aforesaid were overruled by necessary consequence, including said Taylor case. It was farther adjudged that the said consolidation of 1892 operated to extinguish both of the consolidating companies, and not by way of merger, and created a new corporation subject to section 180 of the Constitution of 1890, and the said Lambert case was also expressly overruled, wherefore the said privilege of section five, of the act of 1882 would not have come to said defendant, the Yazoo & Mississippi Valley Railroad Company, even if the said section had not been void under the Constitution of 1869 aforesaid;" record page 565, and "that this suit by the plaintiff and the said decision of June 20th, 1898, are violative of section 10, article 1, of the Constitution of the United States, which forbids any state to pass a law impairing the obligation of contracts," and of the 14th Amendment.

Record, pp 566 567, 594 et seqr.

II.

The 5th pleas plead the said Lambert case, being the case of the Natchez, Jackson & Columbus Railroad Company vs Lambert, 70 Miss. 779, as res-adjudicata.

Record, pp 570 571, 598-599

III.

The 6th pleas plead the Lambert case and other previous cases back to and including the Mississippi Mills case as stare

decisis, and that those cases together with the action and acquiescence of the State officers and tax collectors, constitute an estoppel.

Record, pp 576 577, 604-605

An appeal was taken to the State Supreme Court, and among other grounds it was assigned for error.

5th. That the court below erred in trying the case at its June term 1898 and erred in trying it without the full opinion of the Supreme Court, "the combined effect of which was violative of the 14th Amendment to the Constitution of the United States as being a deprivation of the property of appellants without due process of law."

"6th. That the court below erred in overruling the motion of the appellants to remove the cause into the Circuit Court of the United States for the Southern District of Mississippi."

8th. That the combined effect of the action of the court below in trying the case at its June term, 1898, and in trying it without the full opinion of the Supreme Court, and in overruling the application of appellants for a continuance was violative of the Fourteenth Amendment of the Constitution of the United States, as being a deprivation of the property of appellants without due process of law.

9th, 10th, 11th. That the court below erred in striking out the 4th, 5th and 6th pleas of the defendants respectively.

Record p 683-684.

IT IS NOT AVERRED THAT THE ACTION OF THE COURT BELOW IN STRIKING OUT THOSE PLEAS DEPRIVED THE APPELLANTS OF ANY RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES.

Among other grounds, the plaintiffs in error assign in this court:

14th and 16th. That the State Supreme court erred in denying the 5th and 8th assignments of error, supra.

15th. In overruling the application to remove the cause into the Circuit Court of the United States, in and for the Southern District of Mississippi.

17th, 18th and 19th. That the Supreme Court erred in holding that the Circuit Court committed no error in striking out the 4th, 5th and 6th pleas "because the same presented no defense to this action."

We deny that the Circuit Court made any such ruling or that the Supreme Court decided any such thing, in the sense here attempted to be set up, as that the pleas, as an original proposition, or within themselves, if pleaded at the proper time, would have presented no defense to the action. To show this we will quote the motion to strike out and opinion of the Supreme Court, the material words being italicised by us. That part of the opinion of the Supreme Court is as follows:

"The petition for removal of the cause to the Federal Court was properly denied. The decisions of the United States Supreme Court cited in the briefs of counsel for appellee put this at rest."

K C R R Co v Daughtry 138 U S 303.
Tenn v Bank 152 U S 454.
Galveston v Texas 170 U S 226.

The application for continuance was properly overruled. The Court's action in striking out the special pleas stricken out was correct for the obvious reason that they presented no defense to the action in whole or in part. THE FORMER OPINION OF THIS COURT IN THIS CASE, SETTLED DEFINITELY AND CONCLUSIVELY ALL THE ISSUES INVOLVED, AND THE SPECIAL PLEAS ARE IN EFFECT, NOTHING ELSE THAN AN EFFORT TO HAVE THE CIRCUIT COURT DISREGARD THAT OPINION. THE FUTILITY OF THAT SORT OF PLEADING NEEDS NO COMMENT. THESE MATTERS OF PRACTICE AND PROCEDURE and all the other assignments of error touching matters of practice and procedure were correctly settled by the Court."

Record p 685.

The motion to strike out is here given in full:

1st. Because said pleas are improperly filed.

2nd. Because said pleas are no defense to the cause of action as it now stands before the Court, and no one of them is any defense.

3rd. Because all the defenses set up in said pleas can be set up under their pleas filed prior to the filing of these pleas, and because each of said pleas seek to have this Court review the decision of the Supreme Court.

4th. Because all matters set up in said pleas have been adjudged against said defendants in this case by the Supreme Court.

And the following additional reasons as to said 3rd, 4th, 5th and 6th pleas of each of said defendants respectively, to-wit:

1st. Because (each) one of said pleas is so framed as to prejudice, embarrass and delay a fair trial of this case.

2nd. No one of said pleas is necessary in order to bring the true merits of the controversy fairly to trial.

3rd. Each one of said pleas is so framed as to make the precise nature of the defense intended to be set up so indefinite, uncertain, complicated, and multifarious that it is not apparent what precise defense is intended thereby.

And for the following additional reasons as to said 3rd plea of said defendants, respectively, to-wit:

1st. Because said plea sets up matters of defense that can be set up under the former pleas filed by said defendants, and nothing more.

And for the following additional reasons as to said 4th plea of each of said defendants, respectively, to-wit:

1st. Because said plea seeks to have this Court review the decision of the Supreme Court in this case.

2nd. Because said plea denies the validity of the Supreme Court decision in this case, and calls upon this Court to reverse that decision.

3rd. Because all matters involved in this plea can be set up under the pleas of said defendants, filed prior to the filing of said plea.

4th. Because all matters contained in said plea have been decided by the Supreme Court in this case under said former pleas.

And for the following additional reasons as to said 5th plea of each of said defendants respectively, to-wit:

1st. Because said plea attacks the validity and legal effect of the decision of the Supreme Court in this cause and seeks to have this Court overrule that decision.

2nd. Because said plea sets up the decision of Natchez, Jackson & Columbus Railroad Company vs James W Lambert, tax collector, as a conclusive adjudication against plaintiff's cause of action in this case, when said plea shows on its face that said decision was overruled by said Supreme Court before said pleas were filed.

3rd. Because said plea is offered too late.

And for the following additional reasons as to said 6th plea of each of said defendants respectively, to-wit:

1st. Because said plea attacks the validity of the decision of the Supreme Court in this case, and seeks to have the same reviewed by this Court.

2nd. Because said plea is no defense in this case as it now stands.

3rd Because said plea sets up as an estoppel only such matters as the Supreme Court has overruled in this case before said plea was filed.

4th. Because the State cannot be estopped by the acts of its ministerial officers, and cannot be estopped by the decisions of its courts as to any matters not actually adjudicated in said decisions.

5th. Because said plea is presented too late."

Record, p 606-607

The bill of exceptions, ante, p 6-7 shows that said motion was sustained generally without specifying any particular ground, and the actual order sustaining the motion is as follows:

"This cause came on for hearing upon plaintiff's motion to strike out the 3rd, 4th, 5th, 6th and 7th pleas of the defendant, the Yazoo & Mississippi Valley Railroad Company and the 3rd, 4th, 5th, 6th and 7th pleas of the defendant, the Illinois Central Railroad Company, and thereupon said defendants withdrew said two 7th pleas; and the Court, upon full consideration of the matter, doth order that said motion be, and the same is hereby sustained, and each and all of said pleas (except said 7th) are stricken from the files."

Record, p 608

The plaintiffs in error procured and filed the certificate of the dissenting Chief Justice, as to a Federal question being in-

volved, and in their brief in opposition to our motion to dismiss or affirm, on page 41, undertake to state what the trial court understood "was being done" and what the Supreme Court understood "had been done when it ruled that the pleas presented no defense to the action in whole or in part," and on page 42, talk about us, setting "traps for the unwary."

We will notice these things in the brief, but what we want to do at present is to call the attention of this Court to the fact that the Supreme Court only had power to review what was done in the lower court, and hence that is as far as the power of this Court extends.

May's U S Sup Ct Prac, p 91-92

And if any certificate is proper, it is not that of the Chief Justice, who could only certify at most to things already appearing in the record in the assignment of errors there, but under the broad statements of opposite counsel, the proper certificate would be that of the trial judge who was present and knew all that occurred in the lower court, and to show what he "understood was being done," we have procured and filed his certificate in this case, and now copy the same in full here:

"I, Robert Powell, Circuit Judge of the Seventh Judicial District of Mississippi, in which is included the circuit court of first district of Hinds county, do certify that I was the presiding judge of said court at the June term, A. D. 1898, thereof, and was the judge who heard the motion to strike out the additional pleas in the above styled cause under the court number 2788 in that court, and made the order of July 7th, 1898, striking out the 3rd, 4th, 5th and 6th pleas, and signed the bill of exceptions of that date in reference to the same, and that I am still said circuit judge, and presiding judge of said court, and I further certify that when said motion was sustained, and said bill of exceptions was being prepared, the counsel preparing the same, on behalf of the defendants requested me as said judge to specify some ground of the motion which was sustained in the bill of exceptions, and I, as said judge, expressly refused to do so, stating distinctly that the motion was sustained generally and on all the grounds, and it was so understood by me, and

so distinctly stated at the time it was signed, in open court, and with no other understanding.

Witness my signature this August 9th, 1899.

ROBERT POWELL. (Seal.)

Judge Seventh Judicial District of Mississippi."

POINTS INVOLVED.

I.

That there are only four questions, and they are questions of State practice and procedure, and none of them involve any Federal question.

II.

That if this Court has any jurisdiction to review any of these four questions of practice and procedure, they were all decided correctly.

III.

The unsupported THEORY of the plaintiffs in error that the stricken out pleas, were stricken out "because they presented no defense to this action."

IV.

An answer to other statements and arguments of counsel for plaintiffs in error, which, if unchallenged, may have a tendency to mislead this Court.

I.

That there are only four questions involved, and they are questions of State practice and procedure, which do not involve any Federal question.

All other pleadings being voluntarily withdrawn, this Court can only consider such questions as were not withdrawn, and they are four, as shown by the record.

Of course the whole record of the case comes here, but it is

only that this Court may understand the case from beginning to end, and thus be enabled to act intelligently. But this Court only has jurisdiction of what occurred after the mandate on the first appeal, and the second trial in the trial court, and on the second appeal to the Supreme Court, IN CASE NO 9251, for it is only the rulings and judgment in that last appeal, from which the writ of error is sued out, and it is the settled doctrine of this Court, and of all other courts proceeding according to the course of the common law, that what has been decided and settled in one appeal, is res-adjudicata, and not open to review on a second, or any subsequent appeal.

Union &c v Kirchoff, 169 U S 103
Thompson v Maxwell, 168 U S 451, 456
Great Western &c v Burnham, 162 U S 343-344
Supervisors v Kennicut, 94 U S 498
Stewart v Stebbins, 30 Miss 66
Smith v Elder, 14 S & M (22 Miss) 100
McKinney v State &c, 117 Ind 27-28
Agne v Seitsinger, 104 Iowa 485-486
Long v Perine, 44 W Va 243, 245

Indeed the authorities are so numerous, and so unanimous, that to save space, we refer to 2nd Enc Pldg & Prac, p 373-380 and notes.

And this Court has no more extended jurisdiction in the matter than the Supreme Court of the State, for it is the action of the State Supreme Court only that this Court is called on to review.

May's U S Sup Ct Prac p 91-92, citing among others
Chem Bk v Portage, 160 U S 646, 652
Miller v Texas, 153 U S 538 539, etc etc.

And it was not a case where the record was opened up, and the Supreme Court could try the case de novo, but an appeal in the nature of a writ of error from a judgment in a common law jury trial court, where the jurisdiction of the Supreme Court is limited to a review of the proceedings in the circuit court. The statute simply provides a uniform method of carrying a case up, and calls it all "appeal."

Annotated Code of 1892 Sec 31.

With this point settled then, we claim that there were only four things done by the trial court after the mandate from the first appeal was sent down, which were excepted to, or which were subject to be excepted to, and they were:

A.

The objection to trying the case at the June term, 1898, the the term having commenced before the cause was reversed, or the mandate sent down, and on the summary of the Supreme Court's holdings, in advance of the full opinion.

B.

Refusing the petition to remove the case to the Circuit Court of the United States for the Southern District of Mississippi.

C.

Refusing the application for a continuance.

D.

Sustaining the motion of plaintiff to strike out the 4th, 5th and 6th special pleas.

We will argue these in the above order. Everything else is withdrawn.

A.

The objection to trying the case at the June term, 1898, and in advance of the full opinion. This full opinion when filed on November 22, 1898, did contain one new decision, but otherwise was merely an elaboration, and in our opinion, certainly a very

full and convincing one, of the holdings of the summary. The defendants were not materially concerned with the language used by the Court, but with what it decided, and this they got in the summary.

The objections of the defendants were not based on any provision of the United States Constitution, but exclusively on the State's statutes, as shown by the bill of exceptions; see statement ante, p 5, and the State Supreme Court, in their opinion of November 28th, overruling the motion to strike out this full opinion of November 22, say that "sections 4352 and 4381 of the Code of 1892 were fully complied with by the summary of holdings handed down in June last, certified to and used in the Circuit Court on the trial of the case after it was remanded."

Record p 678.

And in the last opinion of February 20th, 1899, they decide that "these matters of practice and procedure and all the other assignments of error touching matters of practice and procedure were correctly settled by the Court," and further, that as this new ground of decision about the repeal of the exemption was not added to the opinion until several months after the second trial in the Circuit Court, it was perfectly obvious that it could not have had, and did not have any influence on that trial.

Record p 685 and 687.

These parties were present in court, and duly heard, and the decision of the court on questions of practice and procedure in the lower courts of the State, raises no Federal question, especially when the attention of the lower court, as is shown by the bill of exceptions here, record p 529, is directed to the State statutes, and not to any Federal question.

Schuyler v Bollong 150 U S 88-90.
Sayward v Denny 158 U S 184-186.
Long Island v Brooklyn 166 U S 685-688.
Iowa Central v Iowa 160 U S 393-394.
Miller v Texas 153 U S 538 539.
Dewey v Des Moines 173 U S 197-201.
Citizens Sav Bk v Owensboro 173 U S 642-644.

175 U.S. 633=635; 643=644.

This is also argued in our brief on the motion to dismiss or affirm, pages 32-34, and is so plain that counsel for plaintiffs in error in their brief on said motion, state on page 45, that they will not urge it here.

B.

The petition to remove case to the Federal Court.

The appearance terms of all the cases had passed, and the application was too late, and there was no color for it.

Kansas City R R Co v Daughtry, 138 U S 303

No Federal question was raised by the plaintiff, and it can not be raised by the defendants in proceedings to obtain a removal. The first and last cases are,

Tenn v Union & P Bk, 152 U S 454

Third St &c v Lewis, 173 U S 457, with about a dozen intermediate cases.

They are cited in our argument on this point in the brief of the argument on the motion to dismiss or affirm, pages 19-22.

And opposite counsel in their brief in opposition to the motion to dismiss or affirm on page 42, state that this point is not now relied on by them.

It has been in fact so often decided by this Court, that it is not now considered by it to raise color for a Federal question, and in the last case but one, they dismiss an appeal from the Circuit Court of Appeals, where the ground of jurisdiction in this Court, like on a writ of error from a state court, is necessarily based on a Federal question. And that appeal is dismissed with a simple reference to Tenn v U & P Bk, 152 U S 454, and Sawyer v Kochersperger, 170 U S 303, at that time the first and last case.

No 336. New Orleans v Warner, 171 U S 685-686

See also Third Street &c v Lewis, 173 U S 457, 460

This Court has also expressly held that the refusal of the state court to permit the party to amend his defective petition for removal, after the appearance term, did not raise a Federal question, and a fortiori, would an application entirely new, raise none, for if a party cannot amend one already on file, it is difficult to see how he could present one de novo.

Stevens v Nichols, 157 U S 370-371

And if the striking out of such a petition raises no Federal

question, the overruling of one, which is substantially the same thing, would not.

Penna Co v Bender, 148 U S 255

In this last case the petition was stricken out on motion.

C.

Refusing the continuance:

The record shows that the defendants were represented by three eminent counsel, present in the Court, one of whom had always personally conducted the defense from the beginning, and that the absent counsel had never been present, nor taken any part in the case, and the conclusion was irresistible that this application was made merely to delay, and there was no principle of courtesy or ethics which justified us in consenting to it, for there was no reason to believe that the absent counsel, if present, could have induced the Circuit Court to overrule the Supreme Court, and the State already had lost, and was daily losing a large amount of interest, as taxes before judgment do not bear interest. Under such circumstances the refusal to continue was imperative.

Garnett v Kirkman 41 Miss 97-99

Means v Bank of Randall 146 U S 629

See also authorities under 1st head, ante

This also being mere matter of practice presents no Federal question as fully shown in our brief on the motion to dismiss or affirm, on pages 32-34, and is virtually conceded by opposite counsel in their brief in opposition to that motion, on page 45, where they say they will not urge it here.

D.

Striking out the 4th, 5th and 6th pleas.

This is also a matter of practice and raises no Federal question.

A bill of exceptions was taken to the action of the court in striking out these pleas, and no Federal question is raised, or claimed in that respect. It is not claimed in the bill of exceptions that the action of the Court deprived the defendants of

their property without due process of law, or that it denied to them the equal protection of the laws, or that it put in force any subsequent law impairing the obligation of any contract. It simply recites the circumstances under which the pleas were filed, or attempted to be filed, and that the plaintiff made a motion to strike them out and "thereupon the Court sustained said motion as to said 3rd, 4th, 5th and 6th pleas of the said two defendants respectively, and struck the same from the files. Whereupon the defendants excepted and tendered this their special bill of exceptions." 176 U.S. 69-92

See ante, p 6-7 and Record p 608-609

It is not claimed in the assignment of errors in the Supreme Court that the court violated any provision of the Federal Constitution in sustaining this motion. The assignments of Error relating to it are the 9th, 10th and 11th, and they are similar except that each refers to a different set of pleas, the 9th to the 4th pleas, the 10th to the 5th pleas, and the 11th to the 6th pleas. They are this way:

"9th. The Court erred in sustaining the motion to strike out the two fourth pleas of the defendants respectively."

Record, p 684

Nothing is said or claimed about a Federal question. The motion in full is in the Statement, ante, p 12-14, and in the record, page 606-607.

The grounds of the motion may all be embraced under five heads:

1st. Because the pleas are filed too late, and improperly filed.

2nd. Under Code of 1892, § 704, they are "so indefinite and uncertain that the precise nature of the defense is not apparent," and "so framed as to prejudice, embarrass and delay a fair trial of the action."

3rd. That the defenses intended to be set up could be set up under the pleas already on file.

4th. That all the defenses attempted to be set up, had been already decided adversely to the defendants by the Supreme Court, and were res adjudicata.

5th. "That said pleas are no defense to the action as it now stands before the Court and no one of them is any defense."

This motion, as the order on it shows, was sustained generally and the bill of exceptions, exclusive of the judge's certificate now on file, shows that it was sustained generally, and no one has a right to confine it to any particular ground of the motion, and much less to go entirely outside of the motion, as the counsel for plaintiffs in error have done on pages 39, 40 and 41 of their brief in opposition to our motion to dismiss or affirm, and state that the motion was sustained "because the pleas presented no defense in whole or in part" and that this was "what the trial court understood was being done."

Slater v Skirving 51 Neb 108.
Hawes v Contra Costa, etc 5 Sawy 287.
Starr v Stark 2 Sawy 603, 642.
Affirmed in 94 U S 477.
Hawes v Contra, 11 Federal Cases 862, 866
Cited in Huntington v Palmer 8 Fed R 450.

We deny that the trial court or Supreme Court ever understood anything of the kind was being done, or that anything of the kind was done. It is very significant that nothing of the sort appears in the assignment of errors in the State Supreme Court, and that it creeps in for the first time in the 17th, 18th and 19th assignments of error in this Court. 175 U.S. 643=644.

The Supreme Court in sustaining the action of the court below uses this language, a part of which we italicize to bring out the point clearly:

"The court's action in striking out the special pleas stricken out was correct, for the obvious reason that they presented no defense to the action, in whole or in part. THE FORMER OPINION of this court settled definitely AND CONCLUSIVELY ALL THE ISSUES INVOLVED, and the special pleas are in effect, nothing else than an effort to have the Circuit Court disregard that opinion. The FUTILITY OF THAT SORT OF PLEADING NEEDS NO COMMENT.

THESE MATTERS OF PRACTICE AND PROCEDURE and all the other assignments of error touching matters of practice and procedure were correctly settled by the court."

Ante p 12, Re ord p 685.

The dissenting chief justice makes some kind of a certificate which is distorted from its true meaning and purpose on page 36-37 of that brief, but we deny that it will bear any such construction, and if it did, could not contradict the record, and was unnecessary in this case.

Sayward v Denny 158 U S 183.

Newport v Newport 151 U S 536-537.

And lest this Court could have any lingering doubt on this subject, we have had the certificate of the judge who tried the case, and knows what was done, and understood, filed and printed in the Statement, ante, p 15 to show that an express effort was made to get the judge to specify some particular ground in the bill of exceptions, and that he refused, and actually did sustain the motion on all the grounds, and instead of we or the Court setting a trap for the unwary, somebody is evidently endeavoring to set a trap for the Supreme Court of the United States.

Injured innocence! "A trap for the unwary!"

Now if the Court please, be careful. These gentlemen don't need any guardian.

The point we make here is, that these pleas were not stricken out because that in and of themselves they are no defense to the action, but that under any one, or either, or all the grounds of the motion, they were stricken out under rules of pleading and practice, and that the Supreme Court of the State expressly say "that these matters of practice and procedure * * were correctly settled by the Court."

In our brief of the argument on the motion to dismiss or affirm, we endeavor to show that they were correctly settled by the Court under previous decisions of the Supreme Court of Mississippi, in order to show that their ruling was not arbitrary and without precedent, and counsel for the plaintiffs in error in their brief in opposition to that motion, on page 37, endeavor to show that "it is the statutory right of a defendant in Mississippi to amend his pleadings, and set up new defenses at any time before verdict."

But the difficulty with their argument is that this is the Supreme Court of the United States. Their argument would have

been a very proper and appropriate one to address to the Supreme Court of Mississippi. This Court takes its official knowledge of the local practice in Mississippi through the deliverances of its regularly organized expositor, and not from the briefs of counsel, except as a medium of communication. The Supreme Court of Mississippi has decided that under its rules of practice and procedure these pleas were properly stricken out, and that is conclusive on this Court, and raises no Federal question. It matters not whether their decision was right or wrong.

Stevens v Nichols, 157 U S 370-371

Chemical Bank v Portage, 160 U S 653

It was after the appearance terms of all the cases, and that is all this Court will demand or care to know. They have always decided that a Federal question must be raised at the proper time and in the appropriate way.

Winona &c v Minnesota, 159 U S 540

May's U S Sup Ct Prac p 91-93

Sayward v Denny, 158 U S 184-186

L & N R R Co v Louisville, 166 U S 709

Schuyler v Bollong, 150 U S 88-90

Powell v Brunswick Co, 150 U S 433

Citizen's Sav Bk v Owensboro, 173 U S 643-644

A party is no more entitled to plead it at an improper time, or in an improper way, than any other defense. It is not the business of this Court to upset the orderly rules of pleading and practice in the state courts, and they have never attempted to do so.

The Annotated Code of Mississippi of 1892, prescribes the rules of pleading and practice as follows:

"The summons in actions in the Circuit Court shall be made returnable on the first day of the term, and shall be executed five days before the return day thereof."

Section 3417

"The defendant shall plead on or before the first day of the term to which the process is returnable, or within such other time as the court by rule or otherwise shall allow."

Section 722

And in regard to these suits by the State Revenue Agent,

"such suits may be tried at the return term and shall take precedence of other suits."

Section 4194

At the time, the terms of the Circuit Court of the first district of Hinds county were the second Mondays of January and July. Section 626

June was substituted for July by the act of February 5 1898. Laws of 1898, p 72

Of course the appearance terms of the suits for the taxes of 1892, 1893, 1894, 1895 had been long past, and they had been to the Supreme Court and back.

The suits for the taxes of 1896 and 1897 were brought on December 18, 1896 and December 24, 1897, respectively, and the return terms were the second Mondays of January 1897 and 1898 respectively.

There are no summonses in the record, but that is because the Supreme Court Rule 3 provides as follows: "A transcript shall not contain any part of the case except the pleadings, evidence, instructions, bills of exceptions and the order, judgment or decree appealed from, unless the appellant shall by writing, request other matters specified, to be embraced in the transcript, a copy of which request shall be annexed to the transcript."

See 70 Miss., p XX.

The APPELLEE has no control of this, and if the summonses were not issued and served at the proper time, it was very easy for the appellants to show it by a written request to the clerk of the circuit court under the above rule, to include the summonses for 1896 and 1897 in the transcript, and because they did not do so, and because the circuit court under Sec. 156, of the Constitution of 1890 is a court of general and original jurisdiction, all the proceedings are presumed to be correct and regular UNLESS THE CONTRARY BE SHOWN.

Smith vs Central Trust Co. 154 N Y 333.

Cannon v Cooper, 39 Miss. 784.

In order that this Court might not think we had set "a trap for the unwary," we had the clerk of the Circuit Court to send a properly certified copy of these summonses up, and they are now on file and copied in the special record on pages 26-31, and

show that the summons in each case was actually served more than the five days before said second Mondays of January 1897 and 1898, respectively.

Now as to the suits for the taxes of 1896 and 1897, we had been entitled to judgments by default on the face of the record for more than eighteen and six months respectively, and there is in the record no showing whatever for the failure to file pleas at the proper time. We will speak of that hereafter, but what we call the attention of the Court here to is that under the state of the record and without any excuse for the delay, the defendants had no right to file any pleas at all. As the order of consolidation shows, record p 610, we consented that they might have the benefit of pleadings already on file, but did not consent for them to file any new pleadings whatever in those cases, and when the pleadings already on file were voluntarily withdrawn, they stood without any defense, and the action of the court below in refusing to let them file new pleas in either these or the previous case, was a matter of practice and raised no Federal question, and no Federal question in respect thereto is even hinted at, either in the bill of exceptions in the trial court or in the assignment of errors in the Supreme Court.

This Court, moreover, has expressly held that the denial by the trial court of leave to amend the pleadings after the pleading term, so as to raise a Federal question, is a question of of State practice, and raises no Federal question, and that ought to be decisive of this case.

Stevens v Nichols 157 U S 370-371.

To the same effect are:

Iowa Central R R v Iowa 160 U S 393-394.
Long Island v Brooklyn 166 U S 688.
Mexican &c v Pinckney 149 U S 194.
Pennsylvania Co v Bender 148 U S 255.
Belleville v Cox 109 N C 265.
Newburg v Weare 44 O St 604, 609.
Mason v Rolls 130 Ind 260-262.

The plan seemed to be about as follows: On July 5th the defendants requested of the Court until next morning, July 6th, to PREPARE pleas, and the next morning when the court conven-

ed at 9 o'clock, they publicly handed their pleas to the clerk and had him to mark them filed in the presence of the Court and of opposite counsel. Now these pleas cover more than fifty-five printed pages in the record, from page 551 to 606 inclusive. We suppose counsel already had the pleas substantially prepared, and wanted the extra time to put on the finishing touches, and plan a coup-de-tat over night. At any rate it is plain that they were exceedingly anxious to get these pleas on file, but the plan while magnificent in its conception, and a hard dash was made at the finish, failed to pass under the wire by just TWO HEADS.

It got to the very gates, and Rome was only saved by the cackling of her geese, and we are the geese which cackled with our motion.

It aroused the Court to prompt and vigorous action and he with the assistance of the clerk immediately put 'em out and shut the gates.

The 4th pleas especially seem to be a violent assault upon the Supreme Court, almost amounting to a long distance battery, and it was the duty of the judge, as a conservator of the the peace, to strike them out.

Agne v Seitsinger 104 Iowa 485-486.

The case then stood in this condition. They had in two pleas setting up this 21st section, and that under and in compliance with its terms, they had paid out the taxes on the construction debts, made the proper affidavits, got the proper receipts, and had not been able to pay the 8 per cent. dividend, a perfect defense, if the charter provision was valid.

Record p 85, 551, 578.

We filed replications denying the truth of these allegations.

Record p 58, 609.

Here was a square issue on the facts, with all constitutional and Federal questions waived, and rendering the stricken out pleas totally and entirely unnecessary from any point of view whatever, and yet the defendants voluntarily withdrew these pleas, and left us to take judgment nil dicit. This Court has decided that it will not pass on a constitutional question, unless it is necessary.

Baker v Grice 169 US 285, 292.

And when the defendants withdrew their pleas setting up the facts, we cannot see how any Federal question is involved, or how it is possible for this Court to pass on any Federal question. There is none before the Court. 175 U.S. 643-647.

It may be thought strange that the defendants should withdraw these pleas and decline to go to trial on the facts, but if the Court will examine our motion for a new trial on the first trial, it is not so strange as it may seem. The 6th ground of that motion shows that on the former trial one of the jurors by some unfair means forced the other eleven to agree to a compromise verdict. The affidavit in support of that motion is not in this record, and is not material for the present purpose. What we call attention to is that on the former trial the defendants were saved by one juror alone.

Record, p 119-120

With the facts in the record shown hereafter in this brief, this Court can readily appreciate that the defendants stood a better chance to get a delay by a writ of error to this Court, as they have done, than to get any verdict in their favor from a jury on the facts. It was not their fault except in refusing to submit to the inevitable. They had done all that could have been done by any lawyer, and the fault was not theirs that they could not CREATE facts, and the fact that they could not create facts does not entitle them to have Federal questions tried here.

It is true they had made a great and almost unprecedented defense, but we had been slowly advancing with an overwhelming array of facts, until nothing was now left them but Thermopylæ and the Alamo. It was indeed a desperate situation, but to get into this Court they had no recourse left but the forlorn hope of securing a victory before a jury, an apparent impossibility. They claim that if they had made this attempt and succeeded, that like the Persians, we would have found a way 'round over the hills, by making a motion for a judgment NON OBSTANTE VEREDICTO on their pleas.

But as they surrendered the Pass and the Fort there is nothing for this Court to pass on. The jury first, and then victory or death, was their only possible course.

If they had gained a victory before the jury, and we had then been forced to make the motion, the Federal question, if any there was, would have sprung into existence there and then, but as it is there is no question before this Court, except their right to withdraw their pleas and give us a judgment nil dicit, and as the trial court permitted it, and we consented to it, there is nothing before this Court.

II.

The foregoing four questions, we think, are all that are before this Court. We have endeavored to show that none of them raise any Federal question. But if this Court can abdicate its functions as the Supreme Court of the United States, the grandest nation in the world, and come down to the State of Mississippi, and expel her Supreme Court, and sitting not above it, but in its place and stead, decide whether the trial court acted properly and in accordance with the State laws and practice in rejecting the 4th, 5th and 6th pleas, then we will argue the motion to strike out on the actual grounds contained in it, and not on that interpolated into it by the opposite counsel for the first time, in this Court, "because the same presented no defense to this action," as claimed in their 17th, 18th and 19th assignments of error here. We have before denied, and now again deny that there is any such ground in the motion.

The substantial grounds of the motion, which was perhaps too long in order to avoid technical objections, are as follows:

1st. Because the pleas were improperly filed;

2nd. That they were indefinite and uncertain, and calculated to embarrass and delay;

3rd. That the defenses attempted to be set up, could be set up under the pleas already on file;

4th. That the matter of the pleas was all res-adjudicata;

5th. That said pleas are no defense to the action as it now stands, and no one of them is any defense.

For full motion see ante p 12-14.

We could not say they were no defense, when they took is

sue on the 1st and 2nd pleas.

If any one of these grounds was good, then the action of the trial court was right, for the judgment, the bill of exceptions and judge's certificate show they were ALL SUSTAINED.

We will argue them in the above order.

1ST.

Improperly filed and filed too late.

As we have before shown, the pleading terms of all the cases, including those of 1896 and 1897 had passed, and under these circumstances, it is well settled law, that new pleadings cannot be filed without a sufficient showing and leave of the court, and the bill of exceptions, record p 608-609, shows that no leave was asked or obtained in this case. The defendants could either before or after the pleas were stricken out, have asked leave to file them.

Pfeifer v Chamberlain 52 Miss 91.

But this they did not do, and there is nothing on which error can be assigned. This Court can well understand the dilemma. They wanted the pleas in and had no ground on which to ask it.

Shropshire v Probate Judge 4 How (5 Miss) 142.
Wright v Alexander 11 S & M (19 Miss) 411.
Lewis v Black 5 C (27 Miss) 432-434.
Morrison v Gaillard 3 C (25 Miss) 194.
Hunt v Walker 40 Miss 590.
Pool v Hill 44 Miss 306.
Clark v Duke 59 Miss 575, 578.
Hartford v Green 52 Miss 338-339.
Murphy v Frank 69 Miss 403.
Consumer's Ice Co v Cook 71 Miss 886.
Newburg v Weare 44 O St 604, 609.
Mason v Rolls 130 Ind 260-262
Belleville v Cox 109 N C 265.
2 Ency Pldg & Prac p 411-412 & Notes.
1st Series 18 Am & Eng Ency Law p 505 & N 5.

See farther on this, our brief of the argument in support of the motion to dismiss or affirm, pages 14-17.

2ND.

That they were indefinite and uncertain.

It can be pretty well ascertained that the 5th pleas, are pure pleas of res-adjudicata, and expressly plead the Lambert case as such.

Record pp 570-571, 598-599.

And the 6th pleas can reasonably be said to set up the doctrines of stare decisis, and estoppel in pais.

Record, p 577, 604-605

But it is hard to define or tell exactly what the 4th pleas are. The only way to get at it at all, is to quote the language of the pleas themselves on this point. They say "that this suit by the plaintiff, and the said decision of June 20, 1898, are violative of section 10, article 1 of the Constitution of the United States, which forbids any state to pass any law impairing the obligation of a contract" * * and "are violative of section 1 of the 14th Amendment to the Constitution of the United States, which forbids any state to deprive any person of property without due process of law, or to deny to any person within its jurisdiction the equal protection of the laws."

Record, p 566-567, 594

There is some surplusage in the 5th and 6th pleas, but each of these 4th pleas contains more than twelve pages of printed matter and recites the whole history of the State, and so many unnecessary and immaterial things, that they are fairly and squarely obnoxious to section 704 of the Annotated Code of Mississippi of 1892, under which that ground of the motion is made, and which is as follows:

"If the allegations of a pleading be so indefinite or uncertain that the precise nature of the complaint or defense be not apparent, or if any pleading be so framed as to prejudice, embarrass or delay a fair trial of the action, the court, on the application of the opposite party, shall cause the same to be made definite and certain, or may strike the same from the files. Irrelevant or redundant matter inserted in a pleading may be stricken out on motion of any party."

They State that the L.N.O.&T. Ry formed in the year 1894, and built the road in the years 1882 = 1884. Record p. 559 = 560.

3RD.

That the same defenses could be set up under the pleas already on file. If this is correct, it was obviously proper to strike out these pleas; for double pleas are both improper and unnecessary.

Green v McCarroll 2 C (24 Miss) 427
Wallace v Scales 7 G (36 Miss) 53
Railway Co v Brooks 69 Miss 168, 184

Opposite counsel in their brief in opposition to our motion to dismiss or affirm, on page 36, claim and indeed are forced to claim the same thing. They say "on the new trial directed by the appellate court, the railroad companies attempted specially to set up and claim the protection of the Federal Constitution, although it was really sufficiently raised under the pleadings as they stood," and on pages 10-11, 28-29, 24 and 33, they try to show that we admit it.

If that is all so, then what kind of a strange position does it place them in? In the language of the brilliant orator in Congress, "Where are we at?"

They claim it, and we admit it, and the trial court verifies it by striking out these additional and unnecessary pleas. Because the Court refused to let them come into court in their elaborate Sunday-go-to-meeting costume, they indignantly pull off their good-enough-every-day-working clothes. Now pray, what kind of a garb they are in?

If the Federal questions were already raised, they are not raised now, for all those pleadings have been voluntarily withdrawn, and it is too late to raise it by any new pleadings.

Union &c v Kirchoff 169 U S 103.
Miller v Cornwall 168 U S 133-135. 176 US. 89 = 92
N Pac R R Co v Ellis 144 US 458. 175 US. 646 = 647.
Citizen's Sav Bk v Owensboro 173 U S 643-644.

See also our brief on the motion to dismiss or affirm, pages 12-13, 17-19.

4TH AND 5TH.

These two grounds of the motion to strike out, namely;

that the matters attempted to be set up are RES-ADJUDICATA in and by the opinion and decision of June 20th, 1898, on the former appeal in this case, and that "the pleas are no defense to the cause of action as it now stands," are substantially the the same, and may be considered together. The only reason we have kept or stated them separately, is to bring out clearly and emphasize the fact that there is no ground of the motion to strike out "because the same are no defense to this action."

Why if the Court please, we took issue on pleas attempting to set up a defense to the action, on the merits

There are two sets of pleas, both sets mere duplicates of each other, except in the names of the defendants, one set being filed by the Yazoo & Mississippi Valley Railroad Company, and the other by the Illinois Central Railroad Company, which was an unnecessary padding of the record, and in the United States Courts is forbidden by the rules promulgated by this Court, but they are in the State Court, and no objection is made on that account.

We took issue on the 2nd pleas, and they and the 7th pleas are withdrawn in the written withdrawals, and there is no assignment of error either in this Court or in the State Court in reference to the 3rd pleas. So the action of the trial court in reference to the 4th, 5th and 6th pleas is all that is in controversy here.

For convenience we will notice these pleas in their reverse order.

A.

The 6th pleas set up the doctrine of stare decisis and estoppel in pais.

Record p 577, 604 605.

B.

The 5th pleas expressly set up the Lambert case, 70 Mis-

sissippi Reports, page 779-791, as res-adjudicata.

Record p 570-571, 598-599.

C.

The 4th pleas expressly set up that "this suit and said decision of June 20th, 1898," are violative of Section 10, Article 1, and Section 1, of the 14th Amendment to the Constitution of the United States.

Record p 566-567, 594.

A.

The 6th pleas set up that the Supreme Court of Mississippi in April, 1878, in the case of Mississippi Mills vs Cook, 56 Miss R p 40 et seqr,, decided that sections 13 and 20 of article 12 of the Constitution of December 1st, 1869, which respectively provided that "the property of all corporations for pecuniary profits shall be subject to taxation the same as that of individuals," and "taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value, to be ascertained as directed by law," did not mean that the property should always be taxed, but that it should always remain liable to taxation, and that this ruling had been followed by many subseqnent decisions, and acquiesced in and acted on by all departments of the State government, until it had become a rule of property, and under it the charter in controversy, being the 5th section of the charter of the Louisville, New Orleans & Texas Railway Company, extending to it the provisions of the 21st section of the Mobile & Northwestern Railroad Company charter, was accepted under the amendatory act of March 15th, 1884, and many contracts made since on the faith of that construction, and that it is now stare decisis, and an estoppel against the plaintiff.

Record p 577, 604-605.

This Court has often decided in these tax cases and others that the doctrine of stare decisis, or the overruling of its former

decisions by a state Supreme Court; or the effect of the action or of the acquiescence of the State officials, as an estoppel, are matters of general law, and raise no Federal question, and besides whenever these questions have come before this Court in an original and proper way from the lower courts, it has always decided them exactly like the Mississippi Supreme Court has done in this case.

The first case cited below expressly holds that the doctrine of estoppel is a non Federal one.

Pierce v Somerset Railway 171 U S 648-650.
United States v Kirkpatrick 9 Wheat 720.
Hansford v Davis 163 U S 278.
Central Land Co v Laidley 159 U S 109-112.
Winona &c v Minnesota 159 U S 534-539.
Vicksburg &c v Dennis 116 U S 665.
Yazoo &c v Thomas 132 U S 185.
United States v Tanner 147 U S 663.
State v Brewer 64 Ala 287.
Perry Co v Selma 65 Ala 391.
Delaware &c v Commonwealth 50 Pa St 399.
Hannibal &c v Kansas City 81 Mo 285 and cases.
2 Thompson Comm Law Corp § 2825.

In Wood v Brady 150 U S pages 20-23 this Court say, "assuming for the purposes of this case that there may be vested rights under an erroneous decision, it is carrying the doctrine to an unwarrantable extent to say that the construction placed by the Court on one statute implies an obligation on its part to put the same construction upon a different statute though the language of the two may be similar.

The argument that the language being similar, a like construction should be put upon both acts, is one properly addressed to the state court, but when that court has assumed to distinguish between the two acts, it is not within our province to say that the distinction is not well taken."

This Court has itself repeatedly refused to consider as stare decisis decisions on former acts which were not identical with the one before the Court.

In the much contested and noted cases of Pollock v The Farmer's Loan & Trust Company, the great income tax case, in 157 U S pages 574-579, and the case of Killbourn v Thompson, involving the privileges and powers of the House of Representatives, in 103 U S pages 196-200, and in the Legal Tender cases in 12 Wallace, pages 553-554, and also in the cases of Barney v Winona &c, 117 U S p 228, 231, and Wilmington &c v Alsbrook, 146 U S, p 302, and as far back as Cohens v Virginia, in 6 Wheat, 399, this Court refuse to follow the language in former decisions, because the acts under consideration were not identical with those before the Court.

This Court also hold that the principle of stare decisis does not extend to points in other cases, conceded by counsel, or assumed, and not litigated or contested.

Keokuk &c v Missouri 152 U S 312, 316.

United States v Tanner 147 U S 663.

Cross v Burke 146 U S 83, 87.

Boyd v Alabama 94 U S 645.

Smith v Turner 1 Hughes 373.

See also Field v Malster 41 Atlantic R 1087.

(Md p decided 1898.)

Cohens v Va, 6 Wheat 339, 399.

In the first case, 152 U S 312, this Court say the point which is claimed as an estoppel was "conceded" in the former case, and on page 316, they say as "the tax is defended upon a ground not put in issue there, but conceded by counsel in favor of the company, it is difficult to see how that case can be regarded as establishing any rule of property."

In this case the State Supreme Court acknowledged and applied both of these rules, and showed that many of the acts passed on in former decisions were different from those in the case at bar, and in those that were similar the points decided here were either conceded outright, or assumed and not contested, or else fictitious.

Record pp 514 515, 664-671.

B.

The 5th pleas, that the case of Natchez, Jackson & Columbus Railroad Company reported in 70 Mississippi Reports, pages 779-791, known as the Lambert case, is res-adjudicata.

Record p 570-571, 598-599.

The exemption claimed here is under the 5th section of the original charter of the Louisville, New Orleans & Texas Railway Company, being the act of March 3, 1882, copied in the record, p 41-43, 569.

The Natchez, Jackson & Columbus Railroad was a branch road purchased by the Louisville, New Orleans & Texas Railway Company in 1890, under the act of 1890, (Laws of 1890 p 675) authorizing the purchase, with all the immunities, and the exemption, THE THING, claimed in the Lambert case was an exemption under the charter of the former company and not under the 5th section of the charter of the latter company at all. It is true they were similar, as much alike as two black-eyed peas, but one was under a charter granted to one railroad company in 1870, and the other under a different charter granted to another railroad company in 1882. As well claim that two notes for $1000 each were the same thing because they were written and signed alike, one in 1870 and the other in 1882, or that two silver dollars were the same thing, because they look alike, except that one was made in 1870 and the other in 1882. The difference is strikingly illustrated in this very case. The Mississippi Mills case in 1878 intervened between the two charters, and while the former had to take its chances, the defendants are claiming that the Mississippi Mills case establishes a rule of property in the latter.

It is expressly held by this Court that a decision as to the main line of a railroad is not res-adjudicata as to one of its branches, and the reverse must be equally true.

Wilmington v Alsbrook 146 U S 301-302.

New Orleans v Citizens Bank 167 U S 397.

Southwestern R R Co v Wright 116 U S 231, 236.

As there seems to be some confusion about the matter, it

seems to us that a close attention to the exact point would dispel all this. SEPARATE PRINCIPLES FROM THINGS. RES MEANS A THING.

There are two PRINCIPLES:

1st. That a judgment in a suit on a particular cause of action is conclusive on the same parties, in a subsequent suit, on the same cause of action, not only of what was properly in issue and decided, but of all that might properly have been put in issue and decided.

2nd. That a judgment in a suit on a particular cause of action, is only conclusive on the same parties, in a subsequent suit, on a different cause of action, of what was properly put in issue, and actually decided.

The confusion of thought, it seems to us, arises from not making a clear cut distinction between principles and things. It is res-adjudicata, A THING OR THE THING ADJUDGED, and not a principle or the principle settled, for there never has been and is not now, and never will be, any man, or court, or principality or power, or human agency or tribunal great enough or strong enough to settle any principle whatever until it is settled right.

Principles are indelibly written in the book of nature, and through all her works, by the puissant power and hand of God, and while they may be for a time obscured to mental vision or perception, yet they can never be either altered or obliterated by the puny pen or brain of groping man.

THE THING THAT WAS IN CONTROVERSY in the Lambert case was the exemption or appropriation of taxes in the charter of the Natchez, Jackson & Columbus Railroad Company in Adams county alone, and the two questions which were litigated and decided were that this exemption passed in the sale of said railroad to the Louisville, New Orleans & Texas Railway Company, and also through the consolidation of October 24th 1892, into the present Yazoo & Mississippi Valley Railroad Company, for certain taxes. The further question as to whether a new company was created or not, had no influence whatever with the Court, as we will show hereafter.

The thing in controversy in this suit, the exemption or appropriation in the 5th section of the charter of the Louisville, New Orleans & Texas Railway Company, was never in controversy or even involved in that suit. The decision would have been exactly the same if that 5th section had never existed.

But it is involved and in controversy in this suit, on the first appeal as to the taxes of 1892, 1893, 1894, 1895, and in the second appeal as to the taxes of 1896 and 1897 in addition.

For the present it is sufficient to say that neither the property nor exemption in the Lambert case are in any way involved in this suit.

And the conclusive answer to said 5th pleas, is that the Lambert case was not pleaded, nor offered in evidence in this case, before the decision in the first appeal, and it was too late to offer it as res-adjudicata in another case after it was overruled. There would be no use in overruling it.

There are two principles which are now perfectly well settled:

1st. That a former judgment cannot be made available in a subsequent suit about another matter, unless it be pleaded or offered in evidence, as res-adjudicata, and this was not done.

United States v Bliss, 172 U S 321, 326
Land v Keirn, 52 Miss 347-348
Boston v Reed, 23 Colo 523
Brigot's Heirs v Brigot, 49 La Ann 1428
Duchess of Kinston's Case, cited in (1st El) 21 Am & Eng Ency Law, p 258-259, and note 1

This was also decided in this case.

Record, p 656

2nd. That if the former judgment is not pleaded or offered in evidence in the subsequent suit, it like every other defense, which could have been, and was not pleaded or offered in evidence, is itself concluded by the later judgment.

Marsh v Mandeville, 28 Miss 122, 128
Conley v Brayton, 16 Iowa 10, 18
Bateman v Grand Rapids, 96 Mich 441
Freeman on Judgments, section 332

And the State Supreme Court in the decision of June 23th

and November 22nd, 1898, expressly overrule the Lambert case, and in the opinion of February 20, 1899, on the last appeal, expressly hold that the action of the lower court in sustaining the motion to strike out these 5th pleas, was correct.

Record, 513-515, 658-659, 685

It was overruled and was not good for anything except possibly the exact case in which it was rendered, and would probably not be good now in a second suit in that same case.

C.

The 4th pleas, that this suit and the decision of June 20, 1898, violate section 10, article 1, and section 1 of the 14th Amendment to the Constitution of the United States.

Record, pp 566-567, 594

These pleas expressly set out section 13, of article 12 of the Constitution of December 1, 1869.

Record, p 558, 585

And that the Mississippi Mills case decided that this did not render grants of exemption void AB INITIO, but simply made them liable to be repealed at the will of the legislature, and that this construction was accepted and acted upon by all the departments of the government. That the decision was made at the April term 1878, and that the charter of the Louisville, New Orleans & Texas Railway Company was accepted under the act of March 3, 1882, as amended by the act of March 15, 1884 under this construction.

Record, p 558-560, 585-587

That the Supreme Court of Mississippi in the Lambert case, had decided that the consolidation of October 24, 1892 was a merger and did not form a new company and that the exemption was not cut off by section 180 of the Constitution of 1890.

Record, p 560-563, 588-590

That this exemption or appropriation had never been repealed.

Record, pp 561, 566, 589, 593

But that the Supreme Court had, in the decision of June 20, 1898, "held and adjudged" that the exemption was void AB

INITIO, and that the consolidation of October 24th 1892 did form a new company, and the exemption would have been cut off by section 180 of the Constitution of 1890 even if it had not been void AB INITIO as aforesaid, and the Mississippi Mills and coguate cases following it and the Lambert case were all expressly overruled.

Record p 565, 593.

It is then alleged that this suit and that decision of June 20th, 1898 are violative of the Federal constitution as above stated.

These 4th pleas are the pleas which try to, in the famous words of the Hon. Zach Chandler, "claim everything," and yet in the very excess of claiming they fall under the condemnation of that ruler with great possessions, in the Scriptures, when the Savior told him "one thing thou lackest." They forgot to claim the one essential thing to give jurisdiction to this Court, if they were still entitled to the same indulgence as the thief on the cross at that late hour, and that essential thing was they forgot to claim that their so-called contract was "IRREPEALABLE."

And this Court has expressly decided that there can be no irrepealable contract rights, when there is no irrepealable contract.

Louisville v Bank of Louisville 174 U S 444.

In their suggestion of errors on the first appeal, they did for the first time claim that it was not an ordinary exemption, but an appropriation of taxes irrepealable according to its terms and protected by the Federal Constitution.

Record p 521-523. 176 U.S. 83,

And that was too late. 175 U.S. 646 = 647,

Citizens Savings Bk v Owensboro 173 U S 643-644.

But in these new pleas, they actually forgot to make any such claim, and all the others are withdrawn, and the terrific argument in their brief is a very attractive and brilliant pigment thickly put on over a mere figment of a fertile imagination.

It is a waste of time to take to show that these 4th pleas are an attempt to set out what the Supreme Court decided on June 20th, 1898, and then to get the trial court to overrule it, for this is expressly what they say and do. It is due the Su-

preme Court that such pleas should be stricken out on motion, without any formal pleading.

Agne v Seitsinger 104 Iowa 485-486.

This applies to the suits for taxes of 1892-1895 inclusive, which were embraced in the first appeal, and equally as well to the taxes of 1896 and 1897, for there can be no doubt this time that the same parties, and property, and SAME THINGS, are involved, as the consent order of consolidation makes ONE SET OF PLEADINGS applicable to all.

While it is for taxes of different years, it is well settled in such cases, that the decision of THESE THINGS in the one suit is res-adjudicata in the others,

Martin v Lofland 10 S M (18 Miss) 317, 320.
New Orleans v Citizens Bank 167 U S 389-401.
N Pac R R Co v United States 168 U S 48-53.
Stone v Farmers Bank 174 U S 409, 412.
Stewart v Stebbins 30 Miss 66.

On the last appeal, decided February 20th 1899, the State Supreme Court decided the same thing. In this appeal was embraced all the suits, including those of 1896 and 1897, and they say "the former opinion of this Court in this case settled definitely and conclusively all the issues involved and the special pleas are in effect nothing else than an effort to have the Circuit Court disregard that opinion. The futility of that sort of pleading needs no comment."

Record p 685.

And this Court has uniformly decided that the decision of the Supreme Court of a state as to whether a judgment of the courts of that state is res-adjudicata is a matter of either general or local law, and whether made on either ground raises no Federal question.

Phœnix Ins Co v Tenn, 161 U S 184-186.
Wheeling v Wheeling 138 U S 287.
N Pac R R Co v Patterson 154 U S 132-134.
In re Woods 143 U S 202, 206:
San Francisco v Itsell 133 U S 65.
Newport v Newport 151 U S 527. 528.
California v Holliday 159 U S 415-417

Hagar v California 154 U S 639.

See also our brief of the argument on the motion to dismiss or affirm pages 14-15, 33.

In the case of Martin v Lofland, 10, S & M (18 Miss) 317 supra, it is said that when the Supreme Court "have decided a controversy between two judgment creditors as to their respective rights to the proceeds of sales made on their executions, and a subsequent controversy between the same parties as to their respective rights to the proceeds of other sales made under like circumstances under other executions on the same judgments arises, the former decision will be conclusive of the rights of the parties in the latter controversy" which is exactly the same principle here.

And in the other case of Stewart v Stebbins, 30 Miss, 66, it is said that "whatever is necessarily determined by this court in deciding upon the propriety of the judgment of the court below, or in settling the principles to govern the case in any further proceedings to be taken in it, is res-adjudicata, and final and conclusive on the parties, in that or any subsequent suit."

To the same effect see also

Smith v Kernochen 7 How (U S) 198.
Bissell v Spring Valley 124 U S 225.
Tioga Railroad v Blossburg &c 20 Wall, 137.
Lumber Co v Buchtel. 101 U S 638.
Hancock v Singer Mfg Co 42 Law Rep Annated 852,
Same case decided in 1898, N J.
And generally, Bigelow on Estoppel p 37-46.

As we will show hereafter the two cases of McCulloch v Stone, 64 Miss, and L N O & T Ry Co, 68 Miss, were fictitious cases gotten up by said L N O & T Ry Co and not entitled to be used for any purpose, although tried to be used by the plaintiffs in error both in their pleas and briefs.

And right here we wish to protest against opposite counsel continually using the Lambert case either as res-adjudicata or stare decisis for any purpose. That case was ON DEMURRER and the facts were not shown, and besides it was for taxes accruing PREVIOUS to the consolidation. It never showed that at the time of the consolidation of October 24, 1882, there were only $424

shares of the original Yazoo & Mississippi Valley Railroad Company, and of these the Illinois Central R R Co owned 6421 shares, and its officials owned the other 13 shares. Exhibits D and E.

Record p 150.

And it did not show that at that time there were 6000 shares of the Mississippi Valley Company, and that of this number the Illinois Central Railroad Company owned 5910 shares and the other 90 shares belonged to it, but were put in the names of its officials to comply with the charter and enable them to hold office.

Record p 149, 169-170.

And that at the time of the Illinois Central trust of September 1st 1892 it had 37,539 shares of the stock of the said Louisville, New Orleans & Texas Railway Company in the name of said Mississippi Valley Company—see paragraph 4.

Record p 134.

And it did not show that at the first meeting of the stockholders after the consolidation, out of a total of 54,934 shares, the Illinois Central owned 6420 shares in its own name, 44,399 shares in the name of said Mississippi Valley Company to avoid section 197 of the Constitution of 1890, and 112 shares in the name of its officials, making in all a total of 50,931 out of a grand total of 54,934 shares aforesaid.

Record, p 155.

Now if these things had been shown probably the court in the Lambert case, would have had some difficulty, as the court in this case did, in explaining how a railroad company with 48,514 shares of stock could become merged into one with 6420 shares, AND YET GIVE ONE VOTE TO EACH SHARE. The State Supreme Court says it cannot be done, and with all due respect we submit to this Court that such a thing is an inconceivable possibility to any finite mind.

See their opinion, record p 646-647.

But we wish to say further that the decision in the Lambert case was not based on the consolidation of October 24, 1892, being a merger of one company into another else it would have referred to 92 U S 665, but was based singly and alone on

the curious proposition that whether it was a new company or not, the exemption would go into it anyhow, UNLESS FORBIDDEN BY THE LEGISLATURE. They speak of merger and consolidation all through the opinion, as interchangeable terms, and frequently use them together, and without any distinction whatever. For instance they say the charters authorized them to "CONSOLIDATE," and the exemption was not lost by the "merger," in the same sentence.

70 Miss 790.

And on page 789 they say that the consolidation in Railroad Co vs Maine 96 U S 499 did form a new company, but that under the statute certain things in the old companies could not be performed by the officers in the new company, and hence the exemption could not pass, but they expressly say in reference to the Natchez, Jackson & Columbus Railroad Company, "it had the privilege to pay taxes by a prescribed affidavit, which could as well be made by an officer of a NEW COMPANY having control of it, as by one of the Natchez, Jackson & Columbus Company, and on the top of page 790 they say "we approve the doctrine so well put in Tennessee vs Whitworth 117 U S 139, and find it much more applicable to this case than Railroad v Maine, 96 U S 499.

Now if we turn to Tennessee v Whitworth, we will be astounded to see right before our eyes that it expressly finds the consolidation in that case created A NEW COMPANY, and there being no new constitution, that the exemption passed into it under a presumption of law that it would pass UNLESS PROHIBITED BY THE CHARTER.

Tennessee v Whitworth 117 U S 145, 147, 149-150.

And yet this is the case and only case, which the state court approved and applied in the Lambert case. This Court has never called the decision in that case stare decisis, nor applied it in any subsequent case, and yet this Court is now asked to approve the Lambert case, and call it stare decisis in this case.

In reference to the Tennessee vs Whitworth case this Court in Phœnix Ins Co vs Tennessee, 161 U S p 178 say the exemption will not pass by presumption, and on p 181-182, in deference to the learned chief justice who rendered the opinion

in Tennessee v Whitworth, they say that case must be confined to its peculiar facts. In other words, it is not and never was the law, as shown by every decision since. It was simply a slip, based on another slip of Mr. Justice Strong in Central Railroad & Banking Company vs Georgia, 92 U S 665, where he states the same doctrine, that an exemption would pass into a consolidation or merger by presumption.

This, as shown by the court since, is a complete overturning of all the established rules of construing exemption laws.

In that case however, as shown by the court, and also by the Mississippi Supreme Court in this case, the thing done was the merger of another company into the Central Company, under the name AND CHARTER of the Central Company, which still retains its stock, autonomy and charter.

Record p 643.

That decision was all right, because the Central Company was the complaining company, and it was intact, having simply acquired other property by lease, purchase or merger, it was immaterial which, and the decision would have been the same in either case, because it was its original, and not the acquired property that was in controversy.

But the next case, without much argument or other reasons is just simply reversed on the authority of that case, one of the most striking cases of non sequitur we ever saw, and no doubt must have made poor old Aristotle's bones fairly rattle with excitement.

Let us put it in the form of syllogisms.

1st. In a merger between two railroads, where one of them retains its stock, charter and autonomy, it will not lose its exemption.

2nd. In the merger in Central &c v Ga. 92 U S 665, the Central Company did not surrender its stock, charter or autonomy.

3rd. Therefore the Central Company did not lose its exemption from taxation by reason of the merger.

Now take the other case:

1st. In a merger between two railroads, where one of

them retains its stock, charter and autonomy, it will not lose its exemption.

2nd. In the merger in Southwestern Ry Co v Ga 92 U S p 676, the Muscogee R R Co did surrender, and lose its stock, charter and autonomy.

3rd. Therefore the said Muscogee Railroad Company did not lose its exemption in the merger.

You couldn't have gotten even one of his Freshman class to have said "ipse dixit" on any such deduction. The old man would have had him ostracised.

In the one case the merging company WAS NOT DISSOLVED, while in the other it was, and it is expressly claimed and stated as a fact in the pleadings by the plaintiffs in error themselves, that in this case it was the Louisville, New Orleans & Texas Railway Company THAT WAS DISSOLVED in the merger, and the statement in this plaintiff's declarations to that effect were never denied, and it is also found as a fact by the court.

Record p 5, 76, 562, 569-570, 575.

Opinion of the Court, record p 646-647.

We suppose the latter case was just handed in by Mr. Justice Strong, as supposedly embodying the same principles as the one preceding, or possibly there was some agreement of counsel about it taking the same course as the other, or the attention of the Court was probably never called to the difference and distinction, for this Court has always held that where one railroad, although exempt itself, acquires another by purchase, the exemption of the latter does not pass, and what is the difference whether the latter is bought with bonds, money or stock, or all combined; the property of the latter is just merged into the system of the procuring company.

Phœnix Ins Co v Tenn 161 U S 180-181

1 Dauf U S Sup Ct Dig p 1093-1094.

This is only material on opposite counsels' contention that there was a merger. Of course a corporation with 48,514 shares of stock can be merged into one of 6420 shares, but in order to do this it would have to surrender its stock, which was not done here. What we claim here is that the actual things done formed a consolidation, and not a merger, because the

deed of consolidation does not depend on one or the other, but expressly says in the same article that whatever the legal effect of the consolidation, it "is to stand and be effective," record p 14-15, art 1. And a merger of one company with 48514 shares of stock into one with only 6420 is an utter impossibility, WHERE EACH SHARE OF STOCK IS ALLOWED ONE VOTE. It is a mathematical inconceivability.

III.

The unsupported theory of the plaintiffs in error that the pleas were stricken out "because they presented no defense to this action."

We say THEORY, because as we have said before, and repeat now, it has no foundation in fact, and we ask the Court to charge up the additional length of this brief to the counsel for plaintiffs in error, at least in their opinion, for we are forced by their many ingenious assumptions to make this brief much longer than we think ought to have been necessary.

If the pleas had been, as they say, stricken out, "because they presented no defense to this action," we would still claim that no Federal question was raised, and even if there was, there were so many non-Federal reasons for the Court's action even on the merits, that this Court could not say that a Federal question was NECESSARILY involved, and that is requisite to give it jurisdiction. The exact point has been decided by this Court, and should be decisive in this case.

This Court say "it is manifest that it was never contemplated by the framers of the Constitution that this Court should sit in review, as an appellate court, of such a question as that presented by the record in the case at bar, viz; whether or not the highest court of a state erred in holding that it could rightfully determine from the statements in the pleadings filed by both parties to a controversy pending before it that the averments of an answer set forth no defense to the claim of the plaintiff."

Iowa Central Railway Co v Iowa, 160 U S 393-394

In this case the facts were that it had once before been

tried by the same judge, and besides the pleadings, the whole of the actual facts was spread out in the record before him, and he was familiar with them all, and besides had them all actually before him, and was placed in a position where he could thoroughly judge of the propriety of permitting these pleas to be filed or to remain on file.

We will now proceed to show this Court that there were in the pleadings themselves, in connection with the record embracing the bill of exceptions, which contained all the proceedings AND EVIDENCE on the former trial, a number of patent and potent non-Federal reasons for the action of the court.

When a party desires to file pleadings out of time, it is necessary to make some excuse for the delay, which was not even attempted here, and also to present the pleadings with the application, or at least before they are filed, so that the court can judge whether they are to be filed for delay only, or whether on their faces they present evidences of good faith, and fairly amount to a prima facie defense.

Hunt v Walker 40 Miss 590.
1st Series 18th Am and Eng Ency Law p 505
and n 5.

Now in their brief in opposition to our motion to dismiss or affirm, the counsel for plaintiffs in error, state that the railroad was built by the Louisville, New Orleans & Texas Railway Company, and in reliance on this 21st section. P 10.

This we also deny, and this and several other fatal defects we will now proceed to point out in and to these 4th pleas. We have already argued the 5th and 6th pleas.

The defects in and to the 4th pleas are:

A.

They show affirmatively that the plaintiffs in error are not innocent purchasers, nor entitled to claim any protection from the doctrine of stare decisis as to the taxes sued for, and we claim that the decision of the Supreme Court was right on the merits.

B.

It affirmatively appears in the pleas and the record, that the railroad was not built by the Louisville, New Orleans & Texas Railway Company.

C.

The pleas and record show that the consolidation of August 12th, 1884, was not authorized by law, and was an attempt to obtain an exemption by fraud.

D.

The record shows that they largely inflated, the so-called construction debts, and the annual interest on the same, without any consideration whatever, and without the knowledge or consent of the State.

E.

The record which was before the court shows that the profits have all the time been sufficient to pay the annual dividend of 8 per cent. on the proper capital stock over and above the proper construction liabilities.

F.

The record shows that the capital stock issued was a pure gratuity, given merely as a bonus with the bonds, and was not entitled to any dividends as against the State.

G.

The plaintiffs in error, when giving in the property FOR TAXATION, gave it in under oath at $5,500.00 per mile for all the

years and could not complain even if the court had taken that as the value when they were trying to ESCAPE TAXATION.

H.

That there is really no construction debt, it having been novated by the $25,000,000 in 4 per cent. gold bonds of the Illinois Central Railroad Company to purchase both debts and stock.

I.

That the questions decided in the summary of June 20th 1898, considered not as res-adjudicata, but as res-nova, are conclusively shown to be rightly decided by the opinion of November 22nd, 1898, leaving out the new question about the repeal, and founded on the later and now settled decisions of this Court itself.

There are other reasons, but we will give seventeen more under the next head, and if that is not enough, we will simply suggest a few more at the end of this brief, and can find still others if the patience ot the Court is not by that time utterly exhausted.

A.

Victims of Stare Decisis.

In order to get the benefit of stare decisis and show how innocent they were and how implicitly they relied on the acquiescence of the state officers, and the Lambert and other previous cases, without notice, they aver that for the five years preceding 1898, the Yazoo & Mississippi Valley Railroad Company "had in its hands in each year a balance of $200,000 of net earnings, as aforesaid, for each of said years, after payment of operating expenses, and taxes and interest on first mortgage bonds," and then speaking of the other bondholders that "by its contract with such bondholders, it had the right to pay off all assessed taxes and would have paid off these taxes, but for such decisions and such constitution."

Record p 562-564, 590-592.

What an unfortunate admission! They evidently overlooked the fact that these were not suits for BACK TAXES at all, but for the CURRENT TAXES of each year as the same fell due, commencing shortly after the decision of the Lambert case on December 7th, 1893, December 18th, 1894, January 1st, 1896, December 18th 1896, and December 24th 1897, and yet they admit that they actually had the money in hand, and could easily have paid the taxes and had a big surplus of more than $100,000 left each year, if they had just known that we were in earnest, and were not prosecuting these suits just for fun. A clear case of notice not only by lis pendens, but actual notice as defendants in these suits. Another remarkable thing in connection with this admission contained in their evidence and annual reports, of which they are for that reason charged with notice is that in 1892 the first mortgage bonds had mounted up to $16,132,000, and has been $16,832,000 since then. Their annual reports show what enormous amounts for the purchase of other railroads, the Bayou Sara, Woodville, Clinton, Natchez, Jackson and Columbus, Riverside Division Special Charter, and for building the Riverside Division, and a branch in Arkansas, widening the guage of the N J & C R R from narrow to broad guage, taking up the 50 pound rails and replacing them with 56 and 62 pound rails, and a multitude of such outside acquisitions and betterments.

1st Annual Report, record p 332-333
2nd Annual Report record p 345, 347-348
3rd Annual Report record p 359, 363-364
4th Annual Report, record p 375-376, 379-382

The Riverside Division Special Charter had been purchased before March 1888, when the first annual report was made, as they already had it then, record p 331, but Maj. Edwards' shows, besides other things, they paid for in first mortgage bonds $1,140,000.

Record p 396.

So the first mortgage bonds issued for all these things were as follows:

Riverside Division, Special Charter $ 1,140,000.00

Third annual report, p 359	2,901,000.00
Fourth annual report, p 375	2,091,000.00
Widening N J & C R R guage, p 375-376	700,000.00
Total	6,832,000.00
Deduct this from the $16, 832,000 leaves	10,000,000.00
Now take the Mississippi part of this, 315–456, and we get	6, 900,787.00

We will now go down the line and show what tricks these people have been playing "with a smile that was childlike and bland."

Mississippi pro-rata $	6,900,787.00
Record p 487, add Tallahatchie branch	497.076.74
	7,397,863.74

Interest at 4 per cent.	$295,914.54
8 per cent. dividend on $5,000,000 stock	400,000.00
	695,914.54

Add Riverside Division $1,063,386.27 to $7,397,863.74, record p 482, and we have $8,461,250.

Interest at 4 per cent.	$338,450
Stock dividend	400,000
	738,550

Now take above interest	$338,450.00
Dividend on 315–456, Mississippi pro rata of stock of $5,000,000 is 3,453,947	276,315.76
	614,765.76
Now take above interest	$338,450.00
8 per cent. dividend on M & V R R Co	187,719.28
Interest and 214–456 part of stock	526,169.28

Now take entire amount	$10,000,000.00
Tallahatchie Branch	497,076.74
	10.497,076.28

Interest at 4 per cent.	$419,883.04
Entire stock	400,000.00
	819,883.04

Add Riverside Division $1,063,386.27 is 11,560,462	462,418.48
Entire stock	400.000.C0
	862,418.48

Now take the entire bonds $16,832,000 at 4 per cent.	$673,280
Entire stock	400,000
	1,073,280

Entire bonds except the $700,000 added after the consolidation of October 24, 1892, $16,132,000 at 4 per cent.	$645,280
Entire stock	400,000
	1,045,280

Interest as above	$645,280
Dividend on original stock $4,547,000	363,760
	1,009,040

Now if we take entire interest as above	$645,280.00
Mississippi pro rata of stock as above	276,315.76
	921,595.76

Or entire interest as above	$645,280.00
M & V R R Co part of stock as above	187,719.28
	832,999.28

We have put this in every possible form. We will speak of it again under head of "E."

Now let us see if the average profits would not pay the dividends and interest on an average in any way we can put it. The net earnings are as follows:

For the year 1889	$ 1,217,662.24
For the year 1890	1,071,426.96
For the year 1891	992,394.63
For the year 1892	1,367,792,91
For the year 1893	1,100,887.75
For the year 1894	922,879.59
For the year 1895	1,078,677.22

We could only get the annual reports previous to 1891, and it will be noticed that in every instance they were made out by Edwards, and yet he had the net earnings in each case much larger than those he, or some one else, fixed up for this case, and it is reasonable that the net earnings since 1891 are larger than those they made out for this case, and they prevented us from getting any statement at all for 1896 and 1897 by withdrawing their pleas, and letting us take judgment. We explain this more fully under the head "E."

B 1st.

The railroad was not built by the Louisville, New Orleans & Texas Railway Company.

It was commenced in 1882, and finished and tracks joined in July or August 1884, as shown by the testimony of J. M. Edwards, vice president and general manager of the railroad company, agent for the construction company, and general superintendent of construction, and not only a witness, but the principal witness, and a willing witness for the defendants.

Record, pp 410, 412, 415, 416, 420, 423

The Louisville, New Orleans & Texas Railway Company was not formed till August 12, 1884. See deed of consolidation.

Record, p 12

So it is plain that the main line of the road was built before it was formed.

In Mississippi it was composed of the Memphis and Vicksburg, and New Orleans, Baton Rouge, Vicksburg & Memphis (hereafter called the Baton Rouge) Railroad Companies.

Record, p 12

The Baton Rouge Company never had any exemption from taxation and was authorized to build all the way from New Orleans via Vicksburg to Memphis, while the Memphis & Vicksburg Railroad Company was only authorized to build from Vicksburg to Memphis.

See charter, record, p 21, 31.

The charters of both railroad companies and the construction company were all owned by the same parties, C. P. Huntington and associates and R. T. Wilson and associates, in the proportion of 60 per cent. to 40 per cent. respectively, and while John A. Grant was nominally president of the Baton Rouge Company, he was merely their chief engineer, and owned no real interest. R. T. Wilson and C. P. Huntington were the promoters and financiers.

Record p 298, 301. 412, 422.

Maj. Edwards states that the road "was built under the charters of the constituent companies," "and after the track was through, or about that time, I think, we consolidated into one company, the L N O & T."

Record p 412.

Maj. R. T. Wilson was president of the railroad companies, and part owner of the construction company, and helped furnish the money to build the road.

Record p 291, 295, 320, 324, 328, 330, 414.

And he does not know what charters it was built under, and yet this Court is asked to know.

Record p 206-207.

The Baton Rouge Company never was exempt from taxation, and was authorized to build the entire road from New Orleans via Vicksburg to Memphis, while the Memphis and Vicksburg Railroad Company originally had this exemption contained in said 21st section, but was only authorized to build from Memphis to Vicksburg through certain designated landmarks.

Record p 21 and 31-32.

Now a party who claims the benefit of exemption from taxation has always been held to bring himself and the property clearly within the terms of the statute, construed strictissimi juris.

Louisville v Bank of Louisville 174 U S 444-445

Yazoo &c R R Co v Thomas 132 U S 185.

And it is not only not shown that the main line was built by the Louisville, New Orleans & Texas Railway Company, but it is affirmatively shown that it was not. The most that could be said would be that the Baton Rouge Company and Memphis & Vicksburg Company built a JOINT ROAD, and there never was any authority for the Memphis & Vicksburg Railroad Company to build any road either jointly or separately below Vicksburg, and no authority for it and the Baton Rouge Company to build any JOINT ROAD above Vicksburg, nor exempting any such JOINT ROAD from taxation.

Not only is there no evidence showing that the landmarks in the charter of the Memphis & Vicksburg Railroad Company were followed, but the only evidence on that part is in the case of Railway Co v Blythe 69 Miss 943-944, where it is shown that a part of the right of way above Vicksburg, in DeSoto county, was made to the BATON ROUGE COMPANY which serves to emphasize the law that it is dangerous to indulge presumptions in favor of exemptions from taxation. Also 64 Miss. 479.

Also Mo Vr R R Co vs Cooke 64 Miss. 713, and record of same on file, No 5513. Pages 16-18-25. 50 & 54.

But even if it had been proved, which we venture to predict it never can be that the Memphis & Vicksburg Railroad Company, built the part above Vicksburg, the case of N J & C R R Co vs Lambert, 70 Miss, so much relied on by them, decides on page 787 that all exemptions were withdrawn by the act of February 25 1875, Laws of 1875, page 66, and afterwards again by sections 597-608 of the Code of1880, and independently of this decision, they openly admit and assert in the suggestion of errors before the Supreme Court, that "in the year 1880 a new code was adopted in the State of Mississippi, one of the provisions of which subjected all the railroads in the state to taxation."

Record p 519 520.

And this repeal was in full force and effect when this railroad was built, for while the act claimed to authorize the

consolidation was the act of 1882, as amended by the act of March 15th, 1884, it never became effective as the charter of the Louisville, New Orleans & Texas Railway Company until its formation on the 12th day of August, 1884 and AFTER THE RAILROAD WAS BUILT, and had the remarkable peculiarity inserted accidentally, or purposely, it is immaterial which, of only conveying to the consolidated company, the rights and immunities "NOW" on March 3rd. 1882, possessed by the consolidated companies.

Record p 41-42. section 1

So, whatever view we take of this matter, the main line never was exempt. It may be claimed that this 21st section was intended to act retrospectively, as well as prospectively, but to this there are six answers:

1st. That when it was originally granted in 1870, it was granted to a lot of railroads which had not been built.

2nd. The purpose is recited to be to increase the property of the state, and enable it "to greatly increase its revenue, without additional and burdensome taxation on the people," which could not be done by releasing railroads already built and liable to taxation.

Record p 40-41.

3rd. The rule is to so construe a statute as that every part of it shall have some effect, and to construe this section as retrospective, would entirely nullify that part of the first section which gives to the consolidated company all the immunities of the consolidating companies, it evidently being supposed and intended that the consolidation should take place immediately, as section 10 provided that it should be effective of itself unless a dissent was filed within thirty days.

Record p 43.

Lemonius v Mayer 71 Miss 514, 523.

4th. The Supreme Court of Mississippi, in this case, has expressly decided that it was prospective.

Record p 673-674.

5th. If it be admitted that it was retrospective, the plaintiffs in error are in no better plight, for this Court has decided that an exemption from taxation to a structure or railroad,

already erected, is without consideration, and may be modified or withdrawn at pleasure, and is not embraced in or protected by any provision of the Federal constitution, and that this is so, even though subsequent expenses may be incurred or bonds issued on the faith of it, and this would apply as well to an appropriation or donation.

Grand Lodge v New Orleans 166 U S 143
and authorities cited on pages 146-150.
Pearsall v Gr N Ry Co 161 U S 666-668.
Tucker v Ferguson 22 Wall 527, 575.
West Wisconsin R R v Supervisors 93 U S 595.

6th. Such an argument runs itself down to reductio ad absurdum.

Under the amendatory act of March 15th, 1884, it was provided that the act of March 3rd 1882, "be and the same is hereby so amended as to authorize and empower the Memphis and Vicksburg Railroad Company, and any other railroad company OR COMPANIES, incorporated under the laws of this State, to consolidate," &c.

Record p 44.

Now if their argument about being retrospective is carried to its legitimate conclusion, the Memphis and Vicksburg Railroad Company could have consolidated with every railroad "incorporated under the laws of this State," and thereby under said 5th section, rendered every one of them exempt from taxation.

That 5th section meant, and could only have referred to those roads or parts of road which the consolidated road itself should build under its new or consolidated charter, for that is the meaning of the 21st section itself, and is made doubly plain here by the 1st section of the act of 1882, record page 41-42, giving to the consolidated all the immunities and rights of the consolidating companies.

B 2.

Riverside Division.

As to what is called the Riverside Division, that was partly built by, and was purchased from the Memphis & New Orleans Railroad & Levee Company, which had no exemption from taxation. At the time of the purchase it had been constructed, it is admitted as a fact in the case, "between Leland and Huntington and from Wilczinski to Hampton, and thence to Glen Allen."

Record p 297, 394.

Now if the Court will turn to the map between pages 330 and 331 of the record, they will see that the parts constructed by the Louisville, New Orleans & Texas Railway Company were the two branches, one from Coahoma Station to Wilczinski on the north, and the other from Hampton to Rolling Fork on the south, so as to make a continuous loop. There was no authority in the charter of the Baton Rouge Company to build branches north of Vicksburg, and the Memphis & Vicksburg Railroad Company could only build branches on the west side of it, to points on the Mississippi river.

Record p 21 section 1 and p 39 section 18.

By again examining this map, it will be seen that this partly constructed road had already been built to Huntington and Glen Allen, the two points on the Mississippi river.

The Memphis & New Orleans Railroad & Levee Company was authorized under its charter to build its main line in almost any direction and to build branches not to exceed one hundred miles in length.

Laws of 1882, p 876, sec 2

By an amendment to the charter of the Memphis & Vicksburg Railroad Company in 1884 it was authorized "to purchase the whole or any part of any other railroad in this State, and the franchises, rights, immunities and privileges pertaining to the railroad or part of railroad so purchased."

Laws of 1884, p 935, sec 3

And in the act of March 18, 1886, allowing a consolidation between the Memphis, New Orleans Railroad & Levee Company and the Louisville, New Orleans & Texas Railway Company, it is expressly "provided that neither of said railroad companies

shall by this act acquire any rights of exemption from taxation not granted to said railroad companies by their respective charters."

Laws of 1886, p 721

There was no authority whatever to build these two ends to this Riverside Division except under the charter of the said Memphis & New Orleans Railroad & Levee Company, and yet against these two positive acts of 1884 and 1886 it is claimed that this Riverside Division is exempt.

See authorities cited in, and Wilmington v Alsbrook 146 U S 296-302.

It is not claimed that the Riverside Division, SPECIAL CHARTER, is exempt. They admit that they purchased it, and that it is not and never was exempt. It runs as above stated, from Leland to Huntington on the Mississippi River, and then commences at Wilczinski on this Leland line and runs down to Hampton, with a branch out to Glen Allen, also on the Mississippi River.

Record, pp 297, 299-300, 394, 396

The part which they claim to be exempt, and call simply the Riverside Division, are the two branches, one running to Coahoma Station on the north, and the other to Rolling Fork on the south, connecting this Riverside Division, Special Charter, with the main line, both ways, and thus forming a continuous loop, so that trains coming down the main line, could and did run either way from Coahoma Station to Rolling Fork and vice versa. We say there was not even color of authority to build this loop in any of the charters except that of the Memphis & New Orleans Railroad & Levee Company, and that was not only not exempt, but an exemption was provided against in the above two acts.

Record p 407-408.

These two ends were built in 1889 with some other parts not exempt.

Record p 359.

Yazoo M R R Co. v Adams, 76 Miss. 550-554
Chicago R R Co v Guffey 120 U.S. 569.

Now as to the Tallahatchie Branch.

That was built by the Louisville, New Orleans & Texas Railway Company, and under that portion of the constituent charter of the Memphis & Vicksburg Railroad Company, section 18, which authorized it to build branches on the east to the Yazoo, Tallahatchie or Coldwater Rivers.

Record, p 39, 394

But no stock was issued for or on account of it. The entire $5,000,000 of stock had been previously issued on account of the main line, and to purchase the Riverside Division, Special Charter. Record, pp 395, 396, 398

The cost of the Tallahatchie Branch, according to the itemized exhibit filed by Major Edwards was $497,076.74, about $12,500 per mile for the 39.59 miles.

Record, p 487

It was built in 1889–1890, and there has been no year since when the net profits were not much more than sufficient to pay the entire cost of construction in one payment.

Record, pp 402-403, 487, 375

These are the facts as shown by the record, and it would not have been error to reject the pleas, even on their statement of the merits, for they do not claim that the main line was built by the Louisville, New Orleans & Texas Railway Company, further than to say that it was organized in 1884, and built the main road, COMMENCING IN 1882, AND FINISHING IN 1884, adding branches till 1891.

Record, pp 520, 560, 587

The Court should act on the presumption that the party has stated his case as favorably as he could,

Stephen v Beall, 22 Wall 329.

And there is no rule of law which requires a court, without any excuse, or affidavit accounting for the delay, or even to the truth of the plea, to receive a plea, which is not only manifestly insufficient on its face, but which the record before the Court shows could not possibly be amended, so as to present a

ev·e more favorable to the defendants, and on the defendants' o vn evidence, taken under oath.

The part of the railroad south from Vicksburg to Port Gibs on, a distance of 28 miles, and other parts had been built by the Baton Rouge Company and were being actually used for traffic in 1882 and 1883, and under the terms of the statute itself that "if any part of any road shall be finished and used for profit, the part so finished shall be taxed although the whole road may not be finished," was liable to taxation and yet it is claimed that the consolidation withdrew this part, and other parts in the same condition from the tax rolls.

Record, pp 415, 416, 461
Code 1880, sec 597, 608

C.

Consolidation made, not authorized.

The Memphis & Vicksburg Railroad Company was chartered in in 1870, and authorized to build a railroad from Vicksburg to Memphis, and the Mississippi Valley & Ship Island Railroad Company was chartered in 1871, and authorized to build a railroad from some point on the Gulf of Mexico, at or near Ship Island to the city of Vicksburg.

Laws of 18[illegible] p 562 sections 1 and 2.

The Supreme Court of Mississippi, like this Court, has decided that it is proper to take judicial notice of the contents of a railroad charter.

Georgia Pacific Ry Co v Baird No 9147, decided December 5th, 1898, 76 Miss. 523-524

Unity v Burrage 103 U S 447.

Now it was clearly the object of the act of March 3rd, 1882, authorizing the consolidation of these two companies alone and by name, to provide for the building of a railroad from Memphis via Vicksburg to Ship Island, and thus establish a great seaport in Mississippi.

The Baton Rouge Company was not thought of, for it had not been chartered, and was not chartered till March 9th, 1882.

Record p 31.

When the Mississippi Valley & Ship Island Railroad Company failed to go into the consolidation, the act of March 15th, 1884, was passed, allowing the Memphis & Vicksburg Railroad Company to consolidate with any other railroad company "with the rights, privileges and immunities" mentioned in the said act of March 3rd, 1882, which was to build a railroad from Memphis via Vicksburg to Ship Island. Hence we contend that it never was intended by this special act to authorize any consolidation between the Memphis & Vicksburg and Baton Rouge Railroad Companies, and there was no need or necessity for it, because each of said companies was authorized to consolidate by sections 16 and 25 of their respective charters, and the consolidation actually made should be referred to that authority.

Record p 30, section 25 and p 39 section 16.

This is referred to by the Supreme Court in their opinion of November 22nd, 1898.

Record p 674-675.

The only difference was that a consolidation under these two sections of their own charters would not carry any exemption into the consolidation, and this they well knew, and deliberately attempted to steal an exemption, and yet they are now placed in the extraordinary and plainly inconsistent position of claiming that these two sections, which were absolutely their only excuse or authority for consolidating with the Yazoo & Mississippi Valley Railroad Company (the act of March 3rd, 1882, containing within itself no specific authority to consolidate at all) did carry the alleged exemption into that consolidation.

It will be noticed that the 5th section of the charter of the Yazoo & Mississippi Valley Railroad Company expressly provided that it should not have the effect of exempting the consolidating company.

Record p 48-49 section 5.

Now this Court has by a course of decisions settled the rule that there must appear a legislative intention for the exemption to pass into a consolidation, and that it will not pass by presumption.

Phœnix Ins Co v Tenn 161 U S 178-183.

The Baton Rouge Company never did have any exemption and consequently there could have been no legislative intention for any to pass, and the Memphis & Vicksburg Railroad Company is virtually in the same fix, because at the time the charter was granted and it was authorized to consolidate, it had no exemption and hence there could have been no legislative intention for any to pass. Its exemption was conferred by a subsequent amendment which had nothing to do with consolidations.

And we believe it would have been an impossibility to have got the Mississippi legislature, ar any other legislature to have knowingly given an exemption to a railroad already virtually built.

Wilmington v Alsbrook 146 U S 279.
Phœnix Ins Co v Tenn 161 U S 178-183.

D.

Inflation of debt.

It is shown by their own evidence that the entire cost of the road up to December 31st, 1884, after it had been completed and put in full operation was $10,916,783.94.

Record p 476.

This included all the property in Louisiana and Tennessee, besides such items as "R. T. Wilson & Co., commissions for financiering construction, $436,000; cost of venture, franchises, &c., &c., $515,344.67," &c., &c.

Record p 479-480.

Now R. T. Wilson & Co. and C. P. Huntington & Co. owned both the railroads and the Financial Improvement Company which built them. They simply contracted with themselves, and as this Court remark in another case, under such circumstances their contracts were just simply what they might choose to make them, and yet here is a charge of nearly a million dollars for making with themselves just such contracts as they chose. They advanced all money that was advanced.

Record p 298, 301, 414, 422.
Galveston v Cowdry 11 Wall 459.

In order to secure themselves they had the Louisville, New Orleans & Texas Railway Company on September 18, 1884, to execute a mortgage, under which up to August 25, 1886, they had issued $13,641,000 of 5 per cent. first mortgage bonds. This was all a currency transaction, and the increase was in bonds at 75 cents on the dollar.

Record p 185, 396-397.

And yet on August 25, 1886, without the knowledge or consent of the State of Mississippi and in defiance of its rights, they changed this into a gold transaction, took a new mortgage, and changed the $13,641,000 of 5 per cent. currency bonds, into $10,000,000 of first mortgage 4 per cent., $7,899,000 of second mortgage 5 per cent. gold bonds, with a difference in interest or fixed charges AGAINST THE STATE of $112,900 in gold per annum, and a difference AGAINST THE STATE in the principal sum of $4,258,000, enough to build the entire road, which was of course to their advantage, but released the State from any obligation to continue an appropriation to this new and enlarged debt made without its knowledge or consent. The relation of the State was somewhat in the nature of a suretyship or pledge of credit, and this radical change in its nature and amount was clearly a release of the State. This Court can well imagine that if the State had required them to change this back into the original $13,641,000 currency transaction they would willingly have released all claim to exemption in preference. They were simply continually stocking and especially bonding this noble little road up to the full limit of its increasing capacity, and thus millionaires are quickly made, but we have no fault to find with all this, if they would first pay a little taxes for this valuable franchise and protection.

E.

Cost of road and statement of net earnings.

As we have shown before, the railroad was built under contracts made with the Construction Company by the railroad companies, all composed of the same persons. Where the ex-

emption from taxation is conditioned on the inability of the railroad company to pay a dividend over the cost of construction this Court has announced the just and fair rule, that they must both deal fairly with each other, and that only the reasonable and legitimate cost of construction is to be considered, and this is necessarily so where the contractors and contractees are the same persons.

Mobile & Ohio R R Co v Tennessee 153 US 506-507.

And betterments and improvements are not allowed, for the obvious reason, that the State has no stock, nor voice in the management, and the railroad company could just sit down figuratively, and calculate the amount of taxes, and put that amount in betterments and improvements, and thus like a purchaser or tenant, improve the State out of its estate in the taxes altogether, besides being an unconstitutional delegation of power to an individual to make laws, to the extent of saying when he would be taxed and when he would not, turning over the whole business to him.

To the same effect is the opinion of Judge Jackson while on the circuit in

Mackintosh v Flint 34 Fed R 582, 592-616.
Barry v Mo Kans & Tex R R Co 27 Fed R 8-9.
M & O R R Co v Tenn 153 U S 506-507.

Now to get at the actual cost. The parts in the controversy are:

The Riverside Division 85.85 miles.
The Tallahatchie Branch 39.59 miles.
Entire main line 456.15 miles.
The main line in Mississippi 314.92 miles.
Record p 76, 620, 375, &c.

This including the part below Vicksburg, makes in round numbers in Mississippi about 315 miles for the main line, and about 125 miles for the Riverside and Tallahatchie Branches, or about 440 miles in all.

O. A. Gibson, an old railroad contractor, who helped build a large part of this railroad estimates the actual cost at about $10,000 per mile.

Record p 433-435, 440-441.

Maj. R. H. Elliott, the engineer and superintendent of construction of the greater part of it, and through whose hands the pay vouchers passed, estimates that on account of some washouts, etc., the actual cost was about $13,000 for the main line and $10,000 for the branches, but these washouts were paid out of OPERATING expenses.

Record p 458, 459-461.

Maj. Edwards puts the cost of the entire main line, including all these commissions, etc., on December 31, 1884, as shown in supra, at $10,916,783.94. That is about $23,940 per mile for the entire 456 miles. In his exhibit he puts the actual cost of the Hampton and Bolivar branches, which was the Riverside Division at $1,063,386.27 and the cost of the Tallahatchie branch at $497,076.74.

Record p 482, 487.

This would make the cost as follows:

According to Gibson, 440 miles,	$4,400,000.00
According to Elliott	
Main line 315 miles @ $13,000	4,095,000.00
Branches 125 miles @ $10,000	1,250,000.00
Total	$5,345,000.00
According to Edwards	
Main line 315 miles @ $23,940	7,541,100.00
Riverside Division	1,063,386.27
Tallahatchie Branch	497,076.74
Total	$9,101,563.01

Edwards makes a terrible to-do about the great cost of the washouts, but this was done out of operating expenses, and the great cost of miles of trestling, but the chief engineer of construction of all the the trestling part of the road shows that he gave all the vouchers for this, and it cost $422,500, about $20,000 of which was at the time done by the railroad company out of operating expenses, and of course the balance relieved that much of the grading, as it occupied the long spaces instead of grading, an also about the heavy expense of levee work, but

Maj. Starling, the chief engineer of the levee board, shows that the levee board paid them for every dollar's worth of work they did on the levees, even for their own protection, except about $500 worth which they agreed to do free, and then afterwards tried to slip in a bill even for that.

Record p 428, 458-462.

They charged for everything, but forgot to give any credits, and managed to charge about double the estimates of those who did the work, and made out the pay vouchers. It must be remembered that all these washouts, repairs &c, came out of the operating expenses, and the net earnings were what was left after all these things were deducted.

Maj. J. C. Welling, the vice-president of the whole system, explains under cross-examination what the operating expenses consist of. He says they consist of perhaps a hundred items among which are all necessary repairs to rolling stock, and keeping the road in good condition, renewing bridges and cross-ties, repairs and renewals of all descriptions, transportation, maintenance, structures, equipment, taxes and general expenses.

Record p 166-167.

And in answer to direct questions he admitted that they also included WASHOUTS, CREVASSES &c.

Record p 178.

And was forced to admit that the reason the net profits were smaller in 1892 than in other years about that time was that they spent $638,894.76 ON BETTERMENTS AND IMPROVEMENTS.

Record p 173 and 177-178.

Now the amount of interest or fixed charges on the 4 per cent gold bonds representing cost of construction would be (the branches being built in 1890.):

Gibson's $4,400.00	@ 4 per cent	$176,000.00
Elliott's $5,345,000	@4 per cent	213,800,00
Edwards previous to 1890 $7,541,100		301,644.00
Edwards after 1890 $9,101,263.01		364,062.52

Now the net earnings back to 1886 as far as we are authorized to go, is, as shown by their own exhibit prepared especially for this occasion;

For 1886	$495,180.09
For 1887	635,321.00
For 1888	579,660.30
For 1889	969,509.26
For 1890	742,253.49
For 1891	992,394.63

For 1892 to May 1st	$137,234.66	$1,367,792.91
For 1892 after May 1st	591,663.49	
For betterments	638,894.76	
For 1893		$1,100,887.75
For 1894		922,879.59
For 1895		1,078,677.22

Record p 181, 402, 478.

But as shown by their annual reports to the company itself, only four of which we succeeded in getting, the net earnings were as follows:

For the year 1887	$ 722,083.24
For the year 1888	652,441.59
For the year 1889	1,217,662.24
For the year 1890	1,071,426.96

Record p 331, 344-345, 360, 376

For 1889 it will be seen the net profits are made up of two items, $1,040,657.51 and $177,004.73.

Record p 360.

Here there was no motive to conceal the true earnings, and it seems to be certain that the net earnings have been much more than sufficient to pay the fixed charges on the construction debt and there was no authority to divert it to other purposes, or other debts, before the payment of taxes. The fixed charges on the proper construction debt, and that only, was entitled to priority over the taxes. Any other course would have been folly, as they could have increased outside debts at pleasure, even to buying aluminum steel rails, and gold lined cars. No dividends should be allowable against the State for the reason that it was fictitious stock as we will endeavor hereafter to show, but taking the whole combined $5,000,000 of stock, and the net earnings have been more than sufficient to pay the in-

terest on the proper construction debt, and an 8 per cent. dividend on the entire stock ever since the year 1887, and whenever this first occurred the appropriation was to cease by the terms of the 21st section itself.

The part above Vicksburg to Memphis is 219 miles long, and from Memphis to the Mississippi line is about 5 miles, leaving about 214 miles in Mississippi above Vicksburg.

Record p 461.

This deducted from the entire 315 miles in Mississippi leaves 101 miles below Vicksburg built by the Baton Rouge Company, and the Riverside Division 85.85 miles, makes about 186.85 miles, about which we do not think there ought to be any plausibility of a claim to an exemption, and only leaves 253.15 of the 440 miles in Mississippi, but in the above calculation we have given them the benefit of the entire 440 miles and their own figures as to its cost. It must be remembered that the Riverside debt of $1,063,386.27 was not incurred till 1889, and the Tallahatchie debt of $497,076.74 in 1890.

But it has been settled that they are only entitled to appropriate the taxes to those parts of the railroad in Mississippi entitled to it under their charters.

M & O R R Co v Moseley 52 Miss 130.
M & O R R Co v Tenn 153 U S 505-506.
R R Co v Lambert 70 Miss 786.

Indeed it could only apply to the construction debt of Memphis & Vicksburg Railroad Company and its pro rata of the stock, because when the 21st section was extended to it, it never had consolidated with anything, and hence these things necessarily applied to it alone, and roads built by the Louisville, New Orleans & Texas Railway Company, under the 5th section of its charter.

Now let us make a calculation on this, the only proper basis. The main line was 456 miles long in round numbers, of which 315 were in Mississippi. Deduct the Baton Rouge part below Vicksburg of 101 miles, and it leaves the main line 214 miles. Now add the Tallahatchie Branch, about 39½ miles, and we have a total of 253½ miles, and the proper pro rata share of the stock, 214–456 of $4,547,000 would be $2,133,882, and an 8 per cent. dividend would be $170,610.56.

Then Gibson's estimate of cost

253½ miles @	$10,000	$2,535,000.00

Elliott's estimate

214 miles main line @	13,000	2,782,000.00
Tallahatchie Branch @	10,000	395.000.00
Total		$3,177,000.00

Edwards' estimate

214–456 of $10,916,783.94	$5,123,666.15
Tallahatchie Branch	497,076.74
Total	$5,620,742.89

Fixed charges and dividends,

Gibson $2,535,000 @ 4 per cent	101,400.00
8 per cent dividend on stock	170,610.56
Total $	272,010.56
Elliott $3,177,000 @ 4 per cent	127,080.00
Dividend on stock	170,610.56
Total $	297,690.56
Edwards 5,620,742.89 @ 4 per cent	224,829.71
Dividend on stock	170,610.56
Total $	395,440.27

Net earnings from evidence and annual reports, to cover the years in suit.

For 1889	$1,217,692.24
For 1890	1,071,426.96
For 1891	992,394.63
For 1892	1,367,792.91
For 1893	1,100,887.75
For 1894	922,879.59
For 1895	1,078,677.22

Net earnings for 1896 and 1897 not accessible by reason of withdrawal of pleas.

Gibson shows that most of this line was in the Mississippi Delta where it is almost level, and that it was one of the cheapest roads ever built.

Record p 433-438.

We have taken Edwards' exhibit 1, as it stands, but we submit that the following should be expunged from account including 1884, 1st column:

General expenses	$ 107,576.01
Legal expenses	57,102.57
Lumber and timber	58,929.82
Telegraph construction	53,568.90
Street railway in Vicksburg	7,697.47
Terminals in New Orleans	304,883.11
Levees	103,697.85
Rent of I C R R track	8,625.85
Ballast	228,639.01
New Orleans yard	33,418.59
Memphis yard	4,576.48
Insurance	5,399.15
Land account	62,376.81
Stock in Grand Gulf &c R R	17,003.20
Interest	929,957.93
Incidentals	3,142.03
Miscellaneous	7,677.98
R. T. Wilson's commissions	436,000.00
Cost of venture, franchises &c	515,344.67
Total	$ 2,935,567.71

Record p 479-480.

F.

That the stock was fictitious.

There was originally issued $4,547,000 of stock on the main line, and they afterwards paid $453,000 of stock as part of the purchase price of the Riverside Division, Special Charter, which was not, and was not even claimed to be, exempt under the laws of 1884,

p 935. It would indeed be a strange ruling to hold that a railroad bought for cash was not exempt, but that if it was bought on credit for part bonds and part stock, while it was not exempt, yet the bonds and stock would exempt another railroad by being allowed interest on the bonds and an 8 per cent. dividend on the stock, before the other road could be taxed, which would ~~be~~ exceed ~~such~~ exempting the purchased road itself.

Record p 395, 396, 398.

Chicago v Guffey 120 U S 569,

Now under the previous head, if we deduct this $453,000 and leave $4,547,000 instead of $5,000,000 as the proper capital stock used in the construction of the main line and entitled to a dividend, we shall see still more plainly that the net earnings have been more than sufficient to pay the fixed charges even as made out by them, and the 8 per cent. dividend besides. But this $4,547,000 of stock was a pure gratuity. The Supreme Court expressly call it fictitious stock, record p 675-676, and as shown above, the first mortgage 4 per cent. bonds of $10,000,000 more than covered every single dollar actually expended in construction, even according to their own figures, if we leave out the gratuitous commissions, etc., paid by the parties to themselves. It is idle to talk and argue before this Court about the great uncertainty of the enterprise, and what they would have been compelled to do, to get others to take the bonds or to undertake the job. The fact remains that they did not get others to take bonds or undertake the job, and they undertook it themselves, under an express contract with the legislature so far as they could make it, that the State should allow them the interest on the construction debt, and an 8 per cent. dividend, and they were not entitled in addition to this gratuity, to enormously inflate the bonds, and take the stock for nothing. Such a proposition is monstrous. This Court has well explained it in a similar case from Tennessee, where there was no constitutional objection. In that case the charter provided that "no tax shall ever be laid on said road or its fixtures which should reduce the dividends below 8 per cent."

Mobile & Ohio R R Co v Tennessee 153 U S 500.

In regard to this it is said "the manifest object of the clause was to invite and encourage the investment of private capital in

the enterprise of building the road," ib p 501, and on p 502 that "to induce its own citizens as well as outside capitalists, to invest and risk their money in the enterprise, MORE OR LESS HAZARDOUS, was the manifest object of the exemption," etc.

And on page 506 the Court say in ringing and no uncertain tones, "in dealing with an exemption from taxation, like that under consideration, good faith is required on the part of BOTH PARTIES to the contract. While the State may not impair or restrict its operation, neither may the railroad company enlarge it at will and without limitation," and the opinion gets stronger and stronger from there to the end.

153 U S 506-507.

The appropriation of the taxes was the consideration for the extra hazard, and it never was the intention that these parties dealing with themselves, should have the power to increase the stock and debt "at will and without limitation."

As the amount of bonds largely exceeds the cost of construction, the stock is purely fictitious, and as the assessment rolls show, never has had any market value, or any other value except to control the road, and keep these parties and their assignors in office.

Record p 620.

The law is, that a railroad corporation, unless expressly authorized by its charter, cannot dispose of its stock at a discount or at less than its par value in money, property or labor, and it cannot give away its stock as a bonus with its bonds, as was clearly the case here.

2nd Thompson Comm on Law of Corp, § 1562-1564, 1586

1st Morawetz Priv Corp section 289.

Upton v Trabilcock 91 U S 45.

The Baton Rouge Company could settle its stock at a discount, but was never exempt.

Record p 29-30, section 20 and 21,

But neither the Memphis & Vicksburg Railroad Company, nor the Louisville, New Orleans & Texas Railway Company was authorized to dispose of stock at less than par.

Record p 32-34, section 3-6 and p 42, section 7.

Hence giving the stock with the bonds in this case, as a part

of the construction contract when the amount of the bonds far exceeded the cost of construction, was a pure gratuity, and not available against the State in the collection of its taxes. Human nature prevails everywhere. The Construction Company both owned and built the road, and it must be evident to this Court that it was to their interest to make the road cost AS MUCH instead of AS LITTLE as possible, and this without regard to the question of taxation, and doubly so with it.

And in this connection, it is well to remark that the Yazoo & Mississippi Valley Railroad Company under the 3rd section of its charter (Record p 47) was authorized to "issue said stock or any part thereof as fully paid up and not liable to calls," and it would be attributing great folly to the legislature, to hold that it intended for an exemption conditioned on the inability to pay an 8 per cent. dividend on the stock, to pass into a consolidated company authorized to issue paid up and non-assessable stock. The 5th section of the charter provides (record page 49) that on any consolidation, the consolidated company should have, among other things, all the rights and powers herein granted," and by articles 3 and 4 of the deed of consolidation of Oct. 24th 1892, the consolidated company was authorized to issue stock to the amount of $15,000,000, and in that event the old stocks were to be exchangeable for the new at par. "Fully paid up and not liable to calls," here does not mean non-assessable in the ordinary use of that term, because the Constitution of 1869 provides that a stockholder shall not be liable beyond the amount of his subscription.

Record, pp 15, 47-49

Code 1880, p 37, art 12, sec 17

Hence the term here means GRATUITOUS stock, and it is not conceivable that the legislature intended an exemption like the one claimed here to pass into a consolidated company with such powers.

G.

The Yazoo & Mississippi Valley Railroad Company, when giving in this property for taxation UNDER OATH, value it at

$5,500 per mile, and the value including rolling stock, at $2,713,904.

Record, p 619-621

And the court in fixing a value, is justified in taking their statement when giving it in for taxation, instead of their statement when trying to escape taxation, and they have nothing to complain of.

People v Barker, 39 N Y Suppl 682-683

The State Railroad Assessors fixed it themselves at $12,000 a mile, which was a little less than Major Elliott's estimate, and a little more than Gibson's.

And as the earning capacity was constantly increasing enormously, it would seem that it ought to have been worth at least as much when they gave it in, as when first built.

H.

Novation.

Under its mortgage of September 1, 1892, the Illinois Central Railroad Company issued $25,000,000 of its own 4 per cent gold bonds, with which to purchase the stock and bonds of the Louisville, New Orleans & Texas Railway Company, pay any other debts of said company, and to pay for protecting, repairing, completing, improving or extending the railroad and branches, and providing elevators and docks, and works, structures, rolling stock and other equipment.

Paragraph Fourth, record, p 135-136

With power to have cancelled the prior mortgages.

Record, p 138

After the consolidation of October 24, 1892, the Yazoo & Mississippi Valley Railroad Company, on April 14, 1893, executed a new mortgage to secure the Illinois Central Railroad Company for and on account of its said mortgage of September 1, 1892, and to secure advances out of said $25,000,000, it being stipulated that the original bonds of the Louisville, New Orleans & Texas Railway Company might be cancelled.

Record, pp 265, 267-268

When we endeavored to show what the transactions themselves mean, that the bonds of the Louisville, New Orleans & Texas Railway Company have been entirely withdrawn from the market, and are only placed with the Trust Company as collateral security for the Illinois Central Company bonds which have been substituted, the defendants strenuously objected, because we tried to use the Wall Street Report of Latham, Alexander & Co., which shows it.

Record, p 418-419

But the trust deeds show that the whole thing, money for purchase of STOCK, CONSTRUCTION DEBTS, debts for betterments and improvements, and for purchase of other railroads, and docks and elevators, and advances for future use for all purposes, is all consolidated in this $25,000,000 mortgage of the Illinois Central Railroad Company, and no one can separate it or the stocks or the bonds, and tell who owns the construction debt, and how can any affidavit be made, or taxes paid on any construction debt. Of course the interest is not paid on both sets of bonds. It is paid and applied in solido on these Illinois Central bonds, and the earnings are sufficient to pay the interest on the whole $25,000,000.

Newman v Kling 73 Miss. 312.
Railroad Co v Maine 96 U S 499.

A railroad which entire, with all its branches, costing not exceeding nine or ten millions of dollars, in eight or ten years has such enormous profits, that sells for $25,000,000 in gold, and easily earns a net annual income of more than a million of dollars, is so poor that it cannot pay taxes. Such wonderful poverty! Our pity is so great that our pride is gone and we lose sight of great eight and ten story buildings, and are willing to come round and condole with them, if it is only on the ground floor. We never before understood what the wise (rich) man meant, when he exclaimed so fervently "give me neither poverty nor riches!" He must with prophetic vision just have yearned for a simple, unadorned place "ON THE GROUND FLOOR."

I.

The questions decided by the Court in the summary of June 20th, 1898, are right on the merits as shown by the full opinion of November 22nd, 1898. This Court after a long and apparently conflicting series of decisions, finally brought order out of chaos, and the State Court shows an unusual respect for this Court, for that opinion is founded almost exclusively on the later and now settled opinions of this Court, and shows a disposition in all cases of doubt and embarrassment to make the opinions of this Court paramount to all others, which we think ought to be done, to bring about a general American harmony of law and decisions.

IV.

An answer to other statements and arguments of counsel.

The counsel for plaintiffs in error have prepared an exceedingly strong and adroit brief, if we accept their statement of facts, but the fatal defect about it is, that it is built on false foundations, a house built on the sand, or else a splendid creation of the imagination, a brilliant nebula of oratorical scintillations and rhetorical fireworks, but all high in the air.

We claim that many of their statements are immaterial, and others inaccurate, but all stated so adroitly as to have a tendency to mislead this Court, and hence it is necessary to correct them.

We refer to their brief in opposition to our motion to dismiss or affirm, and the pages we refer to are the pages of that brief. Of course we have not seen their general brief, for we never had an opportunity to read the other, before the case was submitted on the motion, but we do not think they can possibly get up any new points.

In this brief we will frequently be compelled to deny their statements and appeal to the record, for that is all we can do. It would be unjust to this Court for us to copy the whole record in

order to show WHAT WAS NOT IN IT. On the contrary the plaintiffs in error hold the affirmative, and we insist that if they assume that anything IS IN THE RECORD, they be required to point it out.

We assume that they will make and elaborate the same points made in their brief in opposition to our motion to dismiss or affirm, and in answering those points here WE WILL REFER TO THE PAGES OF THAT BRIEF.

Those points are as follows:

1st. The policy of the State in granting liberal exemptions, the acquiescence of all departments of the government for twenty-eight years, and the enormous investment of foreign capital.

P 6 7, 8-9, 11-12.

2nd. That the State could undoubtedly make donations, and this was in effect a donation.

P 14-16.

3rd. That the State itself recognized the distinction between the exemption and appropriation forms.

P 11, 12-16, 44 and appendix xiv-xvii.

4th. That we misrepresent their position.

P 43.

5th. The Federal questions have been raised all the time.

P 2, 3, 24, 33, 36-37.

6th. This case falls under the second class of section 709 of the Revised Statutes.

P 30-32.

7th. Federal question raised by the Supreme Court referring to page 118 et seq., in brief of opposite counsel on first appeal.

P 12.

8th. That a suggestion of errors is a matter of right, and Federal question raised in it.

P 34-35.

9th. About it being the local practice in Mississippi to withdraw pleas, and appeal on bills of exception.

P 40.

10th. That the Yazoo & Mississippi Valley Railroad Com-

pany vs Thomas 132 U S 174 is authority for the writ of error here.

P 28-29.

11th. That the effect of the reversal on the first appeal was to open up the case anew.

P 36.

12th. That the Federal questions were necessarily involved in a new trial on the merits.

P 38.

13th. That the Federal questions were raised in time in the suits for taxes of 1896 and 1897.

P. 37-38.

14th. The statement that the Supreme Court had the suggestion of errors before it for five months and undoubtedly considered it in preparing the opinion of November 22, 1898.

P. 35.

15th. The certificate of the Chief Justice.

P. 3-4, 36-37.

16th. About foreign capital.

P. 7, 8.

17th. That the Federal questions were raised by the declarations.

P. 32-33.

IV 1.

The liberal policy of the legislature in granting exemptions, etc. P. 6-9, 11-12.

The counsel for plaintiffs in error prove on page 6 of said brief, by the case of Mobile & Ohio Railroad v Tennessee, 153 U S 486, 502, that in construing statutes, it is proper to take into consideration the history and situation of the country at the time, "rather than at a later period when different ideas and theories may prevail."

This is all very good but they have not carried it far enough. It also applies to constitutions.

And by recalling the fact that for the first time in the his-

Read 3rd line 22nd brick

article 7 of the Constitution of 1869, and extended to hundreds of thousands of freshly emancipated slaves, utterly uneducated tory of the State, universal suffrage was adopted by section 2 of and utterly unused to the wiles of the demagogue, and totally ignorant of governmental affairs, and constituting a great majority of the population, it will readily be seen that sections 5, 13 and 14 of article 12 of that Constitution had a potent meaning, and a direct purpose to prevent this great liberality of the legislature. We do not consider that involved here, for reasons hereafter to be stated under the next head, and hence we merely refer to it.

Further, there was no such general acquiescence, as is claimed by counsel for plaintiffs in error, in this kind of legislation. We suppose the statement is made to work on the sympathies of this Court, in connection with the direct charge of "grossly breaking the plighted public faith and indefensibly violating solemn obligations" against the Supreme Court of Mississippi, on page 11-12 of that brief.

The railroads were all taxed under the revenue laws of 1875 and 1878.

Laws of 1875, p 66, 70 Miss 786-787

Laws of 1878, p 87

And the Mobile & Northwestern Railroad Company having only succeeded in building a few miles, and being in an impoverished condition, had to get an express release from the legislature as to BACK TAXES, but the act DID NOT APPLY TO FUTURE TAXES.

Laws of 1880, p 271

And this railroad is a part of the Louisville, New Orleans & Texas Railroad, known as the Helena Branch, and the father of this 21st section.

Record, p 297, 394

And in the charter of the Jackson, Yazoo City & Arkansas Railroad Company is an express legislative declaration that this 21st section is repealable, and C. P. Huntington, SOTTO VOCE, was the chief promoter, and one of the incorporators of that railroad company.

Laws of 1880 p 228 section 1 and p 234 section 13.

And the Mobile & Northwestern Railroad and C. P. Huntington were great factors in the Louisville, New Orleans & Texas Railway Company, the first being a branch, and the other, C. P. Huntington and associates, owning 60 per cent of its stock and 60 per cent. of the stock of the Financial Improvement Company that built it.

Record p 298, 301, 422.

And in previous litigations, this Louisville, New Orleans & Texas Railway Company has dodged and evaded the true issue, and carried their litigation before the State Supreme Court on false and fraudulent records, claiming that the exempt Mississippi Valley & Ship Island Railroad Company was one of the chief constituents forming the Louisville, New Orleans & Texas Railway Company, instead of the New Orleans, Baton Rouge, Vicksburg & Memphis Railroad Company, which was authorized to build all the way from New Orleans to Memphis, BUT HAD NO EXEMPTION.

McCulloch v Stone 64 Miss 393.

L N O & T Ry Co v Taylor 68 Miss 364.

And this last was decided solely on that belief.

And having set these little "traps for the unwary" they actually seek both on their pleadings and briefs to use them as stare decisis and other things in this suit.

If this Court think these lawyers, or these railroads either, are in danger of being made the innocent victims of breaches of the public plighted faith or traps for the unwary, we pray you beware.

You can't lose Mr. Huntington. If you get ahead of him, you can't get up early enough that night, but must get up the night before, or even earlier than that, and even then have a hundred eyes, and only sleep with one at a time. When he saw this little tax storm brewing he sold out to the Illinois Central Railroad Company, and with an innocent chuckle, had it put in the 3rd paragraph of [redacted] trust deed "that it would cause to be paid off and discharged in due season all taxes and assessments which may from time to time be lawfully levied or imposed by competent authority" upon said property.

Record p 135.

The formidable array of railroad companies with the exemption and appropriation forms in their "Appendix C" p xiv-xvii is no doubt intended primarily to show the difference between the two forms, and the great liberality of the legislatures, but probably intended also secondarily, to make a grand parade of the vast breach of faith being committed.

Now, the defendant in error in this case, the State Revenue Agent, is the proper officer, whose duty it is to look after these delinquent taxes, and he does not wish to show any partiality, or make any discrimination, and hence authorizes us to state that of all this vast array of railroads, all that have been built, and including all mentioned in section 608 of the code of 1880, and in the tax laws of 1884, page 30-31, and laws of 1890, page 12-13, including the New Orleans & Northeastern, now a part of the Queen & Crescent system, and the Greenville, Columbus & Birmingham Railroad, afterwards a part of the Georgia Pacific, Laws of 1882, page 824, and now part of the Southern System, all, all, are and have been for many years regularly paying their taxes, State, county, and municipal, except this system and a little, short, poverty stricken road in the southern part of the State, called the Gulf & Ship Island, and which is also now before this Court on a writ of error. If there are any others now claiming the benefit of any exemption, or not regularly paying their taxes, he waives all technicalities, and willingly agrees for opposite counsel to point them out, for in his official capacity he would like to know.

IV 2.

That this 21st section was not an exemption, but an irrepealable appropriation of taxes, a donation, which the State had an undoubted right to make.

Their brief p 14-16.

We have partly argued this under the previous head.

Counsel for plaintiffs in error cite chapter 359, of the laws of 1871, p 745, where the legislature did actually appropriate

$4,000 per mile to railroads. It was indeed a tempting bait, and should have been greedily swallowed by railroad SHARKS. But unfortunately counsel fail to point this Court to a single instance where it was swallowed.

This Vicksburg, Pensacola & Ship Island or Mississippi Valley & Ship Island Railroad Company did swallow it a little ways, but with a grim smile at its hollowness and Dead Sea taste they permitted the legislature to withdraw the princely donation expressly on the ground of its doubtful constitutionality, and conflict with section 5 of article 12 of said Constitution of 1869, as indeed it plainly was and as would be this 21st section viewed in the light of an agreement to donate taxes.

Laws of 1877, p 170.
Laws of 1878, p 230.

And as is usual in such cases, the State was BUNCOED in the transaction by giving up something for nothing.

This section 5 of article 12 of the Constitution of 1869 is as follows:

"Section 5. The credit of the State shall not be pledged or loaned in aid of any person, association or corporation, nor shall the State hereafter become a stockholder in any corporation or association."

See Code 1880, p 35-36

And when all sorts of schemes were being attempted to be put through the legislature, Major Huggins, one of the leaders of that party, publicly exclaimed on the floor of the State Senate, that these two sections, 5 and 13 of article 12 of the Constitution were the only bulwarks which had stood between Mississippi and bankruptcy.

We have argued this point more at length in our brief on the motion to dismiss or affirm in case No. 320, which involves the taxes on this same property, but must decline to argue it further here, because it is not anywhere referred to in this case in the pleadings. All pleas except the rejected 4th, 5th and 6th pleas are withdrawn, and it is certainly not set up in any of them.

That there were two forms of charters, one the exemption form, and the other this appropriation of taxes form, and that "the State therefore clearly recognized the essential difference between the two forms of contract."

Their brief, pp 11, 12-16, 44-45,

And appendix, p xiv-xvii

In making this argument, it would have been more plausible if the counsel for plaintiffs in error had left out the citation of charters in their appendix.

The Mississippi Mills case, 56 Miss, p 40, et sequitur, decided that this appropriation form, page 42-43, was a simple exemption from taxation, and while not void AB INITIO, under sections 13 and 20 of article 12 of the Constitution of December 1, 1869, yet by force of these sections was repealable and could not be made IRREPEALABLE.

This decision was made at the April Term 1878.

Now if we turn to this appendix, it will readily be seen that the year 1878, with the exception of some few isolated cases, where this 21st section was brought forward into charters by reference merely, as in the 5th section of the charter of the Louisville, New Orleans & Texas Railway Company, was the exact dividing line between these two forms of charters, showing clearly that instead of the legislature recognizing any essential difference between them, that the exact reverse was true, and the later form of a straight exemption was thereafter adopted, because the Mississippi Mills case had settled that THERE WAS NO ESSENTIAL DIFFERENCE.

Before the Mississippi Mills case, they all clung to this straw of an appropriation form, and after the Supreme Court had decided it to be but a repealable exemption, they dropped this palpable attempt at evasion, and took theirs straight, leaving off the sugar, mint and water, and all other frills.

And both these plaintiffs in error, actually adopted and acted on that construction, notwithstanding their counsel are

now engaged in an attempt to start a new revival of State religion.

The charter of the Yazoo & Mississippi Valley Railroad Company was granted in 1882, and it took this straight exemption form, and its promoter and owner, the Illinois Central Railroad Company, at the same time got legislative authority to purchase the stock of the other, and as the record in this case shows, did purchase it.

Laws of 1882, p 847 sec 8, and p 1024, sec 3

Record, p 52: Record, pp 146, 170

So it is entirely clear, that they did not think there was any essential difference between the two forms, at least, none in favor of the appropriation form, for they took the other in preference, probably rightly believing that the "irrepealable" feature in the former would on a test render it unconstitutional, just as it has done.

IV 4.

That we entirely misrepresent the point upon which the plaintiffs in error rely, when we said in our brief on the motion to dismiss or affirm, that it is not claimed by them "that their alleged exemption was ever repealed or attempted to be repealed by the legislature."

Their brief p 43.

All their pleadings are withdrawn except the 4th, 5th and 6th pleas.

The 5th pleas plead the Lambert case in 70 Miss. R 779 as res adjudicata. The 6th pleas plead the former decisions of the courts and acquiescence and action of the State officers as stare decisis, a rule of property and estoppel.

So if there is anything of that kind it must be in the 4th pleas.

Now these 4th pleas expressly state that "at various sessions of the Legislature during said period, members thereof introduced bills for the purpose of repealing said privilege of said section, but each successive legislature at which such efforts were made refused to repeal the same," and this continued

up to and including THE YEAR 1898, the last year in which the legislature has met, "but the legislature again and each time refused to do so."

Record p 561, 566, 589, 593, 575, 576.

We suppose this Court has an extended knowledge of human nature and can appreciate how some things are worked. In the 6th pleas, pages 575-576, are given many instances of where the legislature refused to repeal exemptions, and we can well imagine that in such cases, when the legislature attempts to repeal an exemption granted for say thirty years, the advocates of the railroads appear, and claim that such a course is grossly breaking the plighted public faith, and violating solemn obligations, and if there is anything wrong about it, it can easily be corrected by the courts, and many high-toned men will refuse to violate a contract, even where they think they have the power to do so. The exemption has been given for thirty years, and it looks like a breach of faith to repeal it and hence it is not repealed. When it is attacked in the courts the great and ever present argument is, that it has been decided at least to be repealable, and there is no use of any such summary proceedings, because the legislature has control of the whole matter, and can repeal it at any time, and there is no occasion for the courts to interpose in such plain matters, and thus the see-saw goes on, and the railroad all the time holds on to the illegal exemption.

They do not even charge here that their so-called appropriation is IRREPEALABLE.

Their specific charge is "that this suit by the plaintiff, and the said decision of June 20th, 1898, are violative of section 10, article 1, of the Constitution of the United States, which forbids any state to pass any law impairing the obligation of contracts, and do impair the obligation of contracts as follows:"

And "are violative of section 1, of the 14th Amendment to the Constitution of the United States, which forbids any state to deprive any person of property without due process of law, or to deny to any person the equal protection of the laws; both of which are done by said suit and said decision."

Record p 566-567, 594.

Here is a straight declaration that the alleged exemption

has never been repealed, and that the Constitution of the United States is violated by "this suit and the decision of June 20th 1898."

If there is any statement that this 21st section is not repealable, or that the legislature has ever repealed or attempted to repeal it, the gentlemen have the record before them, and let them point it out to this Court in these 4th pleas.

They have no plausibility for claiming that these 4th pleas raise a Federal question under the 1st head of where "this suit and said decision of June 20th, 1898." violate section 10, article 1, of the Constitution of the United States, in that they violate "the contract between the said Louisville, New Orleans & Texas Railway Company, and its successor this defendant, the Yazoo & Mississippi Valley Railroad Company, and the State of Mississippi, embodied in the said act of 1882, as amended by the act of 1884, aforesaid, and especially in said section five of said act of 1882," which is said 21st section.

Record p 566.

Because as we have shown supra, it is beyond question that this claim is based entirely on the ground that the legislature has never repealed this exemption, but as clearly said in said 4th plea, on the next page, 567, "such requirement not being the will and order of the legislature in the premises, but only by a total and sudden revolution in the judicial construction of the Constitution of the State." It is nowhere claimed or insinuated in the plea that the exemption is IRREPEALABLE but only that it has not been repealed. We call particular attention to the fact that at this time the Supreme Court had not decided that it had been repealed. Let us not get dates and things mixed.

IV 5

That their so-called Federal questions have been raised and insisted on all the time,

P 2, 3, 24, 33, 36-37.

If this is all so, counsel for plaintiffs in error have the whole record before them, and should be able to point it out.

We deny that any Federal question, or any protection of the Federal Constitution, was ever claimed or thought of in any manner in this case, either orally or in writing, either in the pleadings, briefs or arguments, or in any manner whatever, until after the decision of the Supreme Court on June 20th, 1898, and then for THE FIRST TIME in the suggestion of errors filed on June 27th, 1898, and appearing in the record on pages 518-527.

Indeed it crops out all through the pleadings, motions, bills of exceptions, etc., on the second trial in the lower court, that the defendants wanted to get in and plead the Federal questions because of the "NEW ASPECT" put upon the case by the decision of the Supreme Court, and their hope to do this was under Powers v Chesapeake, &c 169 U S 92, 98, which they state on page 42 of their brief they do not rely on.

Record p 540, 544, 567, 608, 610.

It is true they did not expect the Court to decide as it did, and in their opinion it did put a new aspect on the case, and there is no doubt that they thought, and earnestly thought they ought to have some way to get this Court to review that decision, but the only possible excuse they could get up was that the decision of June 20th, 1898, put a "NEW ASPECT" on the case, and they had some sort of right under said case in 169 U. S. to claim that because it did put a new aspect on the case, that therefore they had a right to plead the Federal questions for the first time, but when they attempted to get up their Federal questions, the only thing they could get up was that "this suit by the plaintiff and the said decision of June 20th, 1898," violated the Federal Constitution. The whole theory of their subsequent proceedings at the second trial was that they had no opportunity to set up the Federal questions before that time, and that the opportunity was first created by the new aspect put upon the case by the Supreme Court. The point we make is that this contention is utterly unsound, that any Federal questions they have a right to make now, were directly involved, and could have been made at any time after the beginning of the suit, but as said by Mr. Justice Peckham in Dewey v Des-

Moines, 173 U S p 199 the most that can be said was "that there was somewhere hidden in the record a question which if raised, would be of a Federal nature."

It was involved but was hidden away and they did not raise it plainly because they thought they would not need it, and the point we make is that it is too late to raise it for the first time in the suggestion of errors under repeated and unanimous decisions of this Court, and that is really the only place where it ever was raised either before or since, as the 4th stricken out pleas nowhere even claim that the exemption was irrepealable. Indeed this is so manifest that the plaintiffs in error being (if the Court will permit us to use a slang expression) "between the devil and the deep blue sea," are actually forced to ask this Court to upset itself, by assigning as their 12th assignment of errors here, record p 703, "that the said Supreme Court erred in denying the suggestion of errors filed in this cause in said court, on the 27th day of June, 1898," a thing with which this Court has nothing on earth to do, and which they have decided so often, that it is strange it should still be put in assignments of error. 175 US, 646 = 647.

Citizen's Sav Bank v Owensboro, 173 U S 643-644

IV 6.

That this case falls under the second class of section 709 of the Revised Statutes, and it is not necessary to raise the Federal question.

P. 30-32

To sustain this position opposite counsel refer to

Water Power Co v Street Ry Co, 172 U S 475

In that case the legislature of South Carolina made a contract with the Power Co., and afterwards made another and inconsistent contract with the Street Railway Co., which the Power Co. filed a bill to enjoin, on the ground that it impaired their contract, and the impairment of the contract by the subsequent state statute was the very gist and gravamen of the suit.

In that case, on page 487, the principal case relied on by the

Court, is in the same volume. 172.

McCullough v Virginia, 172 U S 172.

This was one of the long list of Virginia coupon cases. This Court had held the bonds valid, "and the general assembly of Virginia had from time to time passed acts tending to embarrass the coupon holder," and the attempt to enforce any of these acts, of itself and necessarily, raised the question of the impairment of the contract, and was so understood and acted on by the Virginia courts.

Ib p 106, 108, 122, 123.

And the Court add that "it must be borne in mind that this is not a case in which, after a statute asserted to be the foundation of a contract, acts are passed designed and tending to destroy or impair the alleged contract rights, and the first time the question is presented to the highest court of the state, it takes no notice of the subsequent acts, but simply inquires as to the validity of the alleged contract."

Ib p 122.

This was exactly WHAT WAS DONE in this case and, no subsequent act was thought of or urged in the trial or in the opinion and decision of June 20th, 1898.

The Court further, after reviewing the cases on contracts generally, reserve a space for and group the cases relating to "contract exemptions from taxation."

Ib p 119-122.

In these cases referred to, except two, the Federal questions were directly raised and insisted on in the most positive terms.

Yazoo & Miss Valley R R Co v Thomas 132 U S 182.

Mobile & Ohio R R Co v Tenn, 153 U S 491.

In the other two cases, the question was raised in this way: In both cases this Court had decided the property to be exempt, and in both cases the decisions of this Court to that effect were relied on. In the one case it was decided that the exemption had been lost by non-user, and in the other that it was not the identical property, in which of course the Federal question was thus brought directly in issue in both cases, because in each case it became necessary for the Court to decide whether the exemption established by them had been lost by non-user, or was ap-

plicable. In each case the State Court necessarily understood that they were passing on, or rather trying to avoid the effect of a Federal decision, and in both cases, while this Court took jurisdiction, it agreed with the State Courts that in the one case the exemption was lost by non-user, and in the other that it was a branch road, and not the same identical property.

Given v Wright, 117 U S 649.

Wilmington v Alsbrook, 146 U S 284, 293, 302.

Of course this Court will not permit a state court to avoid Federal jurisdiction when a Federal question is necessarily involved, and is the prime or controlling question, by simply not referring to it, and on the other hand they will not take jurisdiction when it is perfectly apparent that the state court had no reason to believe that they were passing on a Federal question.

A later tax case was dismissed for want of jurisdiction because the Federal question was not raised, but the contest was based on a repugnancy between the assessment law and the State Constitution, just like this case.

Hagar v California, 154 U S 639.

While jurisdiction was taken on a peculiar back tax law, where the Federal question was expressly raised in Yazoo & Mississippi Valley Railroad Company vs Thomas 132 U S 181-182, 184, yet in a much later case this Court express a very serious doubt as to whether a general delinquent tax law like the Revenue Agent act in chapter 126 of the Code of 1892, as amended by the act of 1894, Laws of 1894, p 29-31, is a subsequent law within the meaning of the Constitution, that is, as Mr. Justice Brewer puts it, "a law providing generally for subjecting to taxation lands that have improperly escaped taxation in former years," but as the lawyers had made no point on it, and there was another question which did give them jurisdiction, they call attention to it, but do not decide it.

Winona &c v Minnesota, 159 U S [redacted] 5·28–5·29

But the next case involving the very same questions, they dismiss, because the Federal question was not expressly raised.

Winona v Minnesota 159 U S [redacted]. 5·40

In all the late Kentucky back tax assessments the Federal question was directly raised.

173 U S 232, 641, 662-663, 665

174 U S 408-445, 411, 419, 459, 433

And in a case to set aside certain tax assessments, this Court say, "it is not enough that there may be somewhere hidden in the record, a question which if raised would be of a Federal nature." There must be something in the case before the state court, which at least would call its attention to the Federal question as one that was relied on by the party." 176 U.S. 89 = 92 175 U.S. 633 = 635

Dewey v Des Moines, 173 U S 198-200;

See also Citizen's Sav Bk v Owensboro 173 U S 642-644

And under the authority of these cases, and the two Winona v Minnesota cases in 159 U S 528-529 and 540, and the case of Hagar v California [redacted] U S 639, we claim that this class of tax cases comes under the 3rd class of section 709 of the Revised Statutes, where the "immunity" must be specially set up and claimed, and it was never done or thought of in this case till the suggestion of errors.

To the same point see also

L & N R R Co v Louisville 166 U S 714-716

See also cases referred to in May's U S Sup Ct Prac, p 99-100.

IV 7.

That the Federal question was raised by the State Supreme Court referring to page 118, et. seqr., of the brief of opposite counsel claiming that this was an irrepealable appropriation of taxes, and not an ordinary exemption at all.

Record p 12.

But the briefs of counsel are not sufficient to raise a Federal question, and the Court does not refer to any.

Sayward v Denny, 158 U S 180, 183-184.

Zadig v Baldwin, 166 U S 485, 488.

And it was not referred to in the Summary of the Court's holdings on June 20, 1898, at which time the final judgment was rendered, but in the opinion filed several months afterwards, on November 22, 1898, at the next term of the court, after the

Court had lost all jurisdiction of the case, or power to import into it any Federal question.

Record p 676.

And if it had been in the opinion of June 20th, 1898, it would not have raised a Federal question for neither in the brief at page 118 et seq., nor in the opinion of the Court is there any reference to a Federal question, and sections 14 and 16 of article 3 of the Mississippi Constitution of 1890 are the same in that respect as section 10, art 1, and the 14th amendment to the Constitution of the United States.

They are as follows:

"Section 14. No person shall be deprived of life, liberty or property without due process of law."

"Section 16. Ex post facto laws, or laws impairing the obligation of contracts shall not be passed."

See Annotated Code of 1892, bottom page 45, and Code 1880 p 19-20, as to Constitution of 1869

And when the constitutions are similar, and no express appeal is made to the Constitution of the United States, it is the practice of this Court to refer such things to the Constitution of the State.

Miller v Cornwall 168 U S 134-135.

Bolln v Nebraska 176 U.S. 83, 89-92,

IV 8.

That a suggestion of errors is a matter of right, and therefore a Federal question can be raised in it for the first time, p 34-35.

Counsel certainly must be hard pressed. A petition for rehearing is a matter of right under the rules of law, and the rule is made only to limit the time within which it may be made, and yet this Court has persistently and uniformly held that the Federal question cannot be be raised for the first time in it.

Citizen's Savings Bank v Owensboro 173 U S 643-644.

Miller v Cornwall 168 U S 133-135.

Pym v St. Louis 165 U S 273.

Winona v Minnesota (a similar case) 159 U S 540.

Sayward v Denny 158 U S 180.

175 U.S. 646-647.

5704

See our brief on motion to dismiss or affirm, p 12.

The suggestion of errors, is not a matter of either law or right. It is a rule adopted by the court itself for the convenience of counsel and the court, and does not exist in many courts, and can be abrogated by the court at any time. It could have been totally abrogated on June 20, 1898, the very day this case was decided, and how it can be called a matter OF RIGHT is beyond our comprehension.

This rule 10 is in their brief, p 35,

And in our statement, ante, p 3 and 70 Miss p xxii

Every rule is said to have some exceptions, but the only exception to the rule that the original or principal is greater and of more account and dignity, than the substitute is in the matter of drawing pensions.

IV 9.

That it is the local practice in Mississippi when the Court decides against the validity of a plea, to withdraw all the remaining pleas, and appeal on a special bill of exceptions.

Their brief p 40.

We deny the allegation and defy the allegator.

There is no such piece-meal way of trying cases in Mississippi. The general rules of practice in Mississippi, except where the forms of the pleadings themselves have been simplified, are according to the rules of the common law. A litigant there, as in other states, can of course withdraw all remaining pleas, and appeal on a special bill of exceptions, to the refusal of leave to file a new plea, but unless he can induce the Supreme Court in some way, to overrule the action of the court below, and grant him leave to file his new plea, over the head of the trial judge, he is just about in the position of Admiral Cervera's squadron when it emerged from the harbor of Santiago, forced to abandon the courts, and depend on his speed.

IV 10.

That the case of Yazoo & Mississippi Valley Railroad Company vs Thomas, 132 U S 174, is authority for the writ of error in this case.

P 28, 29.

We have already answered that under the IV 6 head, ante., p [redacted]. 93-94

IV 11.

That the effect of the reversal was to open the case anew.

P 36.

The mandate to the lower court is, "You are, therefore, hereby commanded that such execution and further proceedings be had in said cause as according to right, THE JUDGMENT OF OUR SUPREME COURT, and the law of the land ought to be had."

Record p 528-529.

The italics are ours.

It is too plain for argument that this did not authorize the lower court to overrule the Supreme Court, but only to take such further proceedings as would not be inconsistent with their decisions sent down with the mandate.

IV 12.

That the Federal questions were necessarily involved in the new trial on the merits.

Bottom of p 38.

There was no new trial on the merits. Like the illustrious father of his country, Gen. G. Washington, we must confess to the truth. We cannot tell a lie. We did not do it. They cut that valuable new trial tree down themselves, by with drawing their plea.

IV 13.

That the Federal questions were raised in time in the suits for the taxes of 1896 and 1897.

P 38.

We stated in our brief in support of the motion to dismiss or affirm, on page 16, that there was a verbal understanding that these two suits were to take the same course as the other, and therefore declined to argue them on any other ground, but as opposite counsel in their brief in opposition to that motion on page 38, have entirely ignored that statement, after having it before them for three weeks, without either affirming or denying, and we suppose for some supposed advantage of their own, we are no longer under any obligations to be bound by it, and give them two chances to our own one, and hence will now argue the case as if there was no such agreement. Any other course would not be fair to us.

We will now take the face of the record. If the Court will notice the part of the order of consolidation which they rely on, they will see that it is not all ONE SIDED as opposite counsel seem to think. It is as follows:

"This order is made to save expenses and inconveniences of separate pleadings and trial in each case, and it is not to be construed to the prejudice of either party, and all objections and exceptions are reserved, which could be reserved if said orders, proceedings and pleadings were all separate."

Record p 610-611. Their brief, p 38.

Now these two suits for the taxes of 1896 and 1897 stood in this condition. The pleas were due, in one on the second Monday of January, 1897, and three terms and eighteen months had passed, and no plea or defense, and in the other case one term and six months had passed, and no plea or defense, see special record p 26-29, and no time granted, no affidavit excusing the delay, and no pretense at an excuse for delay in either case. We agreed that they could use the pleas on file in the other consolidated case. They withdraw these pleas.

Now in all fairness we ask this Court, in what position do

they stand before this Court in the two suits for the taxes of 1896 and 1897? They have not even the similitude of the other consolidated cause. In that case certain additional pleas were attempted to be filed to meet the new aspect put on the case as they claimed by the Supreme Court. But what about the two suits for the taxes of 1896 and 1897?

If this Court should reverse the State Supreme Court, what kind of a judgment are you going to enter?

There is but one you could enter, and that is to reverse the decision of that court, deciding that the action of the court in striking out these pleas was proper, and remand the cause to the Mississippi Supreme Court, with instructions to remand it to the trial court with directions to receive these 4th, 5th and 6th pleas, and permit them to be filed, out of pleading time, with no affidavit to the truth of the pleas, with no excuse for the delay, and with no affidavit showing why they were not filed at the proper time.

A most extraordinary proceeding!

IV 14.

That the Court undoubtedly considered the suggestion of errors in preparing the full opinion of November 22nd 1898.

Their brief [redacted] p 35.

We are informed by the judge, who prepared this opinion that this statement is not true in point of fact, but that he was shut out from Jackson during the yellow fever epidemic, and had no access to the suggestion of errors, and has not in fact read or seen it since it was overruled. This is not material, except to correct an erroneous statement, where presumption is asserted as fact. It may afford opposite counsel some comfort to claim that the opinion of November 22nd 1898 was prepared from the suggestion of errors, but it is death to their case. The Court in the full opinion not only had a perfect right to elaborate the holdings of June 20th 1898, but also expressly to give the reasons for overruling the suggestion of errors. They are generally given separately, but that is for convenience,

and there is no reason, rule or law, why they cannot be consolidated into one.

Now if the Court had expressly given its reasons for overruling the suggestion of errors, and at the same term, it is settled beyond controversy or cavil, that this Court will not review any question raised or decided for the first time on a petition for re-hearing. But the further fact in this case was that the Court had decided the case on June 20th, 1898, handed down a summary of its holdings, overruled the suggestion of errors and adjourned for the term on July 1st, 1898, see agreement on file, and this full opinion of November 22nd, 1898, was not filed till the next term, being the special term commencing in November, because the yellow fever epidemic prevented the regular term from commencing on the 2nd Monday of October The holdings of June 20th, 1898, are what we are concerned with, and the full opinion of November 22nd is explanatory of those holdings, and shows the long, patient, and exhaustive examination and attention which the Court had bestowed on the subject in all its phases, and also on other points which it did not decide, record p 675-676, but which if it had decided would most assuredly have cut the plaintiffs in error off from any hope whatever of a writ of error to this Court, and yet the insinuation contained in this allusion, is that the Court tried to study up some way to prevent a writ of error. We submit to this Court, in the light of what the Supreme Court of Mississippi FORBORE to decide that this treatment is very unjust to them.

We think, and think the law is, that if there are other questions decisive of the case, the Court should not decide any Federal question at all, and yet the Mississippi Supreme Court did their best to let the plaintiffs in error into this Court, and the only reason they did not do so, was because there was no Federal question before them to decide.

Baker v Grice, 169 U S pp 284, 291-292

Adams v Bank, 74 Miss 316, where counsel on both sides specially requested the court to decide the constitutional question and they refused.

IV 15.

The certificate of the Chief Justice.

P. 3-4, 36-37

We submit that in this case, there was no trial de novo, and that it was a case where the Supreme Court could simply review, and affirm or correct the action of the court below, that all the errors complained of were necessarily limited to the assignment of errors, there was nothing else to certify to, and the certificate was totally unnecessary, and resulted as unnecessary things generally do in being distorted and used for purposes not intended. It is boldly claimed in their brief that this certificate shows that "the Federal question was raised before final judgment in the appellate court on the first appeal, and months before its final opinion was delivered," etc.

P. 37.

Counsel may attempt to escape by saying that what they said was that the record, IN ADDITION to this certificate showed these things, but that is no explanation at all, for the simple reason that this certificate is used in that connection and does not even assist in showing any such things. This certificate is entitled as follows:

"State of Mississippi.

In the Supreme Court, November Special Term, 1898.

Yazoo & Mississippi Valley Railroad Company, et al,
Appellants.

vs.

Wirt Adams, State Revenue Agent, Appellee.

I, Thomas H. Woods, chief justice of the Supreme Court of Missisippi, at the present time and upon the argument and hearing of the above entitled appeal, do hereby certify:

1st. That upon the said argument and hearing," etc.

Record, p 690-692

And then recites in part what is contained in the assignment of errors, which is before this Court and shows for itself.

This merely certifies as to proceedings on the last appeal. It has no reference whatever to the first appeal or any other proceedings.

A Federal question cannot be raised for the first time after the first appeal, when the Court has settled the principles of the case.

Union &c v Kirchoff, 169 U S 103
Miller v Cornwall, 168 U S 131
Citizen's Sav Bank v Owensboro, 173 U S 643-644

This certificate of the Chief Justice is not controlling with this Court, who on dispute of its accuracy, will look into the matter for themselves.

Sayward v Denny 158 U S 183.

And even considered with reference to the last appeal, we here and now deny its accuracy, except as to the 2nd and 4th grounds of the certificate.

The 4th ground related to the right of removal to the Federal Court, and the 2nd ground says there was specially set up and claimed the right, privilege and immunity under the 14th amendment that the defendant should not be deprived of property without due process of law. We suppose that refers to the 5th and 8th assignments of error that the trial at the July term 1898, and in advance of the full opinion of the Court, and refusing the continuance deprived the defendants of property without due process of law, and yet strange to relate, after obtaining the certificate of the Chief Justice to these things, opposite counsel openly abandon them in this Court, and say that they do not rely on or urge them here.

The serious points in the certificate are the 1st and 3rd grounds which certify that sections 180 and 181 of the constitution of 1890, and the taxation of railroads provisions in the Annotated Code of 1892, and the validity of the Revenue Agent act of 1894, were drawn in question as repugnant to the Constitution of the United States, AND THE DECISION OF THE COURT WAS IN FAVOR OF THEIR VALIDITY.

Record p 690-691.

This we deny.

The only other thing left in the record is the action of the of the trial court in striking out the 4th, 5th and 6th pleas, and the assignment of errors on this point is simply that the court below erred in striking out the pleas, that and nothing more.

Record p 684.

How this could be construed into a savage assault on sections 180 and 181 of the Constitution of 1890, and on the railroad tax provisions of the Annotated Code of 1892, and on the Revenue Agent act of 1894, and the decisions of the Court sustaining their validity, is incomprehensible to us.

The assignment of errors mentions nothing of the kind, the bill of exceptions mentions nothing of the kind, and opinion of the Court mentions nothing of the kind. Where did this terrible struggle take place? 175 U.S. 643-647,

IV 16.

Foreign capital, page 7, 8.

Counsel for plaintiffs in error must be getting things mixed. This is not a political campaign, with gold and silver for the issues, without the knowledge or consent of any other nation on earth.

This is the Supreme Court of the United States, and the question which is attempted to be gotten before it is the provision against the inpairment of contracts, and it is as much the duty of this Court to protect our own people and fellow citizens, as foreigners. Then why try to discriminate? Foreigners are entitled to the equal protection of the laws, and nothing more.

IV 17.

That the Federal questions were raised by the declarations.

Page 32-33.

On similar declarations and bills, this Court on petitions for removal of cases to the Federal Courts have so often decided that no Federal question was raised by the plaintiff, and even

where he expressly tried to raise them for the benefit and accommodation of the defendant, that there is really no excuse for this contention here.

Union & Planter's Bank v Tennessee p 454-458, 464.

See on that in this brief, ante p 20.

The last four declarations say nothing about any charters or consolidations or claim of exemption, but simply aver that the property belongs to the defendants and is liable for the taxes of that particular year, which they have failed and refuse to pay.

Record p 71, 99, 611, 623.

The first declaration does set out all the charters and consolidations, but avers that the property was PURCHASED by the Illinois Central Railroad Company and merged into the Yazoo & Mississippi Valley Railroad Company, which it also owned and controlled, and the exemption has so often been held by this Court to be lost by a sale and purchase that the defendants never even contested it.

Phœnix Ins Co v Tennessee 161 U S 180-181,
and cases cited.

The point we were then making was that the purchase of the stock and bonds of the Louisville, New Orleans & Texas Railway Company by the Illinois Central Railroad Company in its own name, and that of its protege, the Mississippi Valley Company of which it owned all the stock, record p 169-170, to avoid section 197 of the Constitution, was in its real essence and was so intended to be a purchase outright of the said Louisville, New Orleans & Texas Railroad, and the exemption would be lost for two reasons; first because an exemption will not pass in a sale, and second, because the lesser title is merged in the absolute title, as a man cannot own a lien on his own property, and hence the construction debts and all other debts would be merged, and entitled to no pay or interest, but that the sole indebtedness would be the new debt of the Illinois Central Railroad Company for $25,000,000, secured by the new mortgage of

the Yazoo & Mississippi Valley Railroad Company as collateral security.

This the defendants well knew, and instead of raising any Federal question, they simply filed pleas denying the facts, and as these pleas have been all withdrawn, those facts stand confessed and present no Federal question 175-148, 631=632; 643=647,

Record, pp 54, 55-56

And there is nothing left in the declarations raising any color for a Federal question.

There are several other things we might urge here, as the continuous traffic over the exempt and non-exempt portions of the road as shown by the testimony of the general manager, Maj. Edwards, record p 407-409. which is held to forfeit an exemption in Railroad Co vs Maine 96 U S 499, which was not the fact in the Lambert case, and the fact that the Illinois Central Railroad Company owned virtually all the stock and bonds in both the Louisville, New Orleans & Texas Railway, and in the consolidated Yazoo & Mississippi, and besides had virtually all of the directors and officers, and that they were close competing lines, and the Illinois Central Railroad Company could send or withhold business over either line at will, and hence had the absolute power to keep the interest and dividends above the tax-paying point by diverting enough traffic over its own line, &c., &c.

Record p 177.

But this BRIEF is already too long.

The 1st and 2nd assignments of error, saying that the State Supreme Court in its judgment of February 20, 1899, by applying certain tax provisions, impaired the obligation of the contract, and deprived plaintiffs in error of rights without due process of law, attribute to the said Supreme Court what it did not do, and what was not even before it. That tries to bring up things done on the first appeal, all of which are withdrawn, if they ever existed.

The assignments of error, 3-11 inclusive, also make a pow-

erful effort to get into this case questions which were before the State Supreme Court about the 21st section being unconstitutional, and being lost by the consolidation, on the first appeal, and which have been all withdrawn, and are not now before this Court in any shape or form, the writ of error in this case being from the 2nd appeal in No. 9251, in which said court not only did not decide, but had no further jurisdiction of any such questions, and so urgent are they to get in a Federal question, that they have even gone to the length in their 12th assignment of errors of claiming that the Supreme Court could not deny their suggestion of errors, and in their 13th assignment of holding that the Supreme Court violated some unknown Federal law in refusing to strike its opinion from the files. Did you ever?

The 14-19 assignments of error inclusive relate entirely to the four questions we have already argued.

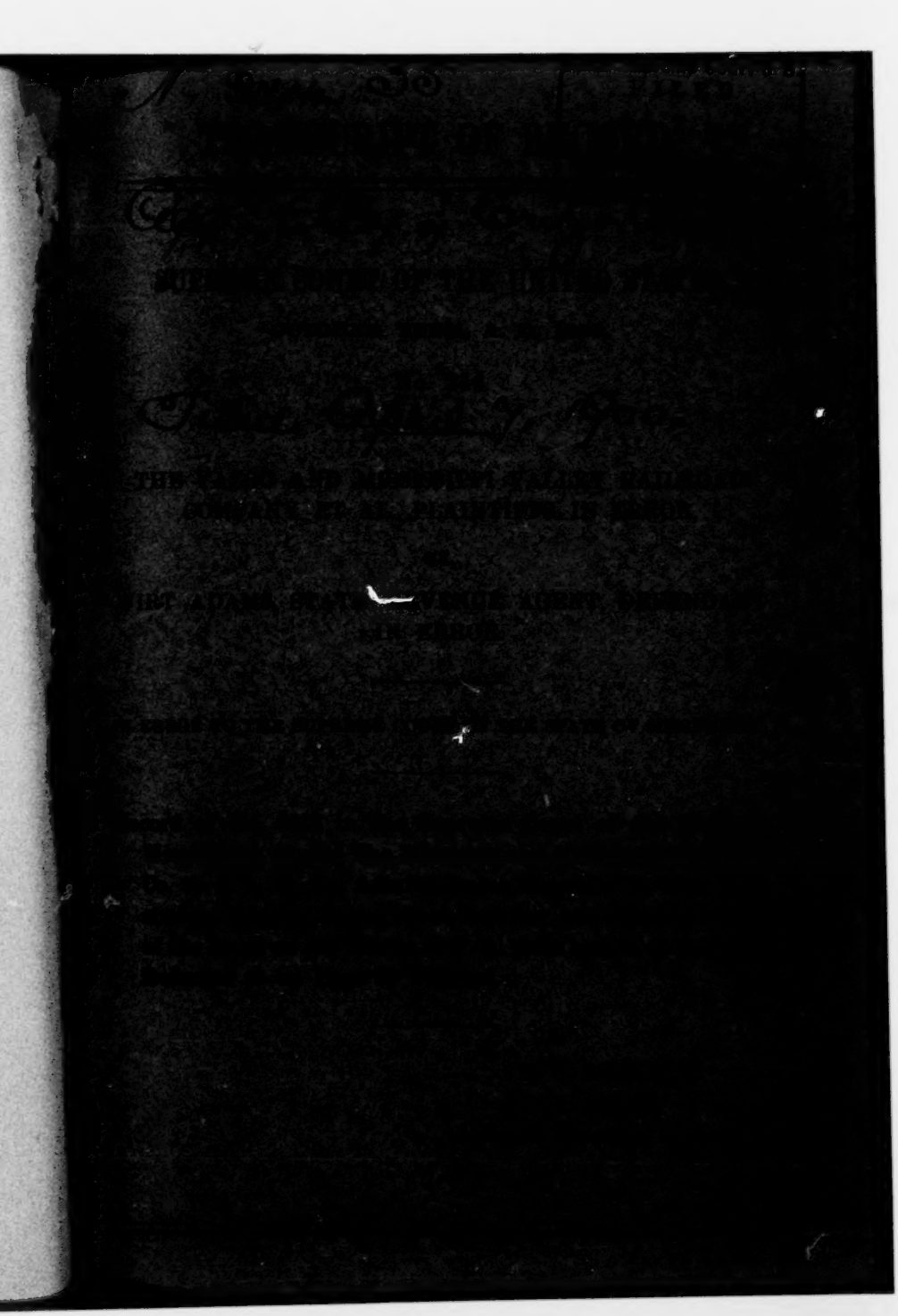
Hence we ask the Court to dismiss this writ of error, or if they cannot do that, then affirm the judgment.

Frank A. Critz

R. C. BECKETT,

ATTORNEY FOR DEFENDANT IN ERROR.

N. B. That the Mississippi Supreme Court had already decided in 55 Miss., p. 114-115 that a privilege tax could not be laid on one of a class and exempt another, but that it must be laid equally on the whole class, and that was affirmed in the Mississippi Mills case in 56 Miss., pp 54-55 and 60, and this was conclusive of this charter granted in [redacted] 1882,



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1899.

No. 244.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY ET AL., PLAINTIFFS IN ERROR,

vs.

WIRT ADAMS, STATE REVENUE AGENT, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

Record of No. 5513 in the Supreme Court of the State of Mississippi, Styled The Memphis and Vicksburg Railroad Co. vs. J. L. Cocke, Administrator, Reported in 64th Mississippi Reports, Pages 713 et sequitur, and Filed as a Part of the Brief on the Merits of F. A. Critz and R. C. Beckett, Referred to on Page 58 Thereof.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 4, 1900.

1 Supreme Court of Mississippi.

Pleas and proceedings had and done at a regular term of the supreme court of Mississippi, begun and held in the court-room, in the capitol, in the city of Jackson, on the first Monday, the 4th day, of April, in the year of our Lord one thousand eight hundred and eighty-seven.

Present: The Honorable Tim. E. Cooper, chief justice, and the Honorable James M. Arnold and the Honorable J. A. P. Campbell, associate justices; Oliver Clifton, clerk of said court, in person and by his deputy, C. C. Campbell; W. C. Harrell, marshal, and Nicholas Francisco, porter.

Proclamation having been duly made, the court proceeded to the dispatch of business.

Afterwards, on the 25th day of April, 1887, the following record was filed in said court in words and figures as follows, to wit:

Minutes, March Term, March 21st, 1897.

STATE OF MISSISSIPPI, }
De Soto County. }

Pleas in and before the hon. circuit court of De Soto county, State of Miss.

Be it remembered that a circuit court was begun and held in and for said county and State at the court-house thereof, in the town of Hernando, on the third Monday of March, 1887, the same being the 21st day of March, 1887.

Present and presiding: The Hon. A. T. Roane, judge of the 3rd judicial district of the State of Mississippi; present also, Maj. T. C. Dockery, sheriff of said county, and T. R. Maxwell, clerk of said court.

The court was opened by the proclamation of the sheriff in the usual form and according to law, and then the following proceedings were had and done, to wit:

Declaration.

STATE OF MISSISSIPPI, }
De Soto County. }

Circuit Court, March Term, 1884.

JNO. T. OWENS }
vs. }
MEMPHIS & VICKSBURG R. R. Co. }

Jno. T. Owens, by attorney, complains of the Memphis and Vicksburg Railroad Co. and demands of them the sum of two thousand dollars for damages sustained by him from said company because

on the 26th day of July, 1883, plaintiff entered into a contract with defendant by which he agreed to do all the work of grading
2 and clearing on section 19 of their said railroad, which is and was located in De Soto county, Miss., and such work was to be done under the instruction of the engineer of said railroad in charge of the work.

And that defendant agreed to pay plaintiff for his work 20 cents per cubic yard for all excavations, 20 cents per cubic yard for all embankments, and 35 dollars per acre for all clearing. Then, in pursuance of said contract, he was put in charge of said section and at once proceeded to work on the same.

That while at work under his contract he obeyed all instructions given him by said engineer in charge; that he furnished and employed all hands, animals, and implements needed for the work or required by said engineer, and that he was able, ready, and willing to go forward and complete his contract, and had provided himself with necessary means of so doing as required by the terms thereof.

Now plaintiff avers that said defendant wilfully and without any cause and in violation of the contract aforesaid took from him a portion of said work on said section 19 and put another person on the same, and refused to let him complete his contract, notwithstanding his ability and readiness and willingness to do the same as he had agreed and was bound to do. Wherefore he says that said defendants have violated their contract, and that he has been thereby damaged to the amount of two thousand dollars, for which he sues and files copy of contract.

WHITE AND MORGAN AND
WITHERSPOON, *For Pl'tff.*

Bill of Particulars.

13,000 cubic yards excavation and embankment *was* taken from him and given to another contractor on which there was and would have accrued to plaintiff a profit of ten cents per cubic yard—$1,300.00.

Filed March 7th, 1884.

T. R. MAXWELL, *Clerk.*

3 EXHIBIT A TO DECLARATION.

Article of Agreement between Jno. T. Owens and Memphis and Vicksburg Railroad Company.

I, Jno. T. Owen, of the first part, do hereby agree to do all the grading and clearing on what is known as section 19 according to instructions given by engineers in charge. M. and V. R. R., of the second part agrees to pay 20 cents per yard for all excavations and 20 cents per yard for all embankments and to pay $35.00, thirty-five dollars, per acre for all clearing.

Time of Payment.

Ninety per cent. of total estimate given at end of each month by engineer in charge to be paid on the 12th of the following month. And at the completion of contract the remaining ten per cent. shall be paid in full.

(Signed) JOHN T. OWENS.
MEMPHIS AND VICKSBURG RAILROAD.

Received by J. A. Moore, resid't eng'r, July 26th, 1883.

Summons.

STATE OF MISSISSIPPI, }
De Soto County. }

To the sheriff of said county, Greeting:

We command you to summons the Memphis and Vicksburg Railroad Co. to appear before our circuit court, to sit in De Soto county, at the court-house therefor, on the 3rd Monday of March, 1884, to answer an action exhibited by Jno. T. Owens for the sum of two thousand dollars for breach of contract.

Issued the 7th day of March, A. D. 1884.

T. R. MAXWELL, *Clerk.*

Endorsed: Jno. T. Owens *vs.* Memphis and Vicksburg Railroad Company. Executed by giving true copy to T. H. Owen, section boss, and J. W. Fulton, a conductor on said road, March 11th,
4 1884. T. C. Dockery, sheriff, per W. H. Rollins, D. S.

Pleas.

STATE OF MISSISSIPPI, }
De Soto County. }

Circuit Court, March Term, 1884.

JNO. T. OWENS }
vs.
M. & V. R. R. Co. }

Defendant, by its attorney, comes and defends the wrong and injury & *and* for plea in this behalf says plaintiff ought not to have and maintain his action against this defendant, because defendant says the contract sued on by plaintiff and filed with his declaration was not signed, executed, or delivered by this defendant, and that said contract was not signed, executed, or delivered by any person authorized by this defendant to sign, execute, or deliver the same; and this defendant is ready to verify.

MALONE AND WATSON,
HOLMES CUMMINS, *For Def't.*

STATE OF MISS., }
Warren County. }

Personally appeared before me, an acting justice of the peace in and for said State and county, J. M. Edwards, who made oath that he is the vice-president and gen'l manager of the Memphis and Vicksburg R. R. Co. Affiant further says that the foregoing plea is true, and that the contract sued on and filed with the declaration herein was not signed, executed, or delivered by the Memphis and Vicksburg Railroad Company nor by any person having authority so to sign, execute, or deliver the same for said company.

J. M. EDWARDS,
V. P. and G. M.

Sworn to and subscribed before me this the 12th day of April, 1884.

L. M. LOWENBERG, *J. P.*

And for further plea in this behalf defendant says it does not owe plaintiff the amount in his said declaration mentioned, nor any other amount; and of this defendant puts itself upon the country.

MALONE AND WATSON,
HOLMES CUMMINS,
Att'ys for Def't.

And for further plea defendant says that it did not con-
5 tract with plaintiff as he has in his declaration alleged; and of this defendant puts itsself upon the country.

MALONE AND WATSON,
HOLMES CUMMINS,
Att'ys for Def'ts.

And for further plea defendant says that it has well and truly paid to plaintiff the amount sued for in this action and all other amounts due from defendant to plaintiff; and this defendant is ready to verify.

HOLMES CUMMINS,
MALONE AND WATSON,
Att'ys for Def'ts.

Defendant, for further plea in this behalf, says plaintiff, on the — day of ——, 1883, began work on defendant's railroad in De Soto Co., Mississippi, and that — was expressly agreed between plaintiff and defendant that the work which plaintiff had agreed to do, to wit, the grading and clearing of section 19 of said road, situated in said county of De Soto, should be done and completed on or before the — day of ——, 1883, and in case plaintiff failed or refused to complete said work by said time, then defendant was empowered and had the right to take charge of said work at that time remaining unfinished and complete the same at plaintiff's expense and to deduct the amount paid out by defendant for having said work done, completed, and finished from the sum for which plaintiff was

to have received for doing all of said work, and to pay the plaintiff the amount he was to have received for the whole work, less the amount paid out by the defendant for that portion of the work for which plaintiff had failed to do and perform, and defendant avers that plaintiff did fail and refuse to complete and finish said work by said time, whereupon defendant, as it had the right to do, finished and completed — at the expense of plaintiff, and deducted the amount which they necessarily expended in having said work completed from the amount to which plaintiff would have been entitled in case he had done the whole of said work and paid to plaintiff the balance which they had the right to do; and this defendant is ready to verify.

HOLMES CUMMINS,
MALONE AND WATSON,
Att'ys for Def'ts.

6 Defendant, for further plea in this behalf, says plaintiff on the — day of ——, 1883, began work on the defendant's railroad in De Soto county, Miss., and that it was expressly agreed between plaintiff and defendant that the work which plaintiff had agred to do, to wit, the grading and the clearing of said section 19 of said road situated in said county of De Soto, should be done on or before the — day of ——, 1883, and in case plaintiff failed or refused to complete said work by said time, then defendant was to have the right to take charge of and complete the same and pay plaintiff only for the work actually performed by him. Now, defendant avers that plaintiff failed to complete said work by said time, although often thereto urged and requested by defendant, and therefore defendant, in accordance with the understanding and agreement between plaintiff and defendant, took charge of said work and completed the same and paid for the work done by him as had been mutually agreed, understood, and contracted between them; and this defendant is ready to verify.

HOLMES CUMMINS,
MALONE AND WATSON,
Att'ys for Def'ts.

And for further plea in this behalf defendant says that in the months of July and August, 1883, plaintiff did certain work and labor on a portion of defendant's road-bed in De Soto county, Miss., in grading and clearing on section 19 of said road, which is the same work referred to by plaintiff in his said declaration, and that afterwards, to wit, on the — day of ——, 1883, defendant and plaintiff had a full settlement of all amounts due from defendant to plaintiff and of all the things and matters in dispute between plaintiff and defendant, and that plaintiff then and there accepted and received from defendant in full discharge of all its liabilities to him the sum of —; and this defendant is ready to verify.

HOLMES CUMMINS,
MALONE AND WATSON,
Att'ys for Def'ts.

And on all the foregoing pleas plaintiff joins issue.

WHITE AND MORGAN, *For Pl'ff.*

Filed July 23rd, 1884.

T. R. MAXWELL, *Clerk.*

7 In Circuit —, De Soto County, Mississippi.

JNO. T. OWENS
vs.
MEMPHIS AND VICKSBURG RAILROAD COMPANY.

And the said defendant, by leave, etc., comes, and for further plea says that this defendant did not construct nor employ others to do so for any of said line of railroad. This defendant has not done any work whatever on said lines of road, nor any other road, but that said line of railroad upon which the plaintiff claims to have done certain work about its construction and about which said contract mentioned in his declaration was made was wholly built and all the work in the construction thereof was done for the New Orleans, Baton Rouge, Vicksburg — Memphis Railroad Co., a railroad company organized under the laws of this State, and therefore this defendant did not so contract, as the plaintiff avers. Wherefore and etc.

HOLMES CUMMINS,
MALONE AND WATSON,
Att'ys for Def't.

Plea filed by leave March 18th, 1885.

T. R. MAXWELL, *Clerk.*

And afterwards, to wit, on the 29th day of March, 1887, same being a day of the regular March term, 1887, of said court, the following proceeding was had in said cause and entered of record in said court, to wit:

Judgement.

J. L. COCK, Adm's of Jno. T. Owens, Deceased,
vs.
MEMPHIS AND VICKSBURG RAILROAD COMPANY.

Come the parties, by their att'y; come also a jury of good and lawful men, — wit, J. M. Chamberlain and eleven others, duly elected, empanneled, tried, and sworn to well and truly try the issue joined in this case, who upon their oaths say they find for the plaintiff the sum of $400.00. It is thereupon ordered by the court that plaintiff do have and recover of defendants the said sum of ($400.00) four hundred dollars, with six per cent. interest until paid, and the costs of this suit, for which execution may issue.

8 *Bill — Exceptions.*

In Circuit Court of De Soto County.

J. L. COCKE, Admin-strator of Jno. T. Owens, Dec'd,
vs.
MEMPHIS AND VICKSBURG RAILROAD COMPANY.

Bill of exceptions.

Be it remembered that on the trial of this cause the following proceedings were had and done, to wit: Plaintiff, first havind proved the death of Jno. T. Owens and that he had testified as a witness on a former trial of this cause, next proved that said Owens on said trial testified as follows: JNO. T. OWENS testified that he had a contract with the defendant to do certain work in constructing its road-bed in De Soto county on that portion of the road known as section 19. The contract filed with his declaration is the contract entered into by the parties. This contract was made with J. A. Moore, a cival engineer in employ of defendant and in charge of that portion of the work. After witness had done a portion of work under this contract, he took it, together with estimates made by Moore, to the office of H. C. Derrick, in the city of Memphis, whom he understood was the chief engineer of defendant. Derrick saw the contract and received the estimates. Plaintiff called again in about a week or ten days and Derrick paid him the money due. Witness had charge of the county convicts of De Soto and adjoining counties and did the work with these and other hands he employed on the road for the purpose of doing this work. Witness had bought eight or ten scrapers and furnished himself with the teams necessary to do it. He had for several days about twenty-five hands, and afterwards increased the number to thirty-five. Labor was plentiful and witness could have obtained all the hands he wanted from one dollar to one dollar and a half a day. There was a clear profit to witness by doing work, as per *per* terms of his contract, of ten cents per each cubic yard. Witness did not understand that he had the whole of section 19. The work that he had to do was staked by the engineer, and he had done very near half of it when stopped by the company. Witness had done about –,500 yards of work, and he estimates that about 13,000 yards remained to be done under his contract. There was a long trestle on
9 section 19, about centre of witness' contract. He did all the work south of this trestle, but none north of it. The ground north of this trestle is what is known as "buckshot land." Much of the land south of the trestle where witness worked was of the same character of land. Witness thinks that two-thirds of the ground in which he did work was of this character. On the south end of this section was a mound or high place, and my work was to cut through this, using the earth taken out of the cut in the fill towards the trestle. Witness got pay for all the work done by him.

The work let to me by Moore under this contract was about a half a mile.

Witness was never notified by defendant that his work was not progressing in a satisfactory manner. He was never notified or directed to hasten the work or to put on more hands. Had he been so notified he could have put on all the hands desired, as labor was plentiful and men was constantly applying for work.

Cross-examined:

After witness quit work on section 19 he sent his team and scrapers and some of his hands further down the road, and did work on sections 21 & 23. The other hands he sent to the bottom, to his farm in Tunica county. It is not true that the convicts were unable to do full work. Witness never measured the work that on his contract he was prevented from completing, but he estimates it at 13,000 yards.

Plaintiff next introduced the contract between him and the defendant:

Contract.

Articles of agreement between Jno. T. Owens and Memphis and Vicksburg railroad.

I Jno. T. Owens of the first part do hereby agree to do all the grading and clearing on what is known as section 19 according to instructions given by engineer in charge. M. & V. R. R. of the second part agrees to pay 20 cents per yard for all excavations 20 cents per yard for all embankments and to pay $35.00 thirty-five dollars per acre for all clearing.

Time of Payment.

Ninety per cent. of total estimates given at the end of each month by the engineer in charge to be paid on the 12th of the following month. And at the completion of the contract the remaining ten per cent. shall be paid in full.

(Signed) JNO. T. OWENS.
MEMPHIS AND VICKSBURG RAILROAD.

Received by J. A. Moore, resid't eng'r.

10 Plaintiff next introduced the statement of estimates of work done for defendants in words and figures as follows, to wit:

M. & V. R. R., 3d Residency.

Copy of Jno. T. Owens, August, 1883.

C. yds., sec. 19, 2,587, earth excavation, 20.....	517.40
4,403, " embankment, 20...	880.60
6,990	
3.42 acres clearing, 35.00.....	119.70
Total to date..	1,517.70
Deduct previous estimate.....	565.00
Estimate in August...	952.70
Ten per cent. reservation.....	95.27
Am't due..	857.43

O K.
J. A. MOORE, *R. E.*

Copy.

Plaintiff next introduced the disposition of George T. Smith and Cyrus Smith as follows:

Deposition of Geo. T. and Cyrus Smith.

To the circuit court of De Soto county:

JNO. T. OWENS
vs.
M. AND V. R. R. Co.

Interrogations for Geo. T. Smith, Cyrus F. Smith, and Dr. W. P. Connor, witness for plaintiff in above case.

Ques. Do you know the parties of this suit?
Ans. We know Jno. T. Owens and the location of the M. & V. R. R.
2nd Ques. Do you know J. A. Moore, an engineer formerly in the employ of the defendant?
Ans. We do.
3rd Ques. What work did he super-tend?
Ans. He super-tended work extending some distance beyond Norfolk trestle and some distance below Indian creek.
4th Ques. Where did he stay and keep his office?
Ans. At Star Landing, De Soto Co., Miss.
11 5th Ques. Did you know Jno. T. Owens while engaged at work on section 19?
Ans. We did.

6th Ques. Who was employed at that time to super-tend the work?

Ans. J. A. Moore.

7th Ques. Did you ever hear J. A. Moore while so employed speak of Jno. T. Owens as a contractor?

Ans. We did, and was present when contract was signed.

8th Ques. Repeat what he (J. A. Moore) said as to how Owens did this work and carried out this contract.

Ans. He (J. A. Moore) stated that Owens did best work that was done on his section, and was carrying out every agreement of his contract when Donnelly and Co. was put on this (Owens) work.

9th Ques. What did he (Moore) say as to how Owens had been treated in this matter?

Ans. He said that the contract had been taken from Owens with cause, and that he (Owens) had been badly treated.

10th Ques. Did you not hear J. A. Moore say that he was authorized both verbally and by letters to *by* Derrick, engineer in charge of north division of road, to let the contract to Jno. T. Owens?

Ans. We did.

11th Ques. Did you not know of his making other contracts on his (Moore's) with other parties?

Ans. We did.

12th Ques. At what time did the conversation take place with Moore in regard to work done by Owens?

Ans. During the time that Owens was fulfilling the contract and afterwards.

13th Ques. Was Moore in the employ of the road at the time that the above conversation took place?

Ans. He was.

12

GEO. T. SMITH.
CYRUS F. SMITH.

STATE OF MISS., }
De Soto County. }

Before R. L. Dabney, justice of the peace of said Co., this day personally appeared Cyrus F. Smith, and, being duly sworn, says that the answers to the within questions are true as stated.

—— ——.

Sworn to and subscribed before me this Sept. 20th, 1884.

R. L. DABNEY, *J. P.*

Sworn to by G. T. Smith this 22nd Sept., 1884.

R. R. WEST, *Clerk.*

Defendant thereupon accepted to the reading of interrogations 8, 9, 10, and 11 and the answer- thereto, and asked the court to exclude the same from the consideration of the jury on the ground:

1st. That it was heresay evidence.

2nd. Because the agency of Moore could not be proved by his own declaration.

3rd. Because the answer to the 9th interrogatory was not a statement of fact, but an expression of opinion of Moore, and calculated to mislead and prejudice the jury; which exceptions were by the court overruled and the testimony admitted; to which action of the court defendant at the time excepted.

Plaintiff next introduced the deposition of CLARENCE D. OWEN, which was read to the jury, in words and figures as follows, to wit:

To the L., N. & T. R. R. Co. or Watson & Malone, attorneys of record:

Ten days after notice we will apply at the office of the circuit clerk of De Soto county for *for* a commission to take deposition of C. D. Owen, a witness for plaintiff, in issue pending in said court, wherein J. L. Cocke (administ'r of Jno. T. Owen) is plaintiff and you are defendant.

Ques. I. Do you know the parties to this suit, and what is or what was your relation to Jno. T. Owens?

Ques. II. Do you know anything of a contract which he had with defendant to do work on section 19 of their railroad in De Soto county? If so, state how you obtained your information.

Ques. III. Were you not employed by Jno. T. Owens to assist him in doing this work?

13 Ques. IV. What force did you have at the time the contract was taken from him? State whether or not if he was getting along well.

Ques. V. Do you know whether or not at the time he was getting forward with his work to the satisfaction of Mr. Moore, the engineer in charge?

Ques. VI. If you are sure that he was doing so, state how you know it and what you may have heard Moore say about it.

Ques. VII. What profit was made by your brother on the work done by him? State how you know it. State also what would have been his profit on the remainder of the work of said section 19 if he would have been allowed to finish it.

Ques. VIII. State whether your brother was in condition to get more hands if he had needed them or he had been requested to increase his force.

Ques. IX. Did you keep the books that show the costs and profits on the work done on section 19 by Jno. T. Owens. If so, state where they are. State whether or not your estimate of costs is made from your recollection of what books showed.

Ques. X. State anything that you may know that will benefit the plaintiff or throw light on this cause.

WHITE AND WITHERSPOON.

Reserving exceptions for incompetency and irrelevancy, defendant propounds the following questions:

X Int. 1st. How much work did Jno. T. Owens do on the railroad and what kind of work did he do?

X Int. 2nd. What was the character of the soil where the work was done?

X Int. 3rd. How much earth per day could one man move and put into the embankment?

X Int. 4th. How much earth could one man move from the cuts in the road?

X Int. 5th. How far did the earth have to be carried to make the embankment or fills?

X Int. 6th. What was the length of section 19, and how much work was necessary to be done there so — to prepare it for the laying of the cross-ties and rails? How long would one laborer have in doing the necessary work? Was the work done by Jno. T. Owens on the north or south side of the trestle in section 19?

MALONE AND WATSON, *For Pl'ff.*

Answers of C. D. Owens to Interrogatories and Cross-interrogatories Propounded to Him in This Cause.

Ans. 1st. I know the parties to this cause. Jno. T. Owens was a brother of mine, and I was employed by him to assist in doing the work on section 19 of defendant road.

Ans. 2nd. I knew of the contract; have seen the same and read it.

Ans. 3rd. I was so employed.

Ans. 4th. At the time the contract was taken away from him he had a full line of teams and implements; also a force of thirty-five hands. He had at first a force of twenty-five and afterwards increased it to thirty-five hands; in fact, he had a sufficient working force to have completed the work on the north side of the trestle in ample time to meet the purposes of the company. He was therefore discharged without any cause whatever.

Ans. 5th. He was getting on well, as above stated, and to the satisfaction of the engineer in charge.

Ans. 6th. I know that he was getting along well and have heard Moore state that his work was entirely satisfactory.

Ans. 7th. He made a profit of 13 cents per cubic yard on the work done by him as estimated by us, and we estimated the profit — the work north of the trestle at 7 cts. per cubic yard; the profit on the north side would not have been so great as that on the south side on account of a difference in the soil.

Ans. 8th. John worked some convict labor. Hands were plentiful and applied to him almost every day for employment. He could have increased his force at any time had the company so desired, but they never at any time intimated that the work was not progressing sufficiently fast or that it was in any way unsatisfactory. On the other hand, it was considered as good, if not better, than any work on the line.

Ans. 9th. The books were kept by me in my room at Helena, Ark., and were burned in fire at that place. So John and I made the calculation from the books before they were burned, and estimated the amount of work taken away from him at 13,000 cubic yards, at the profit of 7 cts. per cubic yard.

15 Ans. 10th. He completed the work of the south side of the trestle on section 19 to the entire satisfaction of the company and was ready and anxious to commence work on the north side when they discharged him. After the company had refused to let him complete the work on section 19 he carried about half of his hands on section 21 and 22 and sent the balance to his farm, in Tunica county, Miss.

Ans. to X Int. 1st. He did about 10,000 yards of embankment and cuts.

Ans. to X Int. 2nd. As a rule it was a light, sandy soil, but there was some buckshot.

Ans. to X Int. 3rd. Twenty cubic yards.

Ans. to X Int. 4th. Same as above.

Ans. to X Int. 5th. Different distances; some of it had to be hauled nearly 500 yards.

Ans. to X Int. 6th. I do not know the length of section 19 nor the amount of labor necessary to prepare it for the track. I cannot say how long it would have taken one laborer to have completed it.

Ans. to X Int. 7th. Jno. T. Owens' work was on the south side of the trestle.

Plaintiff then closed his case.

Defendant then introduced the deposition of JAMES M. EDWARDS in words and figures as follows, to wit:

JNO. T. OWENS
v.
M. AND V. R. R. Co. } Pending in the Circuit Court of De Soto County.

We agree that this deposition may be taken by any officer authorized to administer oaths in the State where taken, without commission or formalities as to time, copies, etc., reserving only objection for relevancy or competency, and may be so read.

WHITE AND MORGAN, *For Pl'ft.*
MALONE AND WATSON, *For Def't.*

In the Circuit — of De Soto County, Mississippi.

JNO. T. OWENS
vs.
M. AND V. R. R. Co.

Interrogatories to be Propounded to James M. Edwards, Witness for the Defendant.

1st. What is your name, age, residence, and business?

2nd. What connection have you had, if any, with the line of railroad from Memphis to Vicksburg, and for what time were you so therewith connected? And, if you know, say who had charge of said work, particularly section 19—under what engineers, etc., etc.

3rd. State what authority said engineers had to make contracts for constructing said road.

4th. Examine the paper herewith filed as Exhibit "A" and say whether J. A. Moore or any other person had authority to make such a contract for the defendant.

5th. What officers of defendant, if any, were authorized to make such a contract or other contracts for construction?

6th. State all you know of the plaintiff having done work on said section 19; within what time, if any, was he to complete such work; what the completion of that he left unfinished cost the defendant; whether his contract was declared forfeited or not, and for what cause it was so done.

7th. Have you had any conversation or correspondence with the plaintiff about the claim he has made and is now suing for or about his doing said work on said section? If so, relate all that he said, giving time and place and in whose presence and any letters from about same.

8th. What monies, if any, and where, — paid the plaintiff on the work that he did on said section, and did he give any receipt therefor? If so, please attach it to your deposition as an exhibit.

9th. If you can, please exhibit a profile of said section at the time the plaintiff began work thereon, and again when he ceased work thereon, and give a detailed statement of what work he did and what payments were made him therefor. Then also state what force of men he had on the work when the same was taken from him; whether plaintiff was building said work as rapidly as
16 required by defendant; why taken from him, to whom let for completion, at what price, and how much was paid in all to such other party for so completing the same; within what time such other party completed the work, how much was done by such other party, etc.

10th. What, if any, requirements do you know were made of the plaintiff as to completing the work on said section by any given time? State all you know on that subject, and also say whether such requirement or notice thereof was given the plaintiff at or before he began said work.

11th. Was any contract similar to that set out in said exhibit hereto ev-r made by you or any other person authorized — and for defendant to do so with plaintiff about said matter? Again, say what is meant by the endorsement "Received by" J. A. Moore, resident engineer.

12th. Did the plaintiff have the men, animals, and implements needed for the completion of said work and required by the engineer in charge, and did he obey all instructions given by the engineer in charge?

EXHIBIT A.

Copy of Contract Sued On.

Articles of agreement between Jno. T. Owens and M. and V. R. R.

I, John T. Owens, of the first part do hereby agree to do all grading and clearing, on what is known as section 19, according to instruc-

tions given by engineer in charge. M. & V. R. R. of the second part agree to pay 20 cts. per yard for all excavations, and 20 cts. per yard for all embankments, and to pay $35.00 per acre for all clearing.

Time of Payment.

Ninety per cent. of total estimate given at the end of each month by engineer in charge, to be paid on the 12th of the following month, and at the completion of contract the remaining ten per cent. shall be paid in full.

(Signed) JNO. T. OWENS.
MEMPHIS AND VICKSBURG
RAILROAD.

July 26th, 1883.

Received by J. H. Moore, resident engineer.

X Interrogations for J. M. Edwards.

1st. Who was in charge of the work on section 19 when this contract between plaintiff and your company was made, and how long did he continue as such engineer after date of it?

2nd. When were you first informed that your engineer, Moore, had made the contract with plaintiff?

3rd. When you were informed that plaintiff was a contractor on your road, did you not pay him per estimates on section 19, given by J. A. Moore, the engineer who made the contract?

4th. If Moore was not authorized to contract for work on your road, why did you pay money to parties contracting with him on such contract?

5th. Did not J. A. Moore make other contracts for you for work on your road? If so, give the name of any person with whom such contracts were made.

6th. Were such contracts in writing? If so, annex copies of the same.

7th. Did you order the contract with plaintiff annulled? If so, for what reason?

8th. Do you, of your own knowledge, know any reason why said contract should have been annulled? If so, state it.

9th. Did not other resident and assistant engineers of your road make contracts for work on your road with parties?

10th. Do you know, of your own knowledge, why plaintiff did not complete the work on section 19?

11th. Do you know how long it was from the time other laborers were put on plaintiff's work before the track was put down on it?

WHITE AND MORGAN, *For Pl'ft.*

17 The deposition of James M. Edwards, a witness on the part of the plaintiff in the case of Jno. T. Owens *vs.* Memphis and Vicksburg Railroad Company, noe pending in the circuit court of De Soto county, State of Mississippi.

In pursuance of the foregoing and annexed commission to me directed, I, T. R. Foster, a justice of the peace for the county of Warren. Miss., caused the same (James M. Edwards) witness to come before me, in the city of Vicksburg, county of Warren and State of Mississippi, at 11 o'clock a. m. on the 8th day of September, 1884, which said witness, after having been duly sworn to tell the truth, the whole truth, and nothing but the truth, so help him God, testified as follows:

Ans. to first Int. My name is James M. Edwards. I am thirty-five years old. I am vice-president and gen'l manager of the Louisville, New Orleans and Texas Railway Co.; residence, at Vicksburg, Warren county, Miss.

Int. 2nd. I have been and since the beginning of the work in 1882 and still occupy the position of superintendent of construction of the line of railroad from Memphis to Vicksburg, Mississippi, and have been and am still the vice-president and gen'l manager of the Louisville, New Orleans and Texas Railway Company and of the companies which were consolidated under this name, one of which companies was the defendant's company. Mr. R. H. Elliott was the principal assistant engineer, having charge of the entire work under me from Memphis to Vicksburg, and Mr. H. C. Derrick, the division engineer under him, for the first fifty (50) miles south of Memphis, in which is section 19, nineteen.

Burke, Foley and McMahon were the contractors of 50 miles of work, commencing at section sixteen (16) and embracing the fifty (50) miles next south. There was no contract on this part of the work with the defendant company. The contract with Burke, Foley and McMahon was made with the New Orleans, Baton Rouge, Vicksburg and Memphis Railroad Company, another company, and incorporated in Mississippi and now consolidated into the Louisville, New Orleans and Texas Railway Company; and this fifty miles of the road was constructed under the charter of the New Orleans, Baton Rouge, Vicksburg and Memphis Railroad Company.

I append as an "exhibit to answer" a copy of the contract made by Burke, Foley and McMahon. (Such exhibit is marked "Exhibit A.")

The Financial Improvement Company, a corporation under the laws of Colorado, made a general contract for the construction of the line of the New Orleans, Baton Rouge, Vicksburg and Memphis Railroad Company, and all payments for the construction of the line of this company were made by the Financial Improvement Company and receipts given by different contractors for estimates paid from time to time.

Ans. 3rd. They had no authority to make contracts for construction unless especially authorized by me. All construction contracts were made by me for the Memphis and Vicksburg Railroad Com-

pany, I being the only person authorized by the directors of this company.

Ans. to Int. 4th. I have examined the paper referred to, and J. A. Moore or no other person except myself had authority to make any contract for defendant company.

Ans. to 5th Int. No officer except myself was authorized to make such a contract or other contract for construction.

Ans. to 6th Int. Burke, Foley and McMahan having the contract and failing to complete it in the time required, notice was given to H. C. Derrick, division engineer, to put a company's force upon section 19 in order to complete it before the track reached it. There were a number of bills paid for work done on section 19, one of which was to J. T. Owens. The fact that Owens was paid was all I know of his having done work on section 19. So far as I know, Owen was nothing but a laborer on the work, and was subject entirely to the order of the company, and therefore had no contract giving him time to complete work. After having given this first notice to Mr. Derrick, I went up to Memphis, and still not finding the work progressing rapidly enough, I instructed Mr. Derrick to put an additional company's force on the works, and he then took the labor and team of Donnelly and Co. and put them upon
18 the work, and the company paying for the same at day-labor rates until the completion of the work, and the whole expense charged to Burke, Foley and McMahon under their contract, they getting credit for the work done at contract prices. There was no forfeiture of any contract with plaintiff declared, because there was no contract made with him.

Ans. to Int. 7th. I don't know plaintiff and do not remember to have ever had any conversation with him.

Ans. to Int. 8th. Some money was paid to Owen in the manner I have stated above. These payments were made through Mr. Derrick, the division engineer, who paid all the laborers put upon this work. If any vouchers were given by plaintiff they must have been given to Mr. Derrick, and in our settlement with Burke, Foley and McMahon such vouchers were turned over to them, I think, as receipts for money paid on their account.

Ans. to Int. 9th. It will be impossible to exhibit such a profile. The division engineer could possibly do so; if not, no one can. I cannot give a detail statement of work done by plaintiff, nor what list of payments were made therefor, for reasons given above. On December 22nd, 1884, I made a final settlement with Burke, Foley and McMahon—that is, that the amount due them at that date was completed, and vouchers forwarded to Memphis for receipt and signature. This voucher, after being signed, was forwarded to New York. (I append herewith a copy of this voucher, marked "Exhibit D.") The date of the signatures being blank, because at the time impression copy in this office was taken the parties were not here to sign said vouchers. In the item "amounts paid to others" in this voucher, the amount paid to Owens is included, but we have no detail statement of these amounts for the reason stated.

Ans. to Int. 10th. So far as I know of, no time was given plaintiff

to complete the work, because he was not a contractor. All of my contracts were limited as to time, it having been the policy of the company to complete all work as speedily as possible.

Ans. to Int. 11. No similar contract that made exhibit hereto was ever made by me or any other person authorized by me. I have no idea what the words "Received by J. A. Moore, resident engineer," mean, unless they mean that the proposition of Owens was received by Mr. Moore, the resident engineer, to be forwarded to the proper officer to be re-accepted or rejected.

Ans. to Int. 12th. I do not know the plaintiff on the work, but know that there were not sufficient men, animals, and implements to complete the work in the time required for the track, and I instructed Mr. Derrick to put the forces of Donnelly and Company on the work as stated above.

Ans. to Cross-interrogatories.

1st. Derrick, division engineer, was directly in charge of the work; he continued until about January, 1884.

Ans. to Cross-int. 2nd. I knew nothing of the so-called contract until after the suit of Owens was brought.

Ans. to Cross-int. 3. As stated in last answer, I never knew that plaintiff claimed to be a contractor on our road until after suit was brought, and any money paid him was not paid him on estimates as a contractor, but upon memoranda receipts as company force.

Ans to Cross-int. 4th. Owens was simply paid upon the statement made by Moore and approved by Mr. Derrick as a company's force put upon the work of Burke, Foley and McMahon.

Ans. to Cross-int. 5th. I know of no such contract; certainly he had no authority to make any such contract.

Ans. to Cross-int. 6th. I have answered this in my last.

Ans. to Cross-int. 7th. There was never any contract made with plaintiff annulled.

Ans. to Cross-int. 8th. I have answered this in my last.

Ans. to Cross-int. 9th. Not that I know of; certainly not, unless specially authorized, of which I have no remembrance.

Ans to Cross-int. 10th. I know nothing of the plaintiff on this work, except as the company's laborer.

Ans. to Cross-int. 11th. I think the laborers put on the section 19 (19) by the company had just about completed the work when the track reached them.

19 JAS. M. EDWARDS.

All of which testimony I caused to be reduced to writing, and said witness (James M. Edwards) after having read the same over to him signed the same in my presence at the time and on the day mentioned in the caption.

All of which I certify under my hand and seal this 9th day of September, 1884.

T. R. FOSTER,
Justice of the Peace.

These articles of agreement, made and concluded this 18th day of December, in the year of our Lord, one thousand, eight hundred and eighty-two, and between C. C. Burke, Thos. Foley and Michael McMahon, under the firm name of Burke, Foley and McMahon, of the first part, and the New Orleans Baton Rouge, Vicksburg and Memphis R. R. Co., of the second part; witnesseth: That for and in consideration of the payments and covenants hereinafter mentioned to be made and performed by the said railroad company, the said parties of the first part do hereby covenant and agree to construct and finish in the most workmanlike manner to the satisfaction and acceptance of the engineer in charge of the same, all the graduation as included in specifications under said general head as below given on fifty miles of said railroad, commencing at section sixteen, south of Memphis, and embracing fifty miles next south. And such other work connected therewith as may be necessary to complete said graduation in accordance with the following specifications, so far as they may be applicable, and agreeable to the directions of said engineer in charge of said work, given from time to time during the progress thereof, and to begin said work on or before — day of —— and to complete the same on or before the 1st day of July 1883, it being expressly agreed that the time herein stipulated shall be of the essence of this contract.

Specifications.

Graduation.

Under this general heading will include clearing and grubbing, excavations and embankments required for formation of road-bed, turnouts, and depot grounds, foundations for masonry and trestle-work, or in any way connected with, or incident to, the construction or drainage of the same, or, the change or crossing of the roads or streams.

I. Clearing and grubbing.—Grubbing will be required the entire width of the road-bed, and in all excavations and embankments which are two feet or less in depth; also, in all slopes, when the safety of the road requires it.

The clearing shall be made the entire length of the road wherever required, and shall not be less than one hundred (100) feet in width on the regular road-bed, and as much more as in the opinion of the engineer will be required for the safety or convenience of the road. The ground on which the embankments and excavations are made, shall be cleared of all vegitable and perishable matter. All stumps must be cut close to the surface and none left within two feet of grade in embankment. Fences, buildings, and wood on the line of road, are the property of the railway or land-owner. If not removed by the owner within a reasonable time, they shall be cleared off by the contractor, piled up and preserved for the use of the owner or railway, without charge. The clearing and grubbing shall be paid for by the acre, on the area actually covered by the timber.

II. Width of roadway.—The roadway will be graded eighteen

(18) feet wide in excavation, and fourteen (14) feet wide in embankment, except when otherwise ordered by the engineer in charge.

III. Slope.—The slopes of excavations shall be generally three-fourths horizontal to one vertical, and of the embankments one and one-half horizontal to one vertical. These are, however, subject to such modification as the engineer may direct. All slopes shall be made true and even.

IV. Ditching.—Whenever required by the engineer, ditches shall be cut beyond the slope of both excavation and embankment, of such location and dimension as he may direct.

V. Excavations.—Excavations shall include all material
20 taken from cuts, ditches, channels for creeks, road crossings, and foundations not under water. The classification of all excavation shall be as follows: Earth will include clay, sand, gravel, loam, hard pan, decomposed rock, and slate stones, and boulders containing less than one cubic foot, and all other material of an earthly kind.

Loose rock.—Loose rock will include all stone and detached rock found in separate masses, containing not less than one cubic foot, nor more than one cubic yard; also all slate or other rock, soft enough to be removed without blasting, although blasting may be resorted to.

Solid rock.—Solid rock will include all rock in masses of over one cubic yard, which cannot be removed without blasting.

VI. Embankments.—The embankments to be formed fourteen (14) feet wide on the top, unless otherwise directed, with slopes generally of one and one-half horizontal to one vertical. Whenever the embankments are formed from burrow pits, or ditching on either side, such burrow pits, and ditching, and the crest of the slopes thereof, shall in no case approach within six (6) feet, nor in double the depth of the ditch, of the foot of the proper embankment slopes. Whenever water-courses, or new channel for rivers require to be formed, they shall be put at such distance from the foot of the slope as the engineer may direct. Care must be taken to exclude all perishable material from the embankments. Embankments shall be built according to the instructions of the engineer, either by dumping from grade, or in layers of such thickness as he may require. Such additional height above grade, usually one-tenth of the amount of the fill, shall be given to embankments as the engineer may deem necessary to compensate for shrinkage. Embankments about masonry shall be built at such time and in such manner, and of such material as the engineer may direct.

Embankments shall be riprapped with stone, or otherwise protected against damage by water-courses, by turning the stream, or making new channel if required.

VII. Hauls.—

VIII. Trestle-work.—Trestle-work will be built of good sound yellow pine, or cypress as directed by the engineer, and to be either piled or framed as per plans and specifications furnished by him. Trestle-work will be paid for per lineal foot, and the price paid will

include all bolts, washers, spikes, or other material necessary to complete it as per plan furnished.

General conditions applicable to all work.

The railroad company reserves the right to make any changes in the alignment or grades of its road, or of the plan of its work; provided however, that the contractor shall be paid at the contract price for the work actually done before changing, and also, for the additional work embraced in the change.

The monthly estimate of the engineer shall be subject to correction by him in any subsequent or final estimate. The monthly estimate being merely made out as a basis of payment on account, it will necessarily be only approximately correct as to quantity and value, pains being taken however, to make them as accurate as possible. The contractor shall render an account monthly, through the proper superintending engineer, of any work which he may have been authorized to do; and to prevent dispute thereafter, it is hereby understood that, no bills for extra work will be allowed without sufficient evidence of the work having been properly authorized, and of the bills having been examined and approved by the engineer.

All the material used in the road will be subject to the inspection and acceptance of the engineer, who will submit them to such tests ad he may desire.

Commodious passing places for public and private roads, shall be made and kept in good condition by the contractor; and he shall provide and maintain good and sufficient fences for keeping up inclosures, and the preservation of crops. The contractor will be held responsible for trespass or damages to the adjacent properties, or the public for any acts or omissions on the part of himself or his employees.

Any parties, under the direction of the engineer, shall be permitted to pass or haul any material required for the road,
21 over any section; such persons not interfering with the work of the contractor. Right of way and necessary lands for burrow pits, spoil banks, ditches, roads etc., will be provided by the railroad company as early as practicable; but they are not to be held responsible for any delay caused by lagal proceedings beyond their control.

Contractors must carefully preserve bench marks and stakes; in case of neglect they will be charged accordingly. Falls and slips, if not occasioned by the contractor, are to be paid for the same as regular classification.

The contractors shall take all risks from floods and casualties of every description, and shall make no charge for detention from such causes.

The quantities marked on the profile are an approximation and will not govern the final estimate.

Disorderly and quarrelsome persons must be discharged by the contractor if, in the opinion of the engineer, the good of the road requires it.

Contractors will not themselves, nor by their agent, give nor sell any ardent spirits to their workmen, or any person at or near the line of railway; nor allow any to be brought on the works by the laborers or other persons, and will do all in their power to discountenance their use in the vicinity of the works by persons in their employ; and they will not allow any person in their employ to commit trespass on the premises of persons in the vicinity of the works, and will forthwith, at the request of the engineer, discharge from their employ any that may be guilty of committing damage in this respect.

Contractors must satisfy themselves of the nature of the soil; of the general form of the surface of the ground, of the quantity of material required for forming the embankments, or other work, and all matters which can, in any way, influence their contract; and no information upon any such matter derived from the maps, plans, profiles, drawings, or specifications, or from the engineer or his assistants, will in any way relieve the contractor from all risks, or from fulfilling all the terms of this contract.

The contractor- will remove, at their own expense, any materials disapproved by the engineers, and will remove and re-execute any works, without extra charge, and within such time as fixed by the engineer, appearing to him during the progress, or within twelve months after completion, to be unsoundly or improperly executed, notwithstanding any certificate as — the due execution of the same. On their default such work will be done by the railroad company at the contractor's expense. The contractor shall give personal attention to the work.

The engineer shall have power to direct the application of force to any portion of the work which, in his judgment, requires it, and to order the increase or diminution of force at any point he may indicate.

Now therefore, this agreement further witnesseth: That the party of the second part agrees to pay, or cause to be paid, at its office in Vicksburg, to the party of the first part, for the faithful performance of the work embraced in this contract, the following prices, to wit:

For earth excavation per cubic yard, twenty (20) cents.
For solid-rock excavation per cubic yard, one dollar.
For loose-rock excavation per cubic yard, fifty (50) cents.
For embankment per cubic yard, twenty (20) cents.
For grubbing and clearing per acre, thirty-five (35) dollars.
For frame trestle per lineal foot, ——.
For extra work not specified cost and ten (10) per cent.

The above payments shall be made in the following manner, that is to say, during the progress of the work, and until it is completed, there shall be monthly estimates made by the engineer in charge, of the quantity, character and value of the work done during the preceding month, or since the last monthly estimate, ninety per cent. of which value shall be paid by the party of the second part, to the party of the first part, between the 10th and 15th of the following month; and when the whole is completed under this contract,

then the party of the first part shall be entitled to the final estimate of his work, and shall be paid in full for all work done, upon his signing a full release to the party of the second part from all
22 claims or demands whatsoever growing, in any manner, out of this agreement.

It is further agreed and understood, that the party of the first part shall be entitled to no damages from delays which may be occasioned by the party of the second part, but for such delays a reasonable extension of time for the completion of this contract shall be made, provided however, that written demand for such extension be made by the party of the first part at the time such delay was occasioned.

This agreement further witnesseth: That should the party of the first part not begin the work herein contracted for at the specified time, or after beginning it should the work be stopped, or not prosecuted with such force and dispatch as, in the opinion of the engineer, is requisite for its completion within the time specified, then the party of the second part may give notice in writing to the party of the first, either in person, or to his agent, or by posting in a conspicuous place on the work, to put a necessary force upon the said work at once, and if the same has not been done within ten days after such notice has been given or posted, then the party of the second part shall have the right to declare this contract forfeited, and may proceed to relet the work herein specified at such prices as may be necessary for its completion at the time specified in this contract, and thereupon the party of the second part shall have the right to appropriate all unpaid estimates and reservations from monthly estimates in its hands or so much thereof as may be necessary to the payment of the increased price, if any, at which it may be necessary for the company to relet said work, in order that it may be finished in the time specified herein, and all damages which the said party of the second part may have sustained, by reason of the default or failure of the party of the first part; and if said unpaid estimates and reservations are not sufficient to make such payments, then the party of the second part shall have the right to proceed against, and recover of the party of the first part, and his guarantors, the amount necessary to cover such balance.

In witness hereof, the parties of the first and second parts have hereunto set their hands and seal- this 18th day of December, 1882.

Executed in duplicate.

The erasure made in section — before signing.

C. C. BURKE. [SEAL.]
THOS. FOLEY. [SEAL.]
M. McMAHON. [SEAL.]
VICKSBURG AND MEMPHIS RAILROAD COMPANY,
By JAMES M. EDWARDS, [SEAL.]
Vice-Pres'd't and Gen'l Manager.

For value received we hereby guarantee the faithful performance of the foregoing contract on the — party of the first part, and bind

ourselves to pay the party of the second part all damages it may suffer by reason of any default or failure on the part of the party of the first part in the performance of their obligation and undertaking the said contract to the amount of ten thousand (10,000) dollars.

JOHN JOHNSON.
WM. H. CARROLL.
CASEY YOUNG.
S. DREYFUS.

Copy.

("EXHIBIT D.")

The Financial Improvement Company to Burke, Foley, and McMahon, Dr.; address, Memphis.

DECEMBER 2, 1884.

No.		For—			
	General expenses:				
1.	Salaries of officers.....		Final estimate of work done under contract by themselves and others to Dec. 21st, 1883, and in full settlement of all demand growing out of same.		
2.	Stationary.....				
3.	Telegrams and postage..				
23					
4.	Advertising and printing.		338.982 c. y. earthwork at 20.		67.796.40
5.	Travelling expenses.....		4.006 "overhaul," 20.		801.20
6.	Legal expenses.....				
	Engineering:				
7.	Engineers and expenses.		250.88 acres clearing..	35.00	8780.80
8.	Instruments.....	77.37840	Less previous payment.....	53.902	132347627
9.	Horses, mules, wagons, etc.....				
10.	Tents.....		Am'ts paid others, 19.259.03		
	Rights of way and damages:		Am'ts paid this date.....	4217.24	23476.27
11.	Rights of way.....				
12.	Damages.....				
13.	Real estate.....				
	Roadway:				
14.	Graduation				
15.	Clearing and grubbing ..				
16.	Culverts.....				
17.	Cross-ties				
	Track:				
18.	Rails.....				
19.	Fish-plates.....				
20.	Nuts and bolts.....		Correct.		
21.	Spikes.....		—— ——, *Auditor.*		
22.	Frogs and switches.....				
23.	Track-laying.....		Approved.		
24.	Bridges and trestle..		—— ——, *Gen'l Manager.*		
25.	Yazoo bridge.....				
26.	Lumber and timber.....				
27.	Telegraph construction..		——, 188-.		
28.	Fencing....		Received of —— ——, treasurer of the Financial Improvement Company, —— dollars in full payment of above account.		
29.	Depots and platform....				
30.	Tanks and water stations.				
31.			—— ——.		
32.					

Defendant next introduced R. H. ELLIOTT, who testified as follows, to wit: I was engaged during the year 1883 by the New Orleans, Baton Rouge, Vicksburg and Memphis R. R. Co. as civil engineer on the construction of that company's line of road between Memphis and Vicksburg. Jno. A. Grant was chief engineer and had charge of the work between Vicksburg and New Orleans, while I had charge of that between Memphis and Vicksburg. J. M. Edwards was vice-president and general manager over entire road. Col. H. C. Derrick was my subordinate in charge of the division of fifty miles next south of Memphis, and I had sub-engineers, called resident engineers, on each section of eight miles. J. A. Moore was one of these resident engineers, and section 19 was a part of his residency. Derrick was not chief engineer; he was subordinate to me. The Memphis and Vicksburg Railroad Co. did not do any work of constructing this line of road; neither were Derrick, Moore, nor myself employed by nor agents of that company. This line was constructed by said N. O., B. R., V. & M. R. R. Co. and we were employed and agents alone of that Co. Neither myself nor any of my subordinates, Derrick, Moore, nor other-, had authority to let contracts for building any part of this road. No one had such authority except Mr. Edwards.

I never heard of the contract plaintiff claims and sues on until after this suit was brought. I never authorized Moore to make it. I had no power to authorize him, and he had no such right.

Section 19 was 5,500 feet long, and on the southern half was a trestle 1,600 feet length. This section was a part of the work let by the R. R. Co. to Burke, Foley, and McMahon. I saw plaintiff's force working on that part of section 19 south of this trestle, most of which was a sandy loam soil, light and easy to move. There
24 were only 15,000 cubic yards of earth to be moved (both excavation and embankment) on this section; that on the north of the trestle was much the heavier, because of being buckshot or gumbo soil and extra haul beyond 300 feet. I have had much experience in railroad building, and believe that it would cost twice as much to do the earthwork on that part of this section north of the trestle as to do that south of the trestle, all because of the difference in the soil, etc.

The contract sued on was never sent me by Derrick or other person-. I never heard of it until after this suit was begun. All estimates for work done under Derrick or Moore were submitted to me and approved by me before being paid and I never knew of such a contract, although I approved Owens' vouchers for such payments as were made him.

Defendant next introduced the deposition of H. C. Derrick, who — in words and figures as follows, to wit:

JNO. T. OWENS
vs.
M. AND V. R. R. Co. } Pending in Circuit Court of De Soto County.

We agree that this deposition may be taken before any officer authorized to administer oaths in the State where taken, without commission, waiving all formalities as to copies, time, etc., and that the same may be read as so taken.

WHITE AND MORGAN, *For Pl'ft.*
MALONE AND WATSON, *For Def't.*

In the Circuit Court of De Soto County, Mississippi.

JNO. T. OWENS
vs.
M. & V. R. R. Co.

Interrogatories to be Propounded to H. C. Derrick, Witness for Defendant.

1. What is your name, age, residence, and business?

2nd. What connection have you had, if any, with the construction *with* the line of railroad from Memphis to Vicksburg, and for what time were you so therewith connected? And, if you know, say who had charge of said work, particularly section 19; under what engineer, etc., etc.

3rd. State what authority said engineers had to make contracts for constructing said road.

4th. Examine the paper herewith file- as Exhibit "A" and say whether J. A. Moore or any other person had authority to make such a contract for the defendant.

5th. What officer- of defendant, if any, were authorized to make such a contract or other contracts for construction?

6th. State all you know of plaintiff having done work on section 19; within what time, if any, was he to complete such work; what the completion of that he left unfinished cost the defendant; whether his contract was declared forfeited or not, and for what cause it was so done.

7th. Have you had any conversation or correspondence with the plaintiff about the claim he has made and is now suing for or about his doing said work on said section? If so, relate all that he said, giving time and place, and in whose presence, and any letters from him about same.

8th. What monies, if any, and when, were paid the plaintiff on the work he did on said section, and was any receipt taken therefor? And, if so, please attach the same hereto and make it an exhibit to your deposition.

9th. If you can, please exhibit a profile of said section at the time plaintiff began work thereon, and again when he ceased work thereon, and give a detailed statement of what work he did, and what payments were made him thereon. Then also state what f[illegible] of men he had on the work when the same was taken from h[illegible]

whether the plaintiff was building said work as rapidly as required by def't; why taken from him; to whom left for completion; at what price, and how much was paid in all to such other party for so completing same; within what time such other party completed the work; how much was done by such other party, etc.

10th. What, if any, requirements do you know was made of the plaintiff as to completing the work on said section at any given time? State all you know on that subject, and also say whether such requirement or notice thereof was given the plaintiff at or before he began said work.

11th. Was any contract similar to that set out in said exhibit hereto ever made by you or any other person authorized by and for defendant to do so with plaintiff about said matter? Again, say what is meant by the endorsement, "Received by J. A. Moore, resident eng'r."

12th. Did the plaintiff have the men, implements, and animals needed for the completion of the said work and required by the engineer in charge, and did he obey all instructions given him by the engineer in charge?

EXHIBIT "A."

Copy of Contract Sued On.

Articles of agreement between Jno. T. Owens and the M. & V. R. R.

I, Jno. T. Owens, of the first part, do hereby agree to do all grading and clearing on what is known as section 19, according to instructions given by engineer in charge. M. & V. R. R., of the second part, agree to pay 20 cents per yard for all excavations, and 20 cents per yard for all embankments, and to pay $35.00 per acre for all clearing.

Time of Payment.

Ninety per cent. of total estimate given at the end of each month by engineer in charge, to be paid on the 12th of the following month, and at the completion of contract the remaining ten per cent. shall be paid in full.

(Signed) JNO. T. OWENS.
MEMPHIS AND VICKSBURG RAILROAD.

July 26th, 1883.

Received by J. A. Moore, resident engin'r.

Cross-questions by Pl'tf for Derrick.

1st. Was J. A. Moore ever in charge of section 19 as engineer; if so, for how long? Give dates.

2nd. Who had the contract for section 19 before it was let to plaintiff? State why the party or parties did not complete it.

3rd. When did such party leave or abandon the work on section 19, and why?

4th. Was not J. A. Moore authorized to contract with parties for work on the M. & V. R. R., and did he not make contracts with various parties for such work?

5th. Did you not authorize J. A. Moore to make contracts for work?

6th. When did you first learn that a contract had been made by Moore, the engineer, with plaintiff for work on said railroad on section 19?

7th. Did you not pay to plaintiff money on this contract on estimates made by J. A. Moore, your engineer; if so, on how many estimates did you pay him, and when?

8th. Did not Moore make other contracts with parties besides plaintiff for work on your railroad, and were not such contracts paid for, in whole or in part? If so, give the name of other parties with whom he contracted.

9th. If he made any such contracts in writing, annex copies of same.

10th. Did you order the contract made by Moore with plaintiff annulled; if so, for what reason?

11th. Did you not know at the time said contract was annulled and Donnelly and Co. put on section 19 that plaintiff had a sufficient force on the section to complete it as required by Moore, the engineer?

12th. Was plaintiff ever given notice of any intention to annul his contract before Donnelly and Co. were actually at work on section 19?

13th. Was plaintiff ever required to increase his force on the work by the engineer, and failed to do so immediately and in a reasonable time?

14th. Who contracted with Donnelly and Co. for the work on section 19 after plaintiff was at work there?

15th. Was J. A. Moore, the resident engineer, informed of any intention to annul the contract with plaintiff until Donnelly and Co. were actually at work on section 19; if so, who notified him?

16th. How long was it after placing of Donnelly on the work before the track was laid on it?

17th. Do you know what force plaintiff had on the work when his contract was annulled?

26 WHITE AND MORGAN, *For Pl'tf.*

Halifax C. H., Va., Sept. 11th, 1884.

Answers to Interrogatories.

1st. H. C. Derrick; a civil engineer, residing at Halifax C. H., Virginia.

2nd. I was the division engineer in charge of construction of the M. & V. R. R. from Memphis, fifty miles south, and continued so in charge from October, 1882, to Dec. 31st, 1883. The resident engineer on section 19 was J. A. Moore, acting under my authority.

3rd. The only person authorized to make written contracts for

the graduation of the work on the part of the R. R. Co. was James M. Edwards, V. P. and gen'l manager.

4th. Mr. J. A. Moore was not authorized to make such a contract on the part of the defendant.

5th. Mr. J. M. Edwards was alone authorized to make such a contract.

6th. Mr. Jno. T. Owens did some work on section 19 by agreement with Mr. Moore, and was paid for the same by me on the estimate given by Mr. Moore; sometimes from money furnished by Burke, Foley and McMahon, and sometimes from funds advanced by me and charged to the contractors, Burke, Foley and McMahon, as were also the amounts paid to other parties doing similar work on section 19 and on other sections comprised in the original contract of Burke, Foley and McMahon. The amounts so paid, the cost of the completion of unfinished work on section 19, and the dates thereof being matters of record, and the record having passed from my possession long since, I cannot state them. Mr. Owens had no contract to be declared forfeited, being simply allowed to do the work at a certain price, and being promised to be permitted to do all on section 19 if he would do it in time to prevent any delay in the tracklaying. He was allowed to do all that he could, and, not progressing fast enough, other forces were put on to complete it in time. The railroad company recognize no subcontractors at all, but under their contract exercised the right to put on hands when the work was not progressing satisfactorily, pay them as per agreement, and charge the amounts so paid to the contractors for the work in question. Messrs. Burke, Foley and McMahon sometimes furnished me the money to pay these men, and sometimes I advanced and charged it to the account of said Burke, Foley and McMahon.

7th. I have had none.

8th. I paid money to Owens for work done by him on section 19, but cannot state amounts and dates. Receipts were taken for same, and amounts charged against Burke, Foley and McMahon, said receipts being returned to them (Burke, Foley and McMahon) upon final settlement.

9th. I cannot furnish profile nor give detailed statement asked for, but I can say that he (Owens) was not building the work as fast as required, and that it would have been impossible for him to have done so with his force, as evidenced by the very heavy force put on by the company, which only succeeded in getting it done at the very last moment by the untiring exertion of the engineer, sent especially for that purpose, and at a very much greater cost than Owens was getting for it. The work was not completed by contract, but by Donnelly and Co.'s forces, who were paid the actual cost of labor and teams, with ten per cent. added for tools, etc. I will add that the work was not taken away from Owens, but that he was allowed to go on and did actually go on working, and was allowed to do all he could, and had the very best part of the work, that done by the company being in Norfolk Bayou swamp and very expensive, whilst that done by Owens was high and dry and easily and cheaply done.

The force put on by the company only assisted him in the completion of the section, and when he had done his easy part I think he did more work on sections 22 and 23 in the same way.

10th. Mr. Moore was directed by me to put any one to work on section 19 who could do the work in time, with the promise that he would see that they received their pay from the contractor. He wrote me that he had found a man (who afterwards turned out to be Mr. Owens) who would undertake it. I directed him to be put to work immediately if he was satisfied that he would comply with our wishes as regarded time, and that I would see that he received his pay for work done. Mr. Moore notified me that he had
27 done so, but I never saw the alleged contract now sued on, nor did I ever hear of it until the completion of the section.

11th. I have no knowledge of any such contract with others, and cannot explain Mr. Moore's endorsement, except it be merely the date at which the proposed contract or memorandum of agreement was filed at his office.

12th. Mr. Owens did not have the men or the means to complete this work in time, and was repeatedly directed by the resident engineer, acting under my orders, to put a larger force on the section and to push the work, all of which he failed to do in a satisfactory manner.

Answers to Cross-interrogatories.

1st. J. A. Moore was in charge of section 19, as resident engineer, from about January or February, 1884, to October, 1884.

2nd. The contractors for section 19 were Burke, Foley and McMahon. I suppose they did not complete it because they had more work than they could do.

3rd. I don't think they ever did any work on it, except a few yards by a subcontractor named Conway.

4th. No; Mr. Moore was not authorized to make contracts for work. Where contractors failed to push their work it was feared the track would catch them. He was directed to put men on the work for the contractor under a promise that we would see that they were paid, which was always done, and the amounts so paid charged to the contractor against his estimates. The work was always estimated to the original contractor at his contract price and sent in to the company in his name, no matter who had done it.

5th. I directed Mr. Moore as above.

6th. I never heard any contract claimed different from the above, as having been made by Owens, until the work was about completed. I do not remember the dates.

7th. I paid money to Owens for work done on section 19 on estimates made by J. A. Moore, but it was on account of Burke, Foley and McMahon, and was charged to them. Mr. Owens must be well aware of this fact, as he was several times put off in the payments of his estimates, because the money for the payment of Burke, Foley and McMahon had not come, and he was informed at the time. I think the number of payments was two, or, probably, three.

8th. Mr. Moore employed other parties to do work, who were paid

in similar manner, and amounts charged to Burke, Foley and McMahon. I cannot give the names of said parties, and never heard of any contract claimed by any one of them.

9th. I never saw or heard of any.

10th. Mr. Owens not putting on sufficient force to do the work required, it was ordered by J. M. Edwards, V. P. & G. M., that Donnelly's force be put on to complete the work. I directed this to be done, but we had no contract, only a verbal agreement. Mr. Owens was at liberty to continue work also with all the force he had, and did actually so continue.

11th. Mr. Owens never had a sufficient force on to complete the work in thrice the time left for its completion, and did not make any show to do better.

12th. Mr. Owens was repeatedly notified that his force was inadequate; that if he did not put on a sufficient force the company would do so. We never regarded Mr. Owens as having any contract.

13th. Mr. Owens was repeatedly notified to put on more men, or that the company would do so. His failure to comply with these orders necessitated the employment of others.

14th. J. M. Edwards directed Donnelly's force to be put on section 19 in order to finish it in time.

15th. Mr. Moore was from the beginning informed and knew that the prime object was to complete section 19 and all other work in time to prevent any delay in track-laying, and that men were to be put on for that purpose and in sufficient numbers, and, if those already there did not give reasonable hope of being able to do so, that he was to employ more. Mr. Owens was allowed to do all the work he could do, and even Donnelly's very large force and ample outfit, in addition, only completed it at the last moment. Mr. Moore received his instructions from me.

28 16th. I do not remember; I think about six or seven weeks.

17th. I knew at the time, as I had a weekly report from every section of the numbers employed, but I do not remember. I know, however, that it was absurdly inadequate to the end in view and time left, and even if Owens had been able to push the work through that it would have cost him at least 50 per cent. more than the prices agreed upon.

H. C. DERRICK.

The foregoing deposition was taken, subscribed, and sworn to before me by H. C. Derrick, the deponent, for the purpose mentioned in the caption, this 11*yh* day of September, 1884.

WM. A. ROGERS, *N. P.*

STATE OF VIRGINIA, *Halifax County*, } *To wit:*

I, E. H. Vaughn, clerk of the county court of Halifax county, in the State of Virginia, certify that Wm. H. Rogers, whose name is signed to the foregoing deposition as having been taken before him,

is now and was at the time of signing the same a notary public in and for said county, duly commissioned and qualified; that his signature there- is genuine and entitled to full faith and credit.

In testimony whereof I have hereunto set my hand and affixed the seal of said county, at the court-house, this 11th day of September, 1884.

E. H. VAUGHN, *Cl'k.*

Filed July 6th, 1885.
T. R. MAXWELL, *Cl'k.*

Commission to Take Deposition, Hernando, Miss.

State of Mississippi to Jno. C. Ferris, judge of the county court, Davidson county, Tennessee, Greeting:

Know ye that we, reposing especial confidence in your fidelity and circumspection in diligently examining James Eagan, witness in a suit now pending in our circuit court of De Soto county, wherein Jno. T. Owens — plaintiff and Memphis and Vicksburg R. R. Co. defendant, do empower you, at such time and place as you shall appoint, to call and cause to come before you the witness aforesaid and him diligently to examine on oath touching the premises to the interrogatories and cross-interrogatories hereto attached, and his examination, when made, you shall send into our said court without delay, under your hand and seal, returning also the writ.

Witness my hand and the seal of said court, at my office, in Hernando, the 4th day of August, A. D. 1885.

T. R. MAXWELL, *Clerk.*

The deposition to be sealed up, with the suit endorsed on the back of the envelop, and directed to the "clerk of the circuit court of De Soto county, Mississippi," at Hernando.

And then defendant introduced and read to the jury the deposition of James Eagan and exhibits thereto in words and figures as follows, to wit:

In the Circuit Court of De Soto County, State of Mississippi.

JOHN T. OWENS
vs.
MEMPHIS AND VICKSBURG R. R. Co.

Interrogatories to be propounded to JAMES EAGAN, a witness for defendant, who resides in Nashville, Tenn., viz:

1st. What is your name, your age, your residence, and your business?

2nd. Are you acquainted with the line of road that was built through De Soto county, Miss., in the year 1883, known as the Memphis and Vicksburg R. R., now as the Louisville, New Orleans and Texas railway? If so, state how you know said railroad;

whether you built any part of said road; and, if so, when and what part.

3rd. Are you acquainted with the plaintiff, Jno. T. Owens? If so, say whether you know anything of any work done by him or his employees in the building of said railroad during 1883,
29 where he worked, and all you know about it.

4th. Do you know where section 19 on said line of road as its sections were numbered during construction lay? If so, please describe the line of road on said section; whether earthwork or trestle, cut or fill excavation or embankment, etc.; and, if you know, say who built the line of road on said section 19. If built by more than one person, state the quantity and character of work done by each respectively, and if you can give a profile of the line on said section, please do so.

5th. Please describe as particularly as you can the character of the earthwork done and needed to be done on the south end, say for 1,500 feet length of said section 19; what part of said 1,500 feet length was excavated and what part was embankment; whether the earth moved from the excavation could be or was put into embankment or not; how much earth would have to be or was taken from barrow pits to put into embankment, the length of haul, the character of the soil, etc., and what it would cost during July, August, and September, 1883, to do that work; also say who did that work.

6th. Beginning at a point on said section 19, about 1,500 feet north of the south end thereof, is there not a trestle for about 1,600 feet length from there north? If so, state the length and height of said trestle and who built it and when.

7th. Beginning at a point on said section 19, about 3,100 feet north of the south end of said section, describe the earthwork from there to the north end of said section; say whether or not you did not build the same; if so, say when you began the work and when you finished it; what force of men, teams, and tools you had at work on it, the quantity of earth moved, whether excavation or embankment, and what quantity was taken from barrow pits, if any; what length of haul. State also what said work cost in August and September, 1883, or what it could be done for, and how you know the same.

8th. Did you about August, 1883, see plaintiff at work on any part of said section? If so, say with what force of men, teams, and tools; also say how long or within what time plaintiff — that force could have completed the northern 2,400 feet of said section.

9th. If there was, from the nature of the work to be done, character of soil, length of haul, or otherwise, any difference in the cost of doing said *said* work south of said trestle from that north of said trestle, please state fully what such difference was, the reason thereof, how you know it, etc.

10th. When was the work on said section finished? If different parts were finished at different times, give each as near as you can. Do you know when the track, I mean the rails and ties, were laid

on said section? If so, say when; whether the track-laying reached said section at or before the completion of the earthwork or no.

11th. Did plaintiff do any work on said line of railroad after said work on said section 19 was finished? If so, say when and where, and, if you know, say with what force of men, teams, and tools. Did not the plaintiff during August, 1883, move his entire force from the south end of 19 onto section- 22 and 23, some three miles — of 19, and work there some time thereafter?

WATSON AND CUMMINS, *Att'ys.*

Filed July 20, 1885.
T. R. MAXWELL, *Clerk.*

Cross-interrogatories for James Eagan by Plaintiff.

JNO. T. OWENS
vs.
MEMPHIS AND VICKSBURG R. R. Co.

1st If in answer to 8th direct question you give a time within which the work north of the trestle on section 19 could have been done, state also whether you know Owens could not have obtained a force sufficient to do the *the* work in a much shorter time if he had been required by the engineer to get a larger force.

2nd. If you did the work as soon as it was needed, state how you know that Owens could not have procured a sufficient force to do it as soon as you did.

3rd. Did not Donnelly and Co., of which you were a member, have a contract to do the work on sec. 19 for the railroad Co. at 20 cents per cubic yard? If so, annex herewith said contract or a copy of the same; give its date.

4th. Why did Donnelly and Co. not do the work under that contract?

5th. What did the work cost done under the new contract made when the work on section 19 was taken from Owens? Annex a copy of the contract under which you did the work.

6th. Did not this change of contract injure Burke, Foley and Company and put money in the pocket of Donnelly and Co., and why was this done?

7th. Are you a civil engineer; and, if so, where were you taught?

8th. Have you settled with the railroad company for your contracts with them for work on their line? If so, when did you settle?

9th. Have you any contracts with the L., N. O. and Texas R. R. Co.? If so, on what part of its line?

10th. State anything you may know to benefit of plaintiff.

Filed July 20th, 1885.
T. R. MAXWELL.

31 STATE OF TENNESSEE, }
County of Davidson. }

Be it remembered that on this — day of August, A. D. 1885, by virtue and — pursuance of a commission to *be* directed from the circuit court of De Soto county, Miss., to take the deposition of James Eagan, of the city of Nashville and the State of Tennessee aforesaid, a witness for defendant in a certain suit in said court pending wherein John T. Owens is plaintiff and The Memphis and Vicksburg R. R. Co. is defendant, on the interrogatories and cross-interrogatories attached hereto and accompanying said commission, I caused the said JAMES EAGAN, a person of sound mind and of about forty years of age, to come before me at my office, in Nashville, State of Tenn.; and said Eagan, being by me first duly cautioned and sworn to speak the truth and nothing but the truth in answer to said interrogatories and cross-interrogatories, did depose and say as follows:

1st. My name is James Eagan. I am 44 years of age; reside in Nashville, Tenn., and my business that of railroad contractor and builder.

2nd. Yes; I know a part of said road, that part of it next to Memphis, say for twenty-five miles south of Memphis. The firm of Donnelly and Co., of which I was a member, built the first eight miles from Memphis south, a portion of section 19 and 23, in De Soto county, Mississippi, and then about ten miles south of Clarksdale. I was not on this last ten miles south of Clarksdale, but had personal supervision and control of the other, including all of section 19, north of the trestle over the bayou. I was on this work and built the railroad bed, embankment, and cut them with the men and teams employed by Donnelly and Co.

3rd. Yes; I know the plaintiff; met him first on said railroad when he was at work on the south end of section 19, the part south of the trestle over the bayou. I first met him then about the 10th of August, 1883. He had been at work on that part of section 19, south of the trestle, and continued there during August, 1883.

32 About the 10th of August, 1883, I moved my forces on to the part of section 19 north of the trestle, and he finished his work on the south end about the same time that I finished mine on the north end, say about the 10th of September, 1883, and we moved our camps and equipments pretty much together to section 22 and 23, south of there.

4th. Yes, I know said road and its sections as numbered during its construction. I know where section 19 was, having spent near a month on its building, the greater part of it; I mean of the earthwork on it. Commencing at the north end of that section, there is a short cut, then a long and high fill or embankment, this part I built; then there comes a trestle about 1,000 feet long, built by J. C. Neely and Co., and at its south end is a short fill or embankment about 500 feet long, and next south of that is a deep cut (say 10 feet, which is deep for the country) of about 500 feet, then shading down to allow cut of 2 or 3 feet out of south end of section.

This work at this south end was done by plaintiff. The cut at the north end is only about 4 feet deep at deepest point, and is less than 150 feet long, will not average 2 feet that distance, and then comes the embankment of about 1,350 feet, over ten feet high most of its length. The earth for this long embankment had to be borrowed and hauled about 1,000 feet, being built through a heavy buckshot soil, forcing us to haul from dryer part next the high ground at north end. The earth for the fill south of the trestle built by the plaintiff was mostly taken from the cut just south of it, when the soil was light, being a sandy loam. There instead of wasting the dirt taken from the cut, it was hauled and put in the fill, so that the builder got double pay for moving the dirt over for excavating the cut and again for putting in embankment, while on my end we had no dirt to amount to anything from the cut, and so had to borrow nine-tenths of that needed for our bank, and because of the swamp had to haul an unusual long distance. I append hereto as Exhibit A profile of said section showing this work and how it lay.

5th. Commencing where the trestle ends, there is about 400 or 500 feet length of enbankment, and from there running south, then next comes about 500 feet of deep cut, and from there to south end of section small cut not amounting to anything.

33 The entire earth taken from the deep cut could be and was mostly put into the embankment next the trestle. I think there was about 2,600 yards of this excavation or cut, all a light dry earth, what is called a sandy loam, and there is about 4,400 yards of the embankment, and estimating the 2,600 yards of excavation as put in the embankment, and I think it all went there, would leave only 1,800 yards to be borrowed, and this could be mostly borrowed from the sides of the cut, all light and dry. So far as I saw, this work was done by the plaintiff, though, perhaps, Burke, Foley and McMahon did some of it before we went there. I am satisfied that this work on the south end of the trestle could — been done at that time at about 15 cents a cubic yard. I mean that I could have done it for that with my equipment.

6th. Yes; there is such a trestle there about 1,600 feet long and about 12 or 15 feet high. It was built by J. C. Neely and Co., successors to McCalen, Gates and Co. They built it during summer — 1883, finishing it just as I left there.

7th. This north end of said section, about 1,500 feet length, is almost entirely embankment, as shown on the profile herewith exhibited. There is a short and shallow cut at the north end of the section, not averaging 2 feet depth for 150 feet, and then from there to the trestle is about 1,350 feet long by 10 feet high enbankment. I built all this, our forces being employed by the R. R. Co. therefore. I began work then about August the 10th and finished about 10th September, 1883, having about 75 men and about 200 *whell* scrapers and about 12 long scrapes, each drawn by two mules and driven by a man, these drivers being extra of the 75 men mentioned, and two double and one single plow team. The quantity of earth moved by me was about 12,000 cubic yards, almost entirely enbaukment and

more than nine-tenths borrowed. By the word borrowed I mean taken from outside the road-bed and hauled onto and put into the road-bed. The average of the haul of earth for this bank was more than 1,000 feet, the south end of this bank requiring more than the north end, being higher and wider. He would not take this work from Col. Derrick at less than forty cents per cubic yard, and he was not willing to pay us that price, and we then agreed to do it
34 for him at cost and ten per cent. added for our attention, use of tools, and etc.—that is, he paid us what we paid our laborers, hired our teams at $4.00 per day, and when done paid us that and ten per cent. more for our attention, use of tools, and etc. I do not remember exactly what it amounted to on this section. He kept a man there to keep the time worked by every man, team, etc., and I think it must have cost about 32 and a half cents a cubic yard. I was on the work all the time and did it as cheaply as it could have been done. I have been doing such work for the past 20 years and have just taken a contract with the city of Nashville for earthwork costing $55,000.00 under a large number of bidders.

8th. Yes; I saw him there several times that month. He had about 14 men with shovels and barrows; some of them were weakly fellows, such as required two men to roll a barrel. They were mostly "convicts." I don't think he could have done the 1,500 feet length of section 19 north of the trestle, which, as I have said, I built with that force inside of a year. He could not have done it with that force. It was necessary to employ teams and buggy scrapers to make that long haul.

9th. I have pretty much answered this above. The difference of the earthwork north of the trestle and that south of it lay in this: Most of the embankment on the south was built of earth that had to be moved out of the adjacent cut, so that earth moved to make excavation also went into embankment, and what was needed further to finish the embankment could almost entirely be taken from the side of the cut of a dry soil in a short haul, while on the south end there was almost no excavation—comparatively speaking, none—and the earth for the long and high fill had to be borrowed from the dryer portions of the swamp and hauled more than double as far as the farthest haul on the south end. This extra haul cost double. I know this because work of this kind is my daily business and has been for 20 years, and have done similar work a hundred times in many different places.

10th. It was all finished about the 10th of September, 1883, and the track rails were laid over this section immediately thereafter. The track-layers were almost on us before we finished our work, and it was the pressure to get this earthwork done ready for
35 the track that induced our employment there. We barely got it done in time, then moved some three or four miles further south, the plaintiff also moving his force off the south end of section 19 at same time to other work on sections 22 and 23.

11th. Yes; *or* I stated above, he moved south about with me, and continued some forces at work south of 19.

Answers to Cross-questions.

1st. I do not know what force plaintiff could have obtained nor in what time. I do — know what he was able to do in that respect. I only mean to say that with the equipment he had on section 19 during August and September, 1883, he could not have done the earthwork on north of the trestle inside of a year.

2nd. I know it, because with my larger and more effective force and equipment I could do it far quicker than was possible with his smaller and weaker force and want of proper equipment. As stated above, if plaintiff had had sufficient force and proper equipment he might have done it as quick as I did. I suppose the difference lay in my having what he did not have.

3rd. We did have such a contract, but I have it not and am unable to give a copy of it. Defendant, I think, has it. I think it is dated in fall of 1883, and embraced, I think, 50 miles of road, commencing at Memphis and running south, including said section 19. We could have done it at a profit, because while this part at north end of section 19 and several other like plans would have cost us more than 20 cents per cubic yard, yet so much of the 50 miles would have cost less than that, that on the whole we could have a profit. It is free for a contractor to get the cream as plaintiff did, and have the company take the load off his hands as when getting *by* firm to the hard part.

4th. As we cancelled that contract before any work was done on it, and my firm made a new contract at the same prices for the eight miles next to Memphis, and R. R. Co. let the 50 miles next south of that to Burke, Foley and McMahon at, I think, the same
36 price *same price.*

5th. Such as we did under the new contract, mentioned in last answer above, we got 20 cents for according to that contract. The work we did on section 19 north of the trestle we did not do under any written contract. Col. Derrick employed us, paying us actual cost that we were out for labor, hiring our two mule-team scrapers and drivers at $4.00 per day, and paying us ten per cent. profit for our attention and etc.

6th. Yes; I suppose Burke, Foley and McMahon lost money by this, because full contracts were paid plaintiff for doing the easy part, on which there was a handsome profit, while the harder and more costly part was done by my firm at actual cost. In that way Burke, Foley and McMahon lost the profits which the plaintiff made. I suppose it was done under the us-al clause in all contracts as to railroad work, empowering the company's engineers, in case the contractor fails to press forward the work with reasonable dispatch, to put a force at it and complete it at contractor's cost. I think such a clause is in all the contracts I ever saw.

7th. No; I am not.

8th. We have settled for some of our work. Other items are unsettled, and a suit is pending at Memphis to settle the issue between us.

9th. No; none.

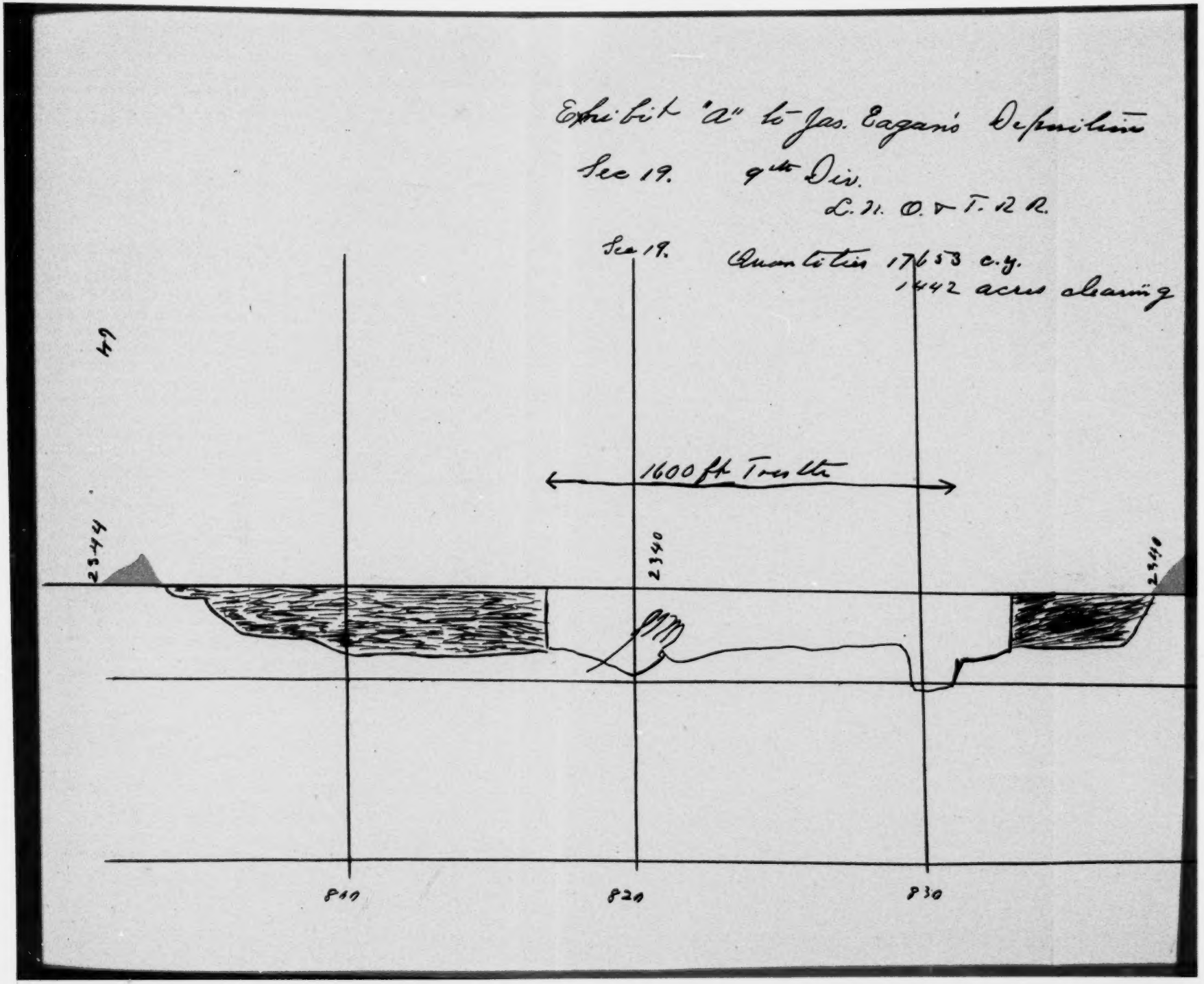
Exhibit "A" to Jas. Eagan's Deposition
Sec 19. 9th Div.
L. N. O. & T. R R.
Sec 19. Quantities 17653 c.y.
1442 acres clearing
49
1600 ft Tracks
2344
2340
2340
810
820
830

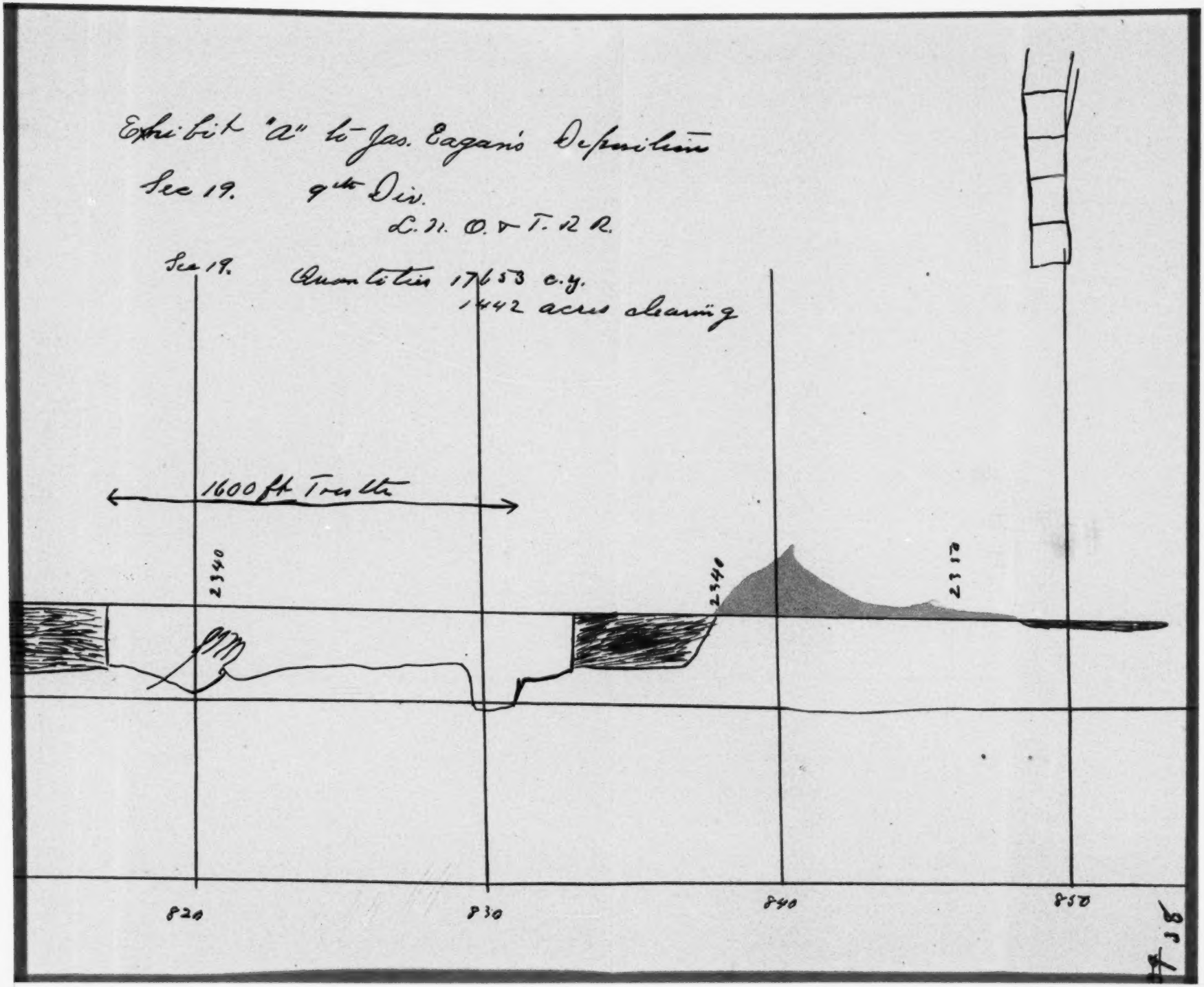
Exhibit "A" to Jas. Eagan's Deposition
Sec 19. 9th Div.
L. N. O. & T. R R.
Sec 19.
Quantities 17653 c.y.
1442 acres clearing
1600 ft Trestle
2340
2340
2312
820
830
840
850

10th. I know nothing to his benefit, except that the R. R. Co. did him a great favor when it employed us to do that work on the north end of section 19, on which he claims a contract to do it at 20 cents, for that saved him from one to two thousand dollars, which he would have lost in doing under his contract.

JAMES EAGAN.

Sworn to and subscribed before me August the 20th, 1885.

J. R. McCANN,
Dep'ty Cleark Co. Court.

37 STATE OF TENNESSEE, }
County of Davidson. }

I, John C. Ferris, specially appointed a commissioner in the cause styled in the caption of the foregoing deposition to the deposition of James Eagan, a witness for the defendant in said cause, do hereby certify that I caused said James Eagan to come before me at Nashville, in the said State, and he, *by* being by me duly cautioned, sworn, and examined to speak the truth, the whole truth, and nothing but the truth in answer to said interrogatories and cross-interrogatories, did give the foregoing deposition; that the answer of said Eagan were reduced to writing by me in the presence of said witness and were carefully read to and thoroughly understood by said witness as his deposition in said cause; that he signed the same *on* his deposition in my presence; that the questions propounded to said witness and to which he has answered are the direct and cross interrogatories accompanying said commission; that said deposition has in no manner been changed *are* altered since the same was subscribed by said witness, but the same has remained in my possession up to the time of sealing and delivering the same to the post-office, directed to the cleark of said court; and I do further certify that I am the person named in said commission, am the judge of the county court of said county of Davidson, and by the laws of Tenn. am authorized to administer oath.

In witness whereof I have hereto set my hand and affixed my seal this 20th day of August, 1885.

JOHN C. FERRIS,
County Judge.

Filed August 22nd, 1885.

T. R. MAXWELL, *Cleark.*

(After this comes plat marked p. 38.)

39 Defendant then read to the jury the deposition of ARTHUR DONNELLY in words and figures as follows, to wit:

In the Circuit Court of De Soto County, Miss.

JNO. T. OWENS
vs.
M. & V. R. R. Co.

Interrogatories to be Propounded to Donnelly, Witness for Defendant.

1st. What is your name, age, residence, and business?

2nd. What connection have you had, if any, with the construction of the line of railroad from Memphis to Vicksburg, and for what time were you so therewith connected, and, if you know, say who had charge of said work, particularly section 19—under what engineer, etc., etc., etc.?

3rd. State what authority said engineers had to make contracts for constructing said road.

4th. Examine the paper herewith filed as Exhibit "A" and say whether said J. A. Moore or any other person had authority to make such a contract for defendant.

5th. What officers of defendants, if any, were authorized to make such a contract or other contracts for construction?

6th. State all you know of the plaintiff having done work on said section 19; within what time, if any, he was to complete such work; what the completion of that he left unfinished cost the defendant; whether his contract was declared forfeited or not, and for what cause it was so done.

7th. Have you had any conversation or correspondence with the plaintiff about the claim he has made and is now sueing for, or about his doing said work on said section? If so, relate all that he said, giving time and place and in whose presence, & any letters from him about same.

40 8th. What monies, if any, and when, were paid the plaintiff on the work that he did on said section, and was any receipt taken therefor? And, if so, please attach the same hereto and make it and exhibit to your deposition.

9th. If you can, please exhibit profile of said section at the time the plaintiff began work thereon, and again when he ceased work thereon, and give a detailed statement of what work he did and what payments were made him therefor; then also state what force of men he had on the work when same was taken from him, whether plaintiff was doing said work as rapidly as required by defendant, why taken from him, to whom let for completion, at what price, and how much was paid in all to such other party for so completing same, within what time such other party completed the work, and how much was done by such other party, etc.

10th. What, if any, requirement do you know was made of the plaintiff as to completing the work on said section by any given time? State all that you know on that subject, and also say

whether such requirement or notice thereof was given the plaintiff at or before he began said work.

11th. Who completed the work left unfinished by Owens on section 19?

12th. What did it cost to complete said work? Give detailed statement of cost of clearing, also cost per yard for excavation, and also for embankments.

13th. Give the character of work required to be done on section 19, what part of the work Owens did, and how the work done by him compared with the work which remained to be done. Which cost the most, that done by him or that he neglected to do?

14th. How much would the profits to a contractor have been on that part of section 19 which Owens did not complete, under a contract identical with a copy of what purports to be a contract between Jno. T. Owens and the Memphis and Vicksburg R. R. Co., by J. A. Moore, engineer, filed as Exhibit "A" hereto, supposing the work to have been done by the party having contract as economically and with as little cost to the contractor as possible?

41 15th. Who had the contract with the Memphis and Vicksburg R. R. Co. to do the work on section 19 of said road? File a copy of said contract as Exhibit "B" to your deposition, if in your possession.

16th. How was it that the party having said contract failed to do the work thereon?

17th. How and by whom was the money paid for the completion of said work on section 19?

EXHIBIT "A."

Copy of Contract Sued On.

Articles of agreement between Jno. T. Owens and the Memphis and Vicksburg R. R. Co.

I Jno. T. Owens of the first part do hereby agree to do all grading and clearing on what is known as section 19, according to instructions given by engineer in charge. M. & V. R. R. of the second part agree to pay 20 cents per yard for all excavations and 20 cents per yard for all embankments and to pay $35.00 per acree for all clearing.

Time of Payment.

Ninety per cent. of total estimate given at the end of each month by the engineer in charge to be paid on the 12th of the following month and at the completion of contract the remaining ten per cent. shall be paid in full.

(Signed) JNO. T. OWENS.
MEMPHIS AND VICKSBURG RAILROAD.

July 26th, 1883.

Rec'd by J. A. Moore, resident eng'r.
6—244

We waive formality and agree for this deposition to be taken without commission before any officer empowered to take depositions.

WHITE AND MORGAN, *For Pl'f.*

Answer by Arthur Donnelly to Questions Propounded by Defendant.

Ans. 1st. My name is Arthur Donnelly. I am twenty-three years old. I live in Memphis, Tenn., U. S. A. I have been engaged in railroad construction.

Ans. 2nd. I have been engaged on the Memphis and Vicksburg railroad since the 1st of January, 1883. I was then connected
42 with Donnelly and Co., railroad contractors, from the date above mentioned until the present time or at least until I left Memphis, Tenn., which was on the 1st of July (1885), eighteen hundred and eighty-five. J. M. Edwards, vice-president and gen'l manager, had charge of the entire line of railroad between Memphis and New Orleans. Col. Derrick was his assistant for the first fifty miles south of Memphis. He was Mr. Edwards' assistant for that part of the road and was in direct charge, subject to Major Edwards' instruction. This fifty miles included section 19.

Ans. 3rd. I believe Col. Derrick and Major Edwards were the only men who could make a contract for the construction of said railroad, because they were the only men Donnelly and Co. made contracts with for the construction of their part of the railroad.

Ans. 4th. I do not know that J. A. Moore had any authority to make a contract for the railroad company such as the within Exhibit "A." I only knew that Major Edwards had that authority or Col. Derrick by his instruction.

Ans. 5th. Major Edwards was the only man that I was aware of who had authority to sign contracts for the railroad company for the construction of their road.

Ans. 6th. All that I know of plaintiff is that I saw him at work on section 19 in the month of August, 1883. I do not — what time he was required to complete his work in, or what his contract with the railroad Co. was, or whether any or not. The costs of what the defendants did on the remaining portion of section 19, I should say, must have cost about 40 cts. per cubic yard.

Ans. 7th. I do not remember having any conversation with Mr. Owens in regard to the claim he has made or is suing for.

Ans. 8th. I do not know of any monies being paid Mr. Owens or any receipts being taken.

Ans. 9th. I cannot exhibit a profile of section 19 when
43 Mr. Owens began work thereon, for I did not see it at that time, and I do not know how much work he did or how much money was paid him for said work. When I saw him, which was about the 21st of August, 1883, he had about 20 men on the section 19 and I was over the work several times after that and I never saw more men on the work. I do not think that Mr. Owens was building at as rapid a speed as required by the rail-

road company. I suppose it was taken from him because he was not pushing the work rapidly enough. It was not let to any one for completion. The railroad company put a hired force on the work and finished it themselves. The railroad company's force completed the work in about four weeks after they took hold of it. I do not know the exact amount done by the railroads company's force.

Ans. 10th. I do not know what requirements was made of Mr. Owens or what requirements he was obligated to.

Ans. 11th. Donnelly and Co.'s forces completed section 19.

Ans. 12th. I cannot give detailed statement of the cost of completing section 19, but I give as near as I can remember. The cost per cubic yard, according to my calculations and Mr. James Eagan's, who was also on the ground and superintending the work, was about 40 cts. per cubic yard for embankment, and I should say about 25 cts. for excavation, about $70.00 per acre for clearing.

Ans. 13th. The character of the work required to be done on section 19 was embankment principally, when the forces of Donnelly and Co. was put on it, and *and* was situated so that it was very difficult for to get the dirt, being most part in soft, swampy place- and amongst heavy timbers, which neces-itated an extra force to be *keep* on in order to clear for the getting of the dirt. The work done by Owens was of a soft, sandy nature and was dry and without heavy timbers, consequently it could be done for, I should say, one-third the price of that done by the railroad company's forces.

Ans. 14th. The profits of a contractor on that portion of section 19 not done by Owens under contract, such as Exhibit "A," I should say would be a "loss."

44 Ans. 15th. I understood Burke, Foley and McMahon had a contract for section 19, but I have no personal knowledge of it or no copy of a contract.

Ans. 16th. I do not know.

Ans. 17th. The money was paid Donnelly and Co. according to the pay-roll kept by the railroad company's timekeeper, named Mr. Divine, for the completion of section 19 after Mr. Owens quit or was suspended.

Ans. to Interrogatories by Plaintiff.

Ans. 1st. I am in no person's employ at present; I have never been in the employ of the defendant.

Ans. 2nd. The way I know Col. Derrick h-d authority to sign contracts I have seen him do so, and the same was reco-nized by Major Edwards as being all right.

Ans. 3rd. I do not know what authority was given J. A. Moore.

Ans. 4th. I do not know whether Mr. Owens went to work under the contract as Exhibit "A" or not.

Ans. 5th. I think J. A. Moore was resident engineer on section 19 at the time of this contract as Exhibit "A" was made, and perhaps continued for about two or three weeks after. Said J. A.

Moore, I believe, is now at Knoxville, Tenn., and, I think, has been there since September, 1883.

Ans. 6th. I do not know of any estimates being made for or given Mr. Owens by the resident engineer or being paid for by the company's agents.

Ans. 7th. I do not remember any conversation regarding the work between Mr. Owens and myself.

Ans. 8th. I cannot state that I know of any claim being made on Mr. Owens by any one.

45 Ans. 9th. I do not know that it was taken from him without notice.

Ans. 10th. I do not know that J. A. Moore ever stated that Owens was a good, reliable contractor or was getting along well. I did not consider him reliable or getting along well.

Ans. 11th. I do not -no- of any demand or requirement being made.

Ans. 12th. I state the character of work done by Owens because I saw it; I do not know how J. A. Moore characterized that portion of the work done by Owens, for I never asked him about it.

Ans. 13th. I do not know whether Owens neglected or refused to comply with the engineer's instructions or not.

Ans. 14th. My opinion in answer to the 14 direct interrogatory is founded upon practical experience.

Ans. 15th. I do not know what Owens' labor cost him.

Ans. 16th. I could not tell exactly how long it was from the time the work was taken from Owens until the steel was laid down.

ARTHUR DONNELLY.

UNITED STATES CONSULATE AT BELFAST, IRELAND.

The foregoing answers to interrogatories and cross-interrogatories were subscribed and sworn before me, Arthur B. Wood, United States consul at Belfast, Ireland, by Arthur Donnelly on this 30th day of July, 1885.

In witness whereof I have hereunto set my hand and the seal of the consulate the day and year just above written.

ARTHUR B. WOOD,
United States Consul at Belfast, Ireland.

Filed September 21st, 1885.

T. R. MAXWELL, *Cleark.*

46 Defendant then introduced the deposition of THOMAS FOLEY and exhibits thereto in words and figures as follows, to wit:

In the Circuit Court of De Soto County, Mississippi.

JNO. T. OWENS
vs.
M. & V. R. R. Co.

Interrogatories to be Propounded to Foley, Witness for Defendant.

1. What is your name, age, residence, and business?

2. What connection have you had, if any, with the construction of the line of railroad from Memphis to Vicksburg, and for what time were you so therewith connected, and, if you know, say who had charge of said work, particularly section 19—under what engineers and etc.?

3. State what authority said engineers had to make contracts for constructing said road.

4. Examine the paper herewith filed as Exhibit "A" and say whether said J. A. Moore or any other person had authority to make such a contract for the defendant.

5. What officers of defendant, if any, were authorized to make such a contract or other contracts for construction?

6. State all you know of plaintiff having done work on said section 19; within what time, if any, he was to complete such work; what the completion of that he left unfinished cost the defendant; whether his contract was declared forfeited or not, and for what cause it was so done.

7. Have you had any conversation or correspondence with the plaintiff about the claim he has made and is now sueing for, *are* about his doing said work on said section? If so, relate all that he said, giving time and place, and in whose presence, and any letters from him about same.

47 8. What monies, if any, and when, were paid the plaintiff on the work he did on said section, and was any receipt taken therefor? And, if so, please attach the same hereto and make it an exhibit to your deposition.

9. If you can, please exhibit a profile of said section at the time the plaintiff began work thereon, and again when he ceased work thereon, and give a detailed statement of what he did, and what payments were made him therefor. Then also state what force of men he had on the work when same was taken from him; whether plaintiff was building said work as rapidly as required by defendant; why taken from him; to whom let for completion; at what price, and how much was paid in all to such other party for so completing same; within what time such other party completed the work, and how much was done by such other party, etc.

10. What, if any, requirement do you know was made of the plaintiff as to completing the work on said section by any given

time? State all that you know on that subject, and also say whether such requirement or notice thereof was given the plaintiff at or before he began said work.

11. Who completed the work left unfinished by Owens on section 19?

12. What did it cost to complete said work? Give detailed statement of cost of clearing; also cost per yard for excavations, and also for embankments.

13. Give the character of work required to be done on section 19, what part of the work Owens did, and how the work done by him compared with the work that remained to be done. Which cost the most, that done by him or that which he neglected to do?

14. How much would the profits to a contractor have been on that part of section 19 which Owens did not complete under a contract identical with a copy of what purports to be a contract between Jno. T. Owens and Memphis and Vicksburg R. R. Co., by J. A. Moore, engineer, filed *and* Exhibit "A" hereto, supposing said work to have been done by the party having the contract as economically and with as little cost to the contractor as possible?

48 15. Who had the contract with the Memphis and Vicksburg R. R. Co. to do the work on section 19 of said road? File a copy of said contract as Exhibit "B" to your deposition, if in your possession.

16. How was it that the parties having said contract failed to do the work thereon?

17. How and by whom was the money paid for completion of said work on section 19?

Cross-interrogatories for Foley, a Witness Examined for Defendant.

1st. In whose employ are you at this time?

2nd. Do you know what particular instructions were given J. A. Moore in making contracts? If you say you know, state who gave them, and where were they given at; if in writing or not. If they were verbal, who was present when they were given?

3rd. Did not Owens go to work under contract which is filed as Exhibit "A"?

4th. Was not J. A. Moore the resident engineer in charge of the work on section 19 at the date when this contract was made, and did he not continue on said section for some time, and was he not there when said work or part of it was taken from Owens, the plaintiff?

5th. Were not estimates for work on section 19 given to Owens by the engineer of the defendant for work done under above contract, and were not these estimates paid to him by the company's agents?

6th. If you state any conversation with plaintiff took place between you, state when it was, where it was, and who was present. Be explicit.

7th. Can you, or do you, state of your own knowledge that any demand was made on plaintiff at any time to increase his force on

section 19? If so, who made it? Where was it made, and
49 when, and who was present?

8th. Do you not know that the portion of section 19 taken from Owens was taken away without any demand whatever for increased force being made on him?

9th. Do you not know that J. A. Moore, the resident engineer at the time when the work was taken away, stated publicly that Owens had been very badly treated by the defendant?

10. Do you not know that Owens was considered by J. A. Moore a good and reliable contractor, and that he stated publicly and to Owens that he was getting along better than any contractor had on his part of the line?

11. If in answer to 10, the direct question, you state that you know of any requirement made by plaintiff about this work, state who gave it. Was it in writing or verbal? If it was not given by Moore, state why it was given by another.

12. If you state the character of work done by Owens, state whether you do not know that this work was characterized by J. A. Moore, the company's engineer, as good and fully up to the contract.

13. If you state in answer to the 13 direct that Owens neglected to do any work, state when it was, particularly so as to locate it, and who reported the neglect. Was it done by Moore, the engineer in charge, and was it in writing?

14. If you state anything in answer to 14 direct question about supposed profits of contractor under the contract of Owens with defendant's engineer, Moore, state all the data on which your opinion is founded.

15. Do you know what the labor employed by Owens costs him; if so, how do you know?

15½. How long was it after the taking of part of section 19 from Owens before the cross-ties and steel was laid on it?

WHITE AND MORGAN,
For Plaintiff.

50 16. Where is J. A. Moore, the engineer, now, and where has he been employed during the last year?

WHITE AND MORGAN.

EXHIBIT "A."

Copy of Contract Sued On.

Articles of agreements between Jno. T. Owens and M. & V. R. R.

I Jno. T. Owens of the first part do hereby agree to do all the grading and clearing on what is known as section 19, according to instructions given by engineer in charge. M & V. R. R. of the second part agree to pay 20 cts. per yard for all excavations and 20 cts. per yard for all embankments and to pay $35.00 per acre for all clearing.

Time of Payment.

Ninety per cent. of total estimate given at the end of each month by the engineer in charge to be paid on the 12th of the following month and at the completion of contract the remaining ten per cent. shall be paid in full.

(Signed) JNO. T. OWENS.
MEMPHIS AND VICKSBURG RAILROAD.

July 26th, 1883.

Rec'd by J. A. Moore, resident engineer.

We waive formalities and agree for deposition to be taken without commissioners — any officers qualified by law for the duty.

WHITE AND MORGAN, *For Pl'ff.*

1. My name is Thomas Foley; age, 58 years; residence, Memphis, Tenn., and my business is contractor and railroad-builder.

2. I was connected with the work of construction — a portion of said railroad. Burke, Foley and McMahon had the contract for doing the earthwork and clearing of fifty miles of its line, including section 19. We were at work there during the first 8 months of the year 1883. H. C. Derrick, at Memphis, was division engineer. J. A. Moore was the resident engineer in charge of section 19 for a part of the time.

3. I do not know that said engineer had authority for making such contracts. Our contract was made with Mr. Edwards, vice-president. My opinion is that the engineers had no authority to make contracts. That was my understanding.

4. I know nothing whatever of Moore's authority to make such contracts.

5. No one, so far as I know, excepting Mr. Edwards, vice-president.

51 6. I know nothing of plaintiff Owens doing any work on said section except that I saw some convicts at work there one day and was told that they were Owens' convicts. I know nothing of his contract, nor when he was to complete his work, nor what it cost the road to finish it, nor whether his contract was forfeited or not.

7. I have had no such conversation or correspondence.

8. I know nothing as to such matters.

9. I have none of the papers asked for in this question, and cannot make any answer to either of its paragraphs.

10. I know nothing whatever of the said injury in this interrogatory.

11. I do not know.

12. I cannot tell.

13. I cannot make any answer to this question.

14. My firm sublet this section 19 to Dugan and Conway at 18 cts. per yard, but they abandoned the work and left it unfinished. Had they remained and finished it according to contract, our profits

would have been 2 cts. per yard. Whether Dugan and Conway would have made anything or not I cannot say, and more than this, I cannot give any estimates upon the profits of working said section.

15. I will examine my papers this afternoon. I think I have said contract; if I can find it, I will file it herewith.

16. Dugan and Conway, through neglect, abandoned it; they claim to me that they were not making money.

17. I do not know.

X 1. I am doing business on my own account in Memphis. I am not in the employ of the defendant or any other railroad company.

X 2. I know — at all about instructions to said Moore.

X 3. Saw none that I know of.

X 4. He was on section 19 during that part of the year 1883; whether he had charge of it on 26th July or whether it was then in charge of Mr. Webb as engineer I cannot say.

X 5. I do not know.

X 6. I had no such conversation.

52 X 7. I do not know anything of such demand.

X 8. I know nothing of such matter.

X 9. I do not.

X 10. I do not.

X 11. I know nothing at all about this matter.

X 12. I know nothing at all of this matter.

X 13. I know nothing at all of this matter.

X 14. I have given all my data in my answer.

X 15. I do not know.

X 16. I do not know when it was taken from Owens.

X 17. I hear that he is — east Tenn.

The foregoing are my answers to direct and cross interrogatories in suit of J. T. Owens *vs.* M. & V. R. R. Co., in circuit court of De Soto Co., Miss., hereto attached.

THOMAS FOLEY.

Sworn to and subscribed before me 17th M'ch, 1885.

HUNSDON CARY,
Commissioner State of Miss. in Tennessee.

STATE OF TENNESSEE, }
County of Shelby. }

I, Hunsdon Cary, a commissioner for the State of Miss., at Memphis, in said county and State, do hereby certify that the foregoing deposition of Thomas Foley, together with the contract hereto attached, which is the paper referred to in his answer — 15 direct interrogatory, were this day produced to me by the witness Thos. Foley, who thereupon signed said deposition in my presence and swore to the same before me as his deposition in this cause.

Witness my hand and seal this 17th day of March, 1885.

HUNSDON CARY,
Com'r for Miss. in Tenn.

These articles of agreement made and concluded this 18th day of December in the year of our Lord one thousand eight hundred and eighty-two, and between C. C. Burke & Thomas Foley and Michel McMahon under firm name of Burke, Foley and McMahon of the first part and the New Orleans Baton Rouge Vicksburg and
53 Memphis R. R. Co. of the second part, witnesseth: That for and in consideration of the payments and *conveyants* hereinafter mentioned to be made and performed by the said railroad company the said parties of the first part do hereby covenant and agree to construct and finish, in the most substantial and workmanlike manner, to the satisfaction and acceptance of the engineer in charge of the same, all the graduation as included in specifications under said general head as below given on fifty miles of said railroad commencing at section 16 south of Memphis, and embracing fifty miles next south and such other work as may be necessary to complete said graduation in accordance with the following specifications, so far as they may be applicable; and agreeably to the directions of said engineer in charge of said work, given from time to time during the progress thereof and to complete the same in or before the 1st day of July 1883 it being expressly agreed that the time herein stipulated shall be of the — of this contract.

Specifications.

Under this general heading will include clearing and grubbing, excavations and embankments, required for formation of rock-bed, turnouts, and depot grounds, foundations for masonry and trestle-work, or in any way connected with or incident to the construction or drainage of the same, or the change or crossing of roads or streams.

I. Clearing and grubbing.—Grubbing will be required the entire width of the road-bed in all excavations and embankments which are two feet or less in depth; also, in all slopes when the safety of the road requires it.

The clearing shall be made on the entire length of the road wherever required, and shall not be less than one hundred (100) feet in width on the regular road-bed and as much more as in the opinion of the engineer will be required for the safety or convenience of the road. The ground on which the embankments and excavations are made shall be cleared of all vegetable and perishable matter. All stumps must be cut close to the surface and none left within two feet of the grade in embankments, fences buildings timber and wood on the property of the railway or the land-owner. If not removed by the owner within a reasonable time they shall be cleared off by the contractor, piled up, and preserved for the use of the owner or railway, without charge. The clearing and grubbing shall be paid for per acree on the area actually covered by timber.
54 II. Width of roadway.—The road will be graded eighteen (18) feet wide in excavation, and fourteen (14) feet wide in embankment, except when otherwise ordered by the engineer in charge.

III. Slope.—The slopes of excavation shall be generally three-fourths horizontal to one vertical, and of embankments one and one-half horizontal to one vertical. These are, however, subject to such modifications as the engineer may direct. All slopes shall be made true and even.

IV. Ditching.—Whenever required by the engineer, ditches shall be cut beyond the slope of both excavation and embankment, of such location and dimension as he may direct.

V. Excavations.—Excavation shall include all material taken from cuts ditches channels for creeks, road crossings not under water. The classification of excavation shall be as follows:

Earth.—Earth will include clay, sand, gravel, loam, hard pan, decomposed rock and slate, stones and boulders containing less than one cubic foot, and all other material of an earthy kind.

Loose rock.—Loose rock will include all stone and detached rock, found in separate masses, containing not less than one cubic foot, nor more than one cubic yard; also, all slate *are* other rock, soft or loose enough to be removed without blasting, although blasting may be resorted to.

Solid rock.—Solid rock will include all rock in masses of over one cubic yard, which cannot be removed without blasting.

VI. Embankments.—The embankments to be formed fourteen (14) feet wide on top, unless otherwise directed, with slopes one and one-half horizontal to one vertical. Whenever the embankment is formed from borrow pits, or ditching on either side, such borrow pits and ditching and the crest of the slopes thereof shall in no case approach within six (6) feet nor within double the depth of the ditch of the foot of the proper embankment slopes. Whenever water-courses or new channel for rivers require to be formed they shall be put at such distance from the foot of the slope as the engineer may direct. Care must be taken to exclude all perishable material from embankments. Embankments shall be built according to instructions from the engineer, either by
55 dumping from grade, or in layers of such thickness as he may require. Such additional height above grade usually one-tenth of the amount of the fill shall be given to the embankments as the engineer may deem necessary to compensate for shrinkage. Embankments about masonry shall be built at such time *as* in such manner and of such material as the engineer may direct. Embankments shall be riprapped with stone, or otherwise protected against damage by water-courses, by turning the stream or making a new channel if required.

VIII. Trestle-work.—Trestle-work will be built of good sound yellow pine or cypress as directed by the engineer, and to be either piled or framed as per plan and specifications furnished by him. Trestle-work will be paid for per lineal foot, and the price paid will include all bolts, washers, spikes *are* other material necessary to complete it as per plan furnished.

General conditions applicable to all work.

The railroad company reserves the right to make any change in the alignment or grades of its road or of the plans of its work; provided however that the contractor shall be paid at the contract price for the work actually done before changing, and also, for the additional work embraced in the change. The monthly estimate of the engineer shall be subject to correction by him — any subsequent or monthly or final estimate. The monthly estimate *estimate* merely being made out as a basis of payment on account, it will necessar-y be only approximately correct as to quantity and value, pains being taken however to make them as accurate as possible.

The contractor shall render and account monthly, through the proper super-tending engineer, of any work he *he* may have been authorized to do; and to prevent disputes hereafter, it is hereby understood, that no bills for extra work will be allowed without sufficient evidence of the work having been properly authorized, and of the bills having been examined and approved by the engineer. All materials used in the construction of the road will be subject to the inspection and acceptance of the engineer, who will submit them to such tests as he may desire.

Commodious passing places for public and private roads shall be made and kept in good condition by the contractor;
56 and he shall provide and maintain sufficient fences for keeping up inclosures and the preservation of crops. The contractor will be held responsible for trespass or damage to the adjacent properties or the public for any acts or omissions on the part of himself or his employees. Any parties under the direction of the engineer shall be permitted to pass or haul any material required for the road over any section, such persons not interfering with the work of the contractor. Right of way and necessary lands for borrow pits, spoil banks, channels, ditches and roads etc. will be provided by the railroad company as early as practicable; but they are not to be held responsible for any delay caused by legal proceedings beyond their control. Contractors must carefully preserve bench marks and stakes, in case of neglect they will be charged accordingly. Falls and slips, if not occasioned by the negligence of the contractor, are to be paid for the same as the regular classification.

The contractors must take all risks from floods and casualties of every description, and shall make no charges for detention from such causes. The quantities marked on the profile are in approximation, and will not govern the final estimate. Disorderly and quarrelsome persons must be discharged by the contractor if in the opinion of the engineer the good of the road requires it. Contractors will not themselves, nor by their agents, give or sell any ardent spirits to their workmen, or any person at or near the line of railway; nor allow any to be brought on the works by their laborers or any other persons, and will do all in their power to discountenance their use in the vicinity of the work by persons in their employ; and they will not allow any person in their employ to commit tres-

pass on the premises of persons in the vicinity of the works, and will forthwith at the request of the engineer discharge from their employ any that may be guilty of committing damage in this respect. Contractors must satisfy themselves of the nature of the soil of the general forms of the surface of the ground, of the quantity of materials required for forming the embankments or other work, and all matters which can in any way influence their contract; and no information upon any such matters *the* derivered from the maps, plans, profiles, drawings, or specifications, or from the engineer or his assistants, will in any way relieve the contractor from all risks or from fulfilling all the terms of this contract.

57 The contractor- will remove at their own expense, any materials disapproved by the engineers, and will remove and re-execute any works, without extra charge, and within such time as fixed by the engineer, appearing to him during the progress and within twelve months after completion, to be unsoundly or improperly executed, notwithstanding and certificate as to the due execution of the same. On their default such work will be done by the railroad company at the contractor'- expense. The contractor shall give personal attention to the work.

The engineer shall have power to direct the application of force to any portion of the work which in his judgment requires it and to order the increase or diminution of force at any point he may indicate.

Now therefore this agreement further witnesseth, that the party of the second — agrees to pay *are* cause to be paid at its office at Vicksburg, to the party of the first part for the faithful performance of the work embraced in this contract the following prices to wit:

For earth excavation per cubic yard, twenty (20) cents.
For solid-rock excavation per cubic yard, one (1) dollar.
For loose-rock excavation per cubic yard, fifty (50) cents.
For embankment per cubic yard, twenty (20) cents.
For grubbing and clearing per acree, thirty (35) dollars.
For pile and trestle per lineal foot ——.
For frame trestle per lineal foot ——.
For extra work not specified cost and ten (10) per cent.

The above payments shall be made in the following manner during the progress of the work and until it is completed, there shall be monthly estimates made by the engineer in charge of the quantity character, and value of the work done during the proceeding month, or since the last monthly estimate ninety per cent. of which value shall be paid by the party of the second part to the party of the first part, between the 10th and 15th of the following month; and when the whole work is completed under this contract, then the party of the first part shall be entitled to the final estimate of his work, and shall be paid in full for all work done, upon his signing a full release to the party of the second part from all claims or demands whatsoever, growing in any manner out of this agreement.

58 It is further agreed and understood, that the party of the first part shall be entitled to no damages from delays which may be occasioned by the party of the second part, but for such delays a reasonable extension of the time for the completion of this contract shall be made provided however that written demand for such extension be made by the party of the first part, at the time such delay was occasioned. This agreement further witnesseth, that should the party of the first part not begin the work herein contracted for, at the specified time, or after beginning it should the work be stopped or not prosecuted with such force and dispatch as, in the opinion of the engineer, is requisite for its completion within the time specified, then the party of the second part may give notice to the party of the first part either in person, or by his agent, or by posting in — co-picious place upon the work, to put the necessary force upon the work at once, and if the same has not been done within ten days after such notice has been given or posted, then the party of the second part shall have the right to declare this contract forfeited and may proceed to relet the work herein specified at such prices as may be necessary for its completion within the time specified in this contract, and thereupon the party of the second part shall have the right to appropriate all unpaid estimates *the* reservations from monthly estimates in its hands or so much thereof as may be necessary to the payment of the increased price, if any, at which it may be necessary for the company to relet said work, in order that it may be finished in the time specified herein, and all damages *in* which the party of the second part may have sustained by reason of the default or failure of the party of the first part; and if said unpaid estimates and reservations are not sufficient to make such payments, then the party of *of* the second part shall have the right to proceed against and recover*y* of the party of the first part and his guarantors the amount necessary to cover such balance.

In witness whereof the parties of the first and second parts have hereunto set their hands and seals this 18th day of December, 1882.

Executed in du*b*licate.

The erasure made in section seven before signing.

C. C. BURKE. [SEAL.]

59 THOMAS FOLEY. [SEAL.]

—— McMAHON. [SEAL.]

THE NEW ORLEANS, BATON ROUGE, VICKSBURG AND MEMPHIS R. R. CO., [SEAL.]

By JAS. M. EDWARDS, [SEAL.]

Vice-President & General Manager.

For value received, we hereby guarantee *of* the foregoing contract on the part of the party of the first part, and bind ourselves to pay to the party of the second part all damages it may suffer by reason of any default or failure on the part of the party of the first

part in the performance of their obligation and undertaking the said contract to the amount of ten thousand (10,000) dollars.

JOHN JOHNSON.
WILLIAM H. CARROLL.
CASEY YOUNG.
S. DREYFUS.

Filed March 18th, 1885.
T. R. MAXWELL, *Clerk.*

Defendant then introduced and read to the jury the depositions and exhibits thereto of F. L. Williford and John Armistead, in words and figures as follows, to wit:

Commission to Take Deposition.

The State of Mississippi to M. B. Trevant or Hun-don Carey, commissioners for Miss., Memphis, Tenn., Greeting:

Know we that we, —— ——, reposing especial confidence in your fidelity and circumspection in diligently examining F. L. Williford and John Armistead, witnesses in suit now pending in our circuit court of De Soto county, wherein John T. Owens — plaintiff and M. & V. R. R. Co. def't, do empower you or either of you, at such time and place as you shall appoint, to call and cause to come before you the witnesses aforesaid, and them diligently to examine on oath touching the premises to the interrogatories and cross-interrogatories hereto attached, and their examination when made you shall send into our said court without delay, under your hand and seal, returning also this writ.

Witness my hand and the seal of said court, at my office, in Hernando, the 4th day of August, A. D. 1885.

T. R. MAXWELL, *Cl'k.*

In the Circuit Court of De Soto County, State of Miss.

JOHN T. OWENS
vs.
MEMPHIS AND VICKSBURG R. R. Co.

Interrogatories propounded by defendant railroad company to F. L. WILLIFORD and JOHN ARMISTEAD, who — residents of Memphis, State of Tenn., for the purpose of taking their depositions on behalf of defendant on the trial hereof, viz:

1. What is your name, your age, your residence, and your business?

2. Are you acquainted with the plaintiff, Jno. T. Owens? If so, say how long you have known him.

3. Were you in any way connected with the house of Dillard, Armistead and Lundee, doing business in Memphis, Tenn., during the year A. D. 1883? If so, say in what way, and then whether

the plaintiff Owens did business with that house during the year 1883.

4. State whether about the six- of August, 1883, and 1st of September, 1883, the plaintiff sent to said house of Dillard, Armistead and Lundee any estimates of work done by him on defendant's line of road or any orders for said house to collect pay for such work; and if you say he did and you can, please file as a part of your answer such estimates and orders and state all you know about the same.

5. Did said house of Dillard, Armistead and Lundee collect any monies on such orders from the plaintiff? If so, please say how. If paid in checks and you have such checks, please file same with your answer.

6. Did you have any communication with defendant's engineer, H. C. Derrick, about said orders from plaintiff for said work? Did you demand payment thereof from him? If so, please tell all he said to you about payment thereof.

WATSON AND CUMMINS,
For Defendant.

Cross-interrogatories for F. L. Williford — Jno. Armistead.

61

JNO. T. OWENS
vs.
M. & V. R. R. Co.

1. Did you have in your possession the contract for work on section 19 made by Jno. T. Owens and the defendant?

2. Did not you *are* one of you go with Jno. T. Owens to see Mr. Derrick, the chief engineer of defendant, and did you not show him the contract above mentioned?

3rd. Was any objection made by Derrick to the contract because it was made in name of defendants and Owens?

4. Did you not transact the business with Derrick in collecting for Owens the money earned under that contract?

5. Were you ever informed by Derrick that he was acting for Burke, Foley and Co., and not for the R. R.?

6. In all your dealings with Derrick did you not understand that you were dealing with the railroad as a party to that contract?

7. From whom did you receive pay for the estimates given by J. A. Moore, and in whose name were they given?

8. In what shape was the pay for the estimates given to you, and by whom signed?

9. Did you notice at the time by whom the checks w-re signed and what explanation was given you as to there being so signed?

10. Did you not in all your dealings suppose you were dealing with the M. & V. R. R. Co.?

11. Was not Derrick in the employ of the company, and acting for them in having this work done?

12. State anything you may know that will benefit plaintiff.

WHITE AND MORGAN,
For Plaintiff.

Filed July 20th, 1885.
T. R. MAXWELL, *Clerk.*

Answers of F. A. Williford and Jno. Armistead to the interrogatories hereto attached in the case of Jno. T. Owens *vs.* Memphis and Vicksburg R. R. Co., in the circuit court of De Soto county, Mississippi, viz:

Said witness, JOHN ARMISTEAD, being duly sworn, said:

62 1. My name is John Armistead. I am forty years old. I live at Memphis, in Tennessee, and my business is cotton factor and commission merchant, being a member of the firm of Armistead and Lundee, successors to Dillard and Armistead and Lundee, both of Memphis.

2. I know plaintiff, Jno. T. Owens; have known him for twelve years.

3. I was a member of said firm of Dillard, Armistead and Lundee during the entire year 1883, and plaintiff, Jno. T. Owens, did some business with us that year.

4. Yes; I attach hereto, as Exhibit "A" and "B," two letters that we received from plaintiff Owens, one dated the 6th of August, the other the 1st of Sept., 1883, and which we received about those dates. I also attach here, as Exhibit "C" and "D," the statements mentioned in said letters, both being estimates for work done on defendant's road, one amounting to $508.50, the other to $857.43; both of which we collected, receiving on the latter $1,009.20, and credited each to the plaintiff on his account with our firm.

5. Yes; our firm collected $508.50 on the 13th of August, 1883, on the first estimate, and $1,009.20 on the 15th of September, 1883, on the last estimate. Mr. Williford, then in our employ, made the collections, and two checks are exhibited with his deposition, which I believe to be the same on which these monies were paid us, although I cannot state positively as to that. Those checks are drawn by Foley and McMahon on the Bank of Commerce of this city, of the dates and amounts above stated, payable to Jno. T. Owens or bearer.

6. I went to see Mr. Derrick several times about the matter before getting the money. He always said that it would be paid as soon as he got the money; that the railroad company did not owe it, but he would get it from Foley and McMahon. He afterwards paid us $508.50 and $1,009.20, and this money, I am confident, was drawn on the checks exhibited in Mr. Williford's depositions. This was all the money ever paid us for Owens for work done on the road.

Cross-interrogatories—Answers to.

1. We did not, that I remember. I never saw any contract.
2. I remember being there once with Owens, but do not remember his having any contract.
3. As above stated, I do not remember seeing or hearing anything said about a contract.

63 4. Our firm collected some money for Owens, as above stated. Whether the money was paid under a contract or not or who the contract was made with, if there was any, I do not know.

5. I do not remember his stating that, but all the money we got from him was the Foley and McMahon drafts, as stated in direct examination.

6. There was no understanding of that kind, because I do not remember to have seen or had anything to do with the contract referred to.

7. We received pay in checks drawn by Foley and McMahon, as above stated. The estimates were in Mr. Owens' name.

8. The checks exhibited with Mr. Williford'- deposition.

9. I did not see the checks before they were collected.

10. Our transactions were with Owens and Derrick; don't know that I ever thought about who he represented. All I was interested in was getting the money.

11. I don't know about that. He was representing the railroad Co. at this place, as I understood. Whether he represented any other party or parties I do not know, nor do I know anything about how this work was done — for whom.

12. I know of nothing else.

And further deponent saith not.

JOHN ARMISTEAD.

Subscribed and sworn to before me this 14th day of September, 1885.

HUNSDON CAREY,
Com. for Miss. in Tenn.

Answers for said Witness, F. L. Williford, to the Direct Examination.

1. My name is F. L. Williford; I am thirty-one years of age; I reside in Memphis, Tenn., and am a salesman in the house of Fulmer, Thornton and Co., of this place.

2. Yes; I know the plaintiff; have known him for five years.

3. I was employed by Dillard, Armistead & Lundee during 1883 as clerk and book-keeper. Plaintiff was a customer of that firm that year.

4. I remember our having some estimates for work done for plaintiff on defendants R. R. Co.'- road during that summer or fall, and suppose the papers exhibited with Mr. Armistead's answers are

those. I collected these monies for our house in checks handed me either by Mr. Derrick or some one in his office.

64 5. Yes; we collected the monies thereon as I have stated above. They were paid me in two checks drawn by Foley and McMahon on the Bank of Commerce, this city—one for $508.50 on the 13 of August, 1883, the other for $1,009.20 on the 15th of Sept., 1883—and I *and I* attached said checks hereto as Exhibits "E" and "F." The receipts that I gave for these monies are on the estimates attached to Mr. Armistead's deposition above.

6. I do not remember any.

Answers of said F. L. Williford to the Cross-interrogatories Attached.

1. No, sir; I never saw any contract.
2. I never went with Owens to see Derrick, that I remember.
3. Not that I know of; I do not know anything about the contract.
4. I received the checks from Derrick. That was the only connection I had with the transaction.
5. No, sir; he said nothing about it one way or the other.
6. No, sir; I did not understand it that way. I did not reco-nize the railroad in it at all.
7. The two checks exhibited with this deposition is all that I ever received.
8. In checks, as before stated, signed by Foley and McMahon.
9. I noticed the checks were signed by Foley and McMahon. No explanation was asked or given.
10. No; I did not know that I was.
11. I don't know about that.
12. I don't know anything else.

FRANK L. WILLIFORD.

Subscribed and sworn to before me this September 14th, 1885.

HUNSDON CAREY,
Com'r for Miss. in Tenn.

STATE OF TENNESSEE, }
Shelby County. }

I, Hunsdon Carey, a commission- for the State of Mississippi, at Memphis, in the county and State aforesaid, duly commissioned and qualified, do hereby certify that the foregoing deposition of Jno. Armistead and Frank L. Williford were produced to me on this 14th day of September by the witnesses and were by them respectively signed and sworn to before me as their deposition-

65 in this case, and I further certify that said depositions have not been out of my possession or altered since they were so signed and sworn to before me.

Witness my hand and seal this 14th day of September, 1885.

HUNSDON CAREY,
Com'r for Miss. at Tenn.

EXHIBIT "E" TO F. L. WILLIFIRD'- DEPOSITION.

MEMPHIS, TENN., *Aug. 15th*, 1883.

Bank of Commerce.

Pay to Jno. T. Owens or bearer five hundred and eight .50 dollars ($508.50).

FOLEY AND McMAHON.

EXHIBIT "C" TO JOHN ARMISTEAD'S DEPOSITION.

M. & V. R. R., 3rd residency.

Estimate of Work Done in July, Done by Jno. T. Owens.

Sec. 19.

Cu. yds.		
1,000,	earth excavation, 20 cts	$200.00
1,300,	earth embankment, 20 cts	260.00
3 acres	clearing, $35.00	105.00
	Total work to date	$565.00
	Provision estimates	$00.00
	Work for July	565.00
	10 per cent. reservation	56.50
	Remainder	$508.05

O K.
J. A. MOORE, *R. E.*

Received the above amount.

DILLARD, ARMISTEAD AND LUNDEE,
For Jno. T. Owens.

Aug. 14th, 1883.

EXHIBIT "A" TO ARMISTEAD'S DEPOSITION.

HERNANDO, MISS., *Aug. 6th*, 1883.

Messrs. Dillard, Armistead and Lundee, Memphis, Tenn.

GENTLEMEN: Enclosed please — a statement for $508.50 *dollars* on Col. H. C. Derrick, div. eng. of M. & V. R. R. Co., 338 Union street, which you will please collect and place to my credit and oblige—

66 Yours respect-ly, JNO. T. OWENS.

EXHIBIT "D" TO JNO. ARMISTEAD'S DEPOSITION.

Burke, Foley and McMahon.

M. & V. R. R. Co., 3rd Residency.

Copy of Jno. T. Owens, Aug., 1883.

Cubic yards, sec. 19, 2,587, earth excavations, 20 cts.....	$517.40
4,403, earth embankment, 20 cts.....	880.60
3.42 acres clearing, $35.00.....	119.70
Total to date.....	1,517.70
Deduct provision estimate.....	565.00
Estimate in Aug.....	952.70
10 per cent. reservation.....	95.27
Amount due.....	857.43
	151.77

O K.
J. A. MOORE, *R. E.*

Received one thousand nine .20 dollars in full of above amount.
1,009.20. DILLARD, ARMISTEAD AND LUNDEE.
WILLIFORD.

EXHIBIT "B" TO ARMISTEAD'- DEPOSITION.

LAMB'S LANDING, MISS., *Sept. 17th*, 1883.

Messrs. Dillard, Armistead & Lunde-, Memphis, Tenn.

GENTLEMAN: Enclosed please find statement of work done in August which you will please collect and place to my credit, and oblige—

Yours respectively, JOHN T. OWENS.

EXHIBIT "F" TO F. L. WILLIFORD'- DEPOSITION.

MEMPHIS, TENN., *Sept. 15th*, 1883.

Bank of Commerce.

Pay to Jno T. Owens or bearer (for work done on section 19, final) one thousand and nine .20 dollars.
$1,009.20. FOLEY AND McMAHON.

67 Filed Sept. 16th, 1885.
T. R. MAXWELL, *Clerk.*

This was all the evidence for both plaintiff and defendant; and thereupon the court instructed the jury for the plaintiff and at the request of plaintiff as follows, to wit:

Plaintiff's Charges.

If the jury believe from the evidence that the contract was made with Owens by a duly authorized agent of the M. & V. R. R. Co., and that a portion of the contract was excepted and confirmed, then the remainder of the contract should not have been rejected in the absence of good cause.

Given by the court:

A. T. ROANE, *Judge.*

2. An agent who had the power to appoint a subagent may ratify his act and make it binding on the agent principal.

Given by the court:

A. T. ROANE, *Judge.*

3. If the jury believe from the evidence that Derrick had authority to make such contracts for defendant, or that — ever held out to the public as having authority to execute such contracts by defendant, and the contract sued on was made by Moore, then submitted to him by plaintiff, and he knowingly acted thereon, then defendant is bound thereby and plaintiffs entitled to recover the damages actually sustained by him on account of a breach of contract.

Given by the court:

T. R. MAXWELL, *Clerk.*

4. The principal is bound by the acts of his agent performed in the scope of his authority, and this may be either express or implied in determining the authority of the agent to bind his principal in a given case. They may look to the nature and character — his employment, and if the act done was proper or necessary to the proper transaction of the business confided to him, then the
68 agent had authority to do it, and his act will bind the principal; and the jury are instructed that whenever any peculiar business is confided to the management of and agent, then the law implies that he sha l have power to do everything proper or necessary to accomplish he purpose of the agency; and if the jury believe that Derrick ad general authority from defendant to have this work done on section 19, and that the contract sued on was proper and necessary to have this work done, then Derrick had authority to make such a contract; and if the one sued on was made and submitted to him and a-quiesced in by him, then the defendant is bound thereby.

Given by the court:

T. R. MAXWELL, *Clerk.*

5. The jury are instructed that when a contract is for personal services the damages *is* governed by the conduct of the party unlawfully deprived of his contract, but when it's for breach of a general contract to be done not by his own services, but by labor generally,

then — rule is different, and in the first case the employee must get employment if he can; in case of a contract, as in the last case, then the damage the party is entitled to recover is the actual damage sustained by plaintiff resulting from the breach of *j*is contract by defendant.

Given by the court:

T. R. MAXWELL, *Clerk.*

To which action of the court in so instructing the jury defendant at the time excepted, and the court instructed the jury for the defendant as follows:

The burden of proof is upon plaintiff to establish to the satisfaction of the jury by a predonderance of testimony the following propositions:

1. That there was a contract made by plaintiff and the defendant, or some agent of defendant duly authorized to make the contract, by the terms of which the plaintiff was to do the work here sued for, or that a contract was made on behalf of defendant and they ratified it with a knowledge of its stipulations.

2. That plaintiff was prohibited by defendant and prevented from doing said work.

3. That by such prohibition and prevention plaintiff lost money.

4. The amount of such loss; and if the evidence fails to satisfy the jury as to any one of said propositions they must find for the defendant.

2. If the jury believe from the evidence that that portion of the railroad between Vicksburg and Memphis, in which is in-
69 cluded section 19, was built by the New Orleans, Vicksburg and Memphis Railroad Co., and that the Memphis and Vicksburg Railroad Co. had nothing to do with the construction of said railroad and did not contract with the plaintiff nor ratify the contract relied on by plaintiff to do work on said railroad, they will find for the defendant.

Given by the court:

T. R. MAXWELL, *Clerk.*

—. Those who deal with an agent must know the extent of the delegated power, for the act done will be valid or not as it conforms to the measure of authority confided to him.

70 4. When one person deals with another, knowing that the other is acting under delegated authority, it is his own folly if he does not inform himself of the extent of the delegated authority. In such case the principal is bound only to the extent of that authority. Where a party relies on the ratification of an unauthorized contract, made by an agent without authority to make such contract, by the principal of such agent, he must show that such principal had full knowledge of the terms of such contract.

Given by the court:

T. R. MAXWELL, *Clk.*

5. More payments made by defendant for work done would not alone be a ratification of the contract relied on, unless the defendant, through its proper officers, was informed of the contract.

Given by the court:

T. R. MAXWELL, *Cl'k.*

6. If the jury believe from the evidence that the contract with Owens was made by an agent of the defendant, authorized to make the contract, and that the work to be performed by Owens was situated partly south of a trestle of the railroad between Vicksburg and Memphis and partly north of said trestle, and that the work on said north side was harder to do and cost contractors more to do than the work on the south side of said trestle, then the jury will take this fact into consideration in determining whether defendant was damaged by not completing the work on north side of said trestle.

Given by the court:

T. R. MAXWELL, *Clerk.*

71 7. If the jury believe from the evidence that plaintiff had a contract with the defendant, made by an agent who had authority to make such contract, and that the defendant, without justifiable cause, prohibited or prevented defendant from completing the work that he had contracted to do, the jury will assess against the defendant and in favor of plaintiff only such damages as the evidence shows that defendant actually sustains. Such damages, if any were sustained, the jury must arrive at from the evidence and not from conjecture, guess, or surmise. The just claims of a party employed to do labor or service are satisfied when he is recompensed for the part performed and indemnified for his loss in respect to the part unexecuted. If in this case the evidence shows that plaintiff was paid for all the work done by him, he can recover nothing, unless the evidence shows that he lost money by not being allowed to complete the work, and amount of this loss must be established by the evidence, and if the evidence fails to show any loss to plaintiff on account of not having completed said work, the jury will find for defendant.

Given by the court:

T. R. MAXWELL, *Clerk.*

8. If the evidence satisfies the jury that the contract sued on was made by the agent of defendant, duly authorized to make such a contract, and that under the terms of such contract plaintiff had the right to do the work north of the trestle, but the evidence further satisfies the jury that there would have been a loss instead of a profit to plaintiff if he had done the work north of the trestle on section 19 at the prices agreed on, the jury must find for the defendant.

Given:

A. T. ROANE, *Judge.*

9. If the evidence fails to show that there would have been any profit to plaintiff in doing the work north of the trestle on section 19 at the prices agreed on in the contract, relied on by plaintiff, they will find for the defendant.

Given:

A. T. ROANE, *Judge.*

72 10. The burden of proof is upon the plaintiff to satisfy the jury by a preponderance of testimony that there would have been profit to the plaintiff in doing the work north of the trestle on section 19 at the prices agreed on in the contract relied on by plaintiff, and if he failed to show by a preponderance of testimony that there would have been a profit to plaintiff in doing such work, the jury must find for the defendant.

Given:

A. T. ROANE, *Judge.*

11. If the jury believe from the evidence that the plaintiff was prohibited by the defendant from building the railroad embankment north of the trestle, and that plaintiff had a contract with defendant to do said work, then after said prohibition it was the duty of plaintiff to seek other employment for himself and laborers employed to do such work if he claims damages on account of loss of time of self and laborers in his employment, and unless he has shown to the jury by the evidence that he was unable to find other employment, or that he was delayed in finding other employment by reason of being prevented from going on under his contract, or was compelled to take employment less profitable than under said contract, or was in some way actually damaged by a breach of said contract without any default of plaintiff's, then the jury will find for the defendant.

Given:

A. T. ROANE, *Judge.*

To all of which charges plaintiff objected *to*, and objection overruled; to which plaintiff *accepted*.

And thereupon the jury retired, and afterwards returned a verdict in words and figures as follows, to wit: "We, the jury, find for plaintiff $400.00, four hundred dollars;" and thereupon defendant moved the court to set aside the verdict of the jury and grant a new trial in words and figures as follows, to wit:

Motion for a New Trial.

J. L. COCKE, Adm'r*st* of J. T. Owens, Deceased, }
vs. }
M. & V. R. R. Co. }

73 Defendant, by attorney, moves the court to set aside the verdict of the jury and for a new trial in this cause:

1. Because the jury found contrary to the evidence.
2. Because the jury disregarded the instructions of the court.

3. Because the court erred in giving the charges asked by plaintiff.

4. Because the court erred in admitting testimony objected to by defendant.

MALONE AND WATSON, *For Def't.*

Which said motion was by the court overruled; to which action of the court in refusing to set aside the verdict of the jury and to grant a new trial defendant accepted and tendered this his bill of exception, and asked that the same be signed and made a part of the record, which is done.

In — whereof I have hereunto set my hand this 4th day of April, 1887.

A. T. ROANE, *Judge.*

Filed April 7th, 1887.
T. R. MAXWELL, *Clerk.*

JNO. L. COCKE, Adm'at'r of Jno. T. Owens,
vs.
MEMPHIS AND VICKSBURG RAILROAD COMPANY. } Petition for Appeal.

To T. R. Maxwell, clerk of the circuit court of De Soto Co.:

Defendant, The Memphis and Vicksburg Railroad Co., against whom a judgment was rendered in the above-styled cause at the March term of the circuit court of De Soto Co. for $400 and costs of said suit, brings on appeal to the supreme court this April 16th, 1887.

MALONE AND WATSON,
Att'ys for Defendant.

Filed April 16th, 1887.
T. R. MAXWELL, *Clerk.*

74 The State of Mississippi to the sheriff of De Soto county:

We command you to summon J. L. Cocke, administrator for Jno. T. Owens, deceased, or White and Witherspoon, his attorneys of record, to appear before the supreme court of Miss. on the 4th Monday in April, 1887, to defend the appeal of the Memphis and Vicksburg Railroad Co. against J. L. Cocke, administrator of Jno. T. Owens, deceased, said appeal having been taken from the judgement of $400 and cost of said suit, rendered by the circuit court of De Soto county at the March term — said court, in favor of said J. L. Cocke, administrator, and against the Memphis and Vicksburg Railroad Co. Herein fail not, and have you there and then this writ with your action thereon endorsed.

—— ——.

We accept service and enter our appearance in said cause.
WHITE AND MORGAN,
WITHERSPOON,
Pl'ff's Att'ys.

Summons in appeal.

J. L. COCKE, Adm'r of Jno. T. Owens, Deceased,
vs.
M. & V. R. R. Co.
} Appeal Bond.

We, the M. & V. R. R. Co., principal, and Holmes Cummins and H. C. Watson, sureties, acknowledge ourselves to be indebted to J. L. Cocke, administrator of Jno. T. Owens, deceased, in the sum of $800; to be void upon condition that we shall pay such judgement as the supreme court may render against said defendant in said above-styled cause and all costs that may be adjudged against said defendant by said supreme court; otherwise to remain — full force.

This April 16th, 1887.

M. & V. R. R. CO.
MALONE AND WATSON,
Its Attorneys.
H. C. WATSON, *Surety.*
HOLMES CUMMINS, *Surety,*
By H. C. WATSON.

Filed and approved April 16th, 1887.
T. R. MAXWELL, *Clerk.*

75 *Certificate of Clerk.*

J. L. COCKE, Administrator of Jno. T. Owens, Deceased,
vs.
M. & V. R. R. Co.

I, T. R. Maxwell, clerk of the circuit court of De Soto county, do hereby certify that the foregoing pages contain a true and perfect transcript of the record of the above-styled causes — the same appears of record in my office.

Witness my hand and seal this the 18th day of April, 1887.
[SEAL.] T. R. MAXWELL, *Clerk.*

Cl'k Maxwell, for transcript, $50.20.

76 Afterwards, on the 27th day of April, 1887, the appellant filed its assignment of errors in said supreme court in words and figures as follows, to wit:

In Supreme Court of Mississippi.

MEMPHIS & VICKSBURG R. R. Co.
vs.
J. L. COCK, Adm'r Jno. T. Owens.
} No. 5513.

Assignment of Errors.

Appellant, by att'y, comes and assigns for error:

1st. The court erred in admitting the answers of Cyrus & Geo. T. Smith to interrogatories Nos. 8, 9, 10, & 11, to be read to the jury

over the objection of appellant, and especially appellee's 1st, 2nd, 3rd, & 4th charges.

2nd. The court erred in giving instructions to the jury asked by appellee Owens.

3rd. The court erred in refusing to set aside the verdict of the jury and in refusing to grant appellant a new trial.

MALONE & WATSON,
Att'ys for Appellant.

Filed April 27, 1887.

OLIVER CLIFTON, *Clerk*,
By C. C. CAMPBELL, *D. C.*

Afterwards, on the 6th day of May, 1887, letter of agreement as — revivor in name of administrator was filed in said supreme court in the following words and figures, to wit:

MEMPHIS, TENN., *May 5th*, 1887.

COCKE
v.
M. & V. R. R. Co.

Oliver Clifton, Esq.:

Messrs. White & Witherspoon write us that the record in J. L. Cocke, adm'r of Jno. T. Owens, *vs.* Memphis & Vicksburg R. R. Co. fails to show that the suit was revived in the name of Cocke, adm'r. We agree that the suit was regularly revived, and that the court shall consider the cause as if the record — this fact.

Please file this agreement with the record in said cause.

MALONE & WATSON,
Att'ys for M. & V. R. R. Co.

5513. Filed May 6, 1887.

OLIVER CLIFTON, *Clerk*,
By C. C. CAMPBELL, *D. C.*

77 On the 2nd day of May, 1887, prior to the filing if the letter of agreement of revivor, the following entry was made upon the minutes of said supreme court, to wit:

MEMPHIS & VICKSBURG RAILROAD COMPANY
v.
J. L. COCK, Adm'r.
5513.

Submitted on briefs by Mess. Malone and Watson, for appellant, and Mess. White & Witherspoon, for appellee.

And on the 9th day of May, 1887, the same being a day of the regular April term, A. D. 1887, of the said supreme court, the following final judgment was rendered in said cause and entered on the minutes of said court, to wit:

MEMPHIS & VICKSBURG RAILROAD COMPANY
v.
J. L. COCK, Adm'r. } 5513.

This cause having been submitted on a former day of this term on the record herein from the circuit court of De Soto county, and this court, having sufficiently examined and considered the same and being of the opinion that there is error therein, doth order and adjudge that the judgment of said circuit court rendered in this cause at the March term thereof, A. D. 1887, on the 29th day of March, 1887, be, and the same is hereby, reversed and cause remanded, and that the appellee pay the costs of this appeal to be taxed, &c.

I, E. W. Brown, clerk of the supreme court of the State of Mississippi, do hereby certify that the above and foregoing 76 pages contain a true and correct copy of the record, agreement as to revivor, proceedings, and judgment of and in said case No. 5513 in said supreme court, as fully as the same appears of record and on file in my office as said clerk, except the opinion of the court, which is not herein copied; but I further certify the opinion of said court in said case as reported in volume 64 of the Mississippi Reports, on
78 pages 713–717, inclusive, is a true and correct copy of said opinion.

Seal State of Mississippi Supreme Court.

Witness my hand and the seal of said court, affixed in my said office, at Jackson, Mississippi, this the 21st day of March, A. D. 1900.

E. W. BROWN, *Clerk.*

Clerk's transcript fee, $76.10.

Office Supreme Court U.S.
FILED
APR 7 1900
JAMES H. McKENNEY,
Clerk.

Office Supreme Court U.S.
FILED
OCT 13 1899
JAMES H. McKENNEY,
Clerk.

No. 244.
(By. of Calhoon & Green for D.E.)

Filed April 7, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1898.

NO. 756.

OCTOBER TERM, 1899. No. 244.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, ET AL., Plaintiff's in Error,

versus

WIRT ADAMS, STATE REVENUE AGENT,
Defendant in Error to the

SUPREME COURT OF MISSISSIPPI.

Brief on Motion to Dismiss and on Merits,

FOR DEFENDANT IN ERROR, BY

S. S. CALHOON AND MARCELLUS GREEN.

SUPREME COURT OF THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF MISSISSIPPI.

YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY, ET AL.,

PLAINTIFFS IN ERROR.

NO. 756; 244. VERSUS.

WIRT ADAMS, STATE REVENUE AGENT

DEFENDANT IN ERROR.

BRIEF OF S. S. CALHOON AND MARCELLUS GREEN FOR DEFENDANT IN ERROR.

This voluminous record contains much matter irrelevant to the decision of the case in this court. The following matters are germain to the questions here involved.

This proceeding was instituted, originally, by Wirt Adams, State Revenue Agent, in 1893, in the circuit court of Hinds county, Mississippi, to recover of Plaintiffs in Error, for the use of the state and of the several counties, the state and county taxes, privilege and *ad valorem*, assessed by the State Railroad Commission, as State Railroad Assessors, upon the railroad and property of the Louisville, New Orleans and Texas Railway Company. Similar suits for the taxes of 1892, 1893, 1894, and 1895 were severally instituted, and in 1896, R. 106, these cases were consolidated.

The declaration avers that the defendant, Yazoo and Mississippi Valley R. R. Company, was duly chartered by Act of the Legislature of Mississippi, approved February 17, 1882, entitled, "An Act incorporating the Yazoo and Mississippi Valley Railroad Company," (its charter being filed with the declaration, R. 45), and that defendant, Illinois Central Railroad Company, was chartered under the laws of Illinois. That Louisville, New Orleans and Texas Railway Company was a corporation authorized under the laws of Mississippi, by Act entitled, "An Act to amend an Act entitled an Act to authorize the Memphis and Vicksburg Railroad Company and the Mississippi Valley and Ship Island Railroad Company to effect a consolidation, approved March 3, 1882," approved March 15, 1884, and was created by a consolidation of the New Orleans, Baton Rouge, Vicksburg and Memphis Railroad Company, a Mississippi corporation, created by an Act entitled "An Act to incorporate New Orleans, Baton Rouge, Vicksburg and Memphis Railroad Company," approved March 9, 1882, the Memphis and Vicksburg Railroad Company, a Mississippi corporation, chartered in 1870, a Tennessee corporation and a Louisiana corporation, under a deed of consolidation dated August 12, 1884. Copies of said Acts are in Exhibits to the declaration. R. 12, *et seq.* That the taxes, state and county, were duly assessed, and the amounts thereof are recited, and thereby said railroads and property of Louisville, New Orleans and Texas Railway Company became liable therefor; that the Illinois Central Railroad Company purchased in July, 1892, all the railroads and other property of Louisville, New Orleans and Texas Railway Company, and that about October 25, 1892, the Illinois Central Railroad Company "turned over, delivered to and merged all of said property and railroads of said Louisville, New Orleans and Texas Railway Company with the railroad system and property of the said Yazoo and Mississippi R. R. Co.," that since that date said Yazoo and Mississippi Valley R. R. Co., under the direc-

POOR COPY

tion and control of the Illinois Central R. R. Co. has been operating said railroads of Louisville, New Orleans and Texas R'y Co.; that by taking the property and railroads of Louisville, New Orleans and Texas R'y Co. said defendants became liable for the taxes. A copy of the "articles of consolidation" of Louisville, New Orleans and Texas R'y Co. and Yazoo and Mississippi Valley R. R. Co. is made Ex. B. to declaration. R. 14.

By sec v. of the said act of 1882 authorizing the consolidation, the provisions of the 21st section, hereinafter recited, were extended to the consolidated company (R 42). By the act of 1884 this act of 1882 was so amended as to permit consolidation of Memphis & Vicksburg R R. Co. with any other company and without Miss. Valley & Ship I. R. R. Co.

It was under this act that Louisville, New Orleans and Texas Ry. Co. was created by consolidation. R. 12.

The charter of Yazoo & Mississippi Valley R. R. Co was granted in 1882, and, as to power of consolidation, provides: "Said company may consolidate with any other railroad company in or out of the state of Mississippi upon such terms as the consolidating companies may agree upon; * * and upon any such consolidation, the consolidated company shall have and enjoy all the property, rights, privileges and immunities and franchises herein granted; but such consolidation shall not have the effect of exempting from taxation the railroad or property owned by such other consolidating company prior to its consolidation with the company herein chartered: nor of exempting from taxation any property which the consolidated company may, after such consolidation acquire under the provisions of the charter of such other consolidating company." R. 48-9.

By Sec. 8, of this charter the stock, property, &c., of the Yazoo and Mississippi Valley R. R. Co. is exempted from taxation "for a term of twenty years from the com-

pletion of said railroad to the Mississippi river, but not to extend beyond twenty-five years from date of the approval of this Act." R. 52.

The 'Articles of Consolidation' of Louisville, New Orleans and Texas R'y Co. and Yazoo and Mississippi Valley R. R. Co., dated October 24, 1892, are set forth. R. 12.

The charters of New Orleans, Baton Rouge, Vicksburg and Memphis Railroad Company, and of Vicksburg and Memphis Railroad Company, the constituents of Louisville, New Orleans and Texas Railway Co., contain these pertinent provisions:

SEC. 25. That the company shall have power "to consolidate the company with any other company, under the name of one or both; but when * * such consolidation is effected, the said company shall be entitled to all the benefits, rights, &c., belonging to said road or roads * * consolidated." R. 30. This charter contains no exemption from taxation.

That said company "shall have * * power to consolidate the stock, property and franchises of the road with any other road or roads, in or out of this state * * upon such terms as may be consistent with the powers conferred upon said company." R. 39.

This charter was approved August 8, 1870, and as granted, contains no exemption from taxation.

By an Act, approved August 8, 1870, the provisions of the 21st section of the charter of the Mobile and Northwestern Railroad Co., was extended to the Memphis and Vicksburg Railroad Company, and it is found on R. p. 40.

The Illinois Central Railroad Co. traversed the averments of the declaration so far as they pertained to it. R. 54.

The Yazoo and Mississippi Valley Railroad Company pleaded (R. 55).

1 That Louisville, New Orleans and Texas Railway

Co. was authorized by and organized under the Act *supra* of 1884.

2. That on October 24, 1892, Louisville, New Orleans and Texas Railway Co. "was consolidated with and merged in the said defendant The Yazoo and Mississippi Valley Railroad Company, by Act and deed of said two companies, as authorized by their respective charters."

3. That during 1892, 3, 4, and 5, said Yazoo and Mississippi Valley Railroad Company delivered to the tax collectors the affidavit prescribed by said 21st section, and that said tax collectors gave to defendant a receipt in full for said taxes; and that in said years of 1892, 1893, 1894 and 1895, respectively, the profits of defendant, nor of Louisville, New Orleans and Texas Railway Co., had never enabled either to pay a dividend of 8 per cent on its capital stock.

4. Traverses the averments of the declaration so far as they pertain to Illinois Central Railroad Company.

After demurrer overruled to this plea plaintiff replied: R. 58.

1. Denying that the property was not purchased by Illinois Central Railroad Company.

2. Denying that the profits of Louisville, New Orleans and Texas Railway Company was not sufficient to declare a dividend of 8 per cent on its proper capital stock under the said 21st section.

3. Denying that the amount of the taxes had in good faith been applied as provided in said 21st section.

9. That after building the railroad Louisville, New Orleans and Texas Railway Company had issued bonds aggregating $30,833,000, some bearing 4 per cent, some 5 per cent and some 6 per cent interest, and had sold them to non-residents, and divided the proceeds, except what was required to construct said road, about $4,000,000, among its officers and stockholders, and that said company had so intermingled its liabilities for money used for construction, with money used for division among its officers, &c.,

that it became impossible to appropriate the taxes to the debts contemplated by said 21st section; or tell what rate of interest the construction debt bears; or to make a true affidavit as required, and thereby said exemption was waived. R. 59.

10. That prior to January 1, 1891, Louisville, New Orleans and Texas Railway Company issued to its incorporators and others to make them stockholders 48,242 shares of its capital stock, of par value $100 each for no consideration, and no authority existed by the respective charters of the consolidating companies, or by its charter, to issue gratuitous or paid up stock without its full consideration; and that its profits were able to pay 8 per cent dividend on the full amount paid or agreed to be paid for its capital stock, over and above its current due liabilities for debts incurred in and about said road as contemplated by its charter; that the illegal issue of said stock has made it practically impossible to determine when its profits will enable it to pay 8 per cent dividend on its proper capital stock, and thereby said exemption was waived. R. 60.

11. That previous to said assessment the Illinois Central Railroad Company had paid off by an issue of its own bonds, by novation, all the debts and liabilities incurred in such construction, &c., and the dividends enabled it to pay 8 per cent on its proper stock, and thereby the alleged "appropriation of taxes" ceased. R. 60.

14. That all of said property, except the "main line" and "Tallahatchie branch," was acquired by L., N. O. & T. R'y Co. by purchase, or under other charters, and it is liable to taxation.

There were other replications averring nothing material here, and demurrers were sustained to them. R. 57-9, 87.

To the foregoing replications demurrers were overruled, and issues finally taken on the matters averred in them. R. 87, 89, 90, 91, 93.

Upon these issues the first trial was had in which a volume of evidence was introduced tending to show the facts in regard to the consolidation of October 24, 1892, and the amount of valid stock, and of the debts of construction, money borrowed therefor, &c.

It will be noted that there is no right claimed, either in the pleadings or or in the evidence, under the Constitution or laws of the United States, in this first trial; and that none of the decisions of the supreme court of Mississippi were pleaded as *res adjudicata*, nor introduced in evidence on the trial.

Upon this record there was verdict for the plaintiff for the taxes of 1895, and for the defendant for those of 1892, 3 and 4, and judgment accordingly.

Both plaintiff and defendant moved for a new trial; both motions were overruled, and both parties appealed to the October Term, 1896, of supreme court of Mississippi.

By the assignments of error in the supreme court of Mississippi, R. 503-9, no right was claimed by either side under the Constitution or laws of the United States.

The case was thrice argued before the supreme court of the state, and on June 20, 1898, (erroneously recited in the record June 30, and corrected by stipulation) that court reversed the judgment and remanded the cause for a new trial.

The opinion of the court—summary of the court's holdings—is found R. 513, and it does not decide any right claimed by these plaintiffs in error under the Constitution and laws of the United States.

Thereupon these plaintiffs in error, on June 27, 1897, filed a suggestion of error to the court, R. 518, under Rule 10, viz: "The court will at any time during the term at which a judgment is rendered, consider a matter or suggestion of error of law or fact therein, and will take such action as will seem proper." 70 Miss., XXIII, in which it was claimed that this decision impaired the obligation

of their charter contract, was not due process of law, and denied them equal protection of the laws.

No order of the court was made on this suggestion of error; but the clerk certifies that the practice of the court is, where suggestions of error are denied or overruled, to return the same without endorsement thereon, and without an order or entry on the minutes, and that this suggestion of error took this course. R. 527.

After an abortive effort to have the mandate withheld, R. 528, the cause was remanded to the circuit court July 1, 1898, R. 548, and the mandate was filed July 4, 1898.

Thereupon defendants objected to proceeding because a mandate as prescribed by the statute had not been filed; this being overruled, they then objected that under the statute the cause could not be docketed for trial at that term; this, also, was overruled on July 4, 1898. R. 529. 529 No federal question was claimed in the circuit court to arise on these objections.

Defendants then presented a petition and bond for removal of said suit, No. 2788, for the taxes of 1892, 3, 4 and 5, which had been filed June 27, 1898, while the suggestion of error was pending in the supreme court in this case on the first appeal. R. 531. The court denied this petition. R. 544.

Then defendants moved for a continuance because not ready for trial, and of the absence of some of their attorneys, R. 544: this, after hearing evidence, the court overruled. No right under the Constitution and laws of the United States was claimed to arise in the circuit court on this motion.

Thereupon, the defendants requested the court to grant until next morning "to prepare pleas to meet the new aspect put upon the case, in their opinion by the decision of the supreme court." (R. 608). On July 6, all counsel being present, "the court inquired of counsel if their pleas were ready; whereupon counsel for defense

replied that they were, and produced the same and handed them to the clerk of the court in the presence of counsel for plaintiff and without any objection by them. The clerk thereupon marked the same filed before they were submitted to the court or counsel for the plaintiff and without any leave of the court to file same other than as stated above. The counsel for the plaintiff obtained said pleas from the clerk, after the same had been marked filed by him and asked time until 3 o'clock in the afternoon to consider the same, which was granted." Thereupon, in the afternoon the plaintiff filed his motion to strike the pleas, so filed, from the files, and before hearing said motion, it was amended so as to confine its operation to the pleas, 3, 4, 5, 6 and 7 of each of defendants. R. 608-9.

The record stood in this cause at this time as an action to recover the taxes of 1892, 3, 4 and 5, with the pleas standing thereto upon which the former trial was had, and with the said pleas, filed, July 5, 1898, with the motion to strike out pleas 3 to 7 inclusive. Plea 2, filed July 6, 1898, (R. 551, 578)—not included in the motion to strike out—averred said 21st section, its embodiment into the charter of the consolidated company under the articles of consolidation of October 24, 1892, under the Act of 1882, as amended by said Act of 1884, that said railroad was constructed and equipped thereunder, in reliance upon said 21st section; that said charter constituted "a contract between said railroad company and the state * * * and whereby * * it was contracted irrepealably for a period of 25 years from the approval of said Act * * that in consideration of the construction of the railroads provided for in said Act and of the general benefit that the state would receive therefrom, * * the state agreed and contracted that all of the taxes to which said company should be subject should be and were appropriated and set apart and directed to be applied by said company to the payment of the debts and liabilities which the said company should incur in constructing said railroad and to

the repayment of moneys borrowed by said company, upon lands or otherwise, to be used in constructing said road and to the payment of debts incurred by said constructing the same;" that enormous debts and liabilities were incurred and money was borrowed and used in construction conformably to said charter; that during the years 1892, 3, 4 and 5, said defendant did pursuant to said section of said Act and said contract of appropriation, pay said taxes to the full extent thereof, in the payment of the debts and liabilities incurred in said construction and in the repayment of moneys borrowed therefor by Louisville, New Orleans and Texas Railway Company; and that said affidavit as prescribed by said section was duly made; that the tax collector gave defendant a receipt in full for said taxes: that on October 24, 1892, said Louisville, New Orleans and Texas Railway Company, was consolidated with and merged in the said defendant Yazoo and Mississippi Valley Railroad Company, by the act and deed of the said two companies, as authorized by their charters, by which said consolidation the existence of the said Louisville, New Orleans and Texas Railway Company was merged into that of the said Yazoo and Mississippi Valley Railroad Company without creating a new company or disturbing or breaking the continuous existence of the latter company"; and it then traverses the matters averred in the declaration pertaining to the purchase of the Louisville New Orleans and Texas Railway ~~Company~~ by the Illinois Central Railroad Company, and the turning over, delivery to and merger of Louisville, New Orleans and Texas Railway ~~Company~~ into the system of the Yazoo and Mississippi Valley Railroad Company, &c.

Upon this plea 2, issue was taken, R. 609, and it, with the pleas filed at the former term, were the issues in the case when the motion to strike out the pleas 3 to 7, filed July 6, 1898, was heard.

Plaintiff moved to strike out said pleas 3 to 7, for numerous reasons, R. 606, among them, I. That they

were improperly filed. 2. Because no defense as the case now stands. 3. Because these defenses can be set up under the pleas now on file, and because they seek to review the decision of the supreme court. 4. That the matters have been adjudged; and, 5. Because the pleas 3, 4, 5 and 6, are so framed as to prejudice, embarrass and delay a fair trial; and as that the precise defense intended, because of their indefiniteness, uncertainty and complication, cannot be ascertained; and for numerous other reasons, some as to the merits of the pleas, others to the practice and procedure.

The pleas are on R 551 to 606, and to abstract them would be to deprive the objection of prolixity, indefiniteness, uncertainty and complication of their force. Substantially stated, they are a prolix, vague, uncertain endeavor to inject into the record a federal question upon the ground that the decision of the supreme court had violated their constitutional rights.

The court, as shown, supra, R. 608, and as stated in the bill of exceptions, recited the facts showing that these pleas were filed without leave of court and without consent, and sustained the motion to strike them out, generally, without specifying any particular ground; nor does the bill of exceptions show any request by defendants' counsel for a specification or refusal by the court of the ground of the ruling. R, 608. Defendant's counsel at hearing of this motion withdrew plea 7. R. 609.

There is no application for leave to file the pleas so stricken out after they were stricken out; nor any application to make the pleas conform to the views of the court, in the record; nor any suggestion that any right was claimed under the Constitution and laws of the United States as being raised by the action of the court in striking the pleas from the files.

This motion to strike out was sustained July 7, 1898, R. 608, and on the same day this entry was made on the minutes by defendants. "In this cause the court having

strick n from the files the pleas of the two defendants respectively numbered 3, 4, 5 and 6, filed by them in order to meet the new aspect put upon the case by the decision of the supreme court herein rendered on the 20th of June, 1898, the said defendants hereby withdraw the joint plea filed by them prior to such decision and all other pleas filed before that decision, and also withdraw the two pleas filed by them respectively at this term numbered 2, and decline to plead further herein," and this is signed by defendant's counsel.

This withdrawal of all the pleas filed, left the case as stated in the declaration for the taxes of 1892, 3, 4 and 5, without any defense made, and a refusal to defend further.

On December 18, 1896, there was filed in said circuit court a similar suit for the taxes of 1896. (R. 622-9,) No. 3059; and on December 24, 1897, there was filed in the said circuit court a similar suit for the taxes of 1897, No. 3142. (R. 611-8.) These suits were pending in said circuit court at the July Term, 1898—the appearance term thereof, having been returnable January Term, 1897 as to the suit for 1896 taxes, and January Term, 1898, as to the suit for 1897 taxes—and no pleas having been filed therein on July 7, 1898, when said withdrawal of pleas as to the suit for 1892, 3, 4 and 5 taxes was made, and no orders of any kind had been made therein by the court.

On July 8, 1898, this entry is made on the minutes, R. 610. "On the 21st day of July, 1896, causes numbered 2788, 2916 and 3018, the suits of plaintiff against defendants for the taxes of the years 1892, 1893, 1894 and 1895, respectively, were consolidated; and after that proceeded with as one case under said number 2788, and now by consent of all parties, said consolidated case embracing said three cases is further consolidated with cases numbered 3069 and 3142, the suits of the plaintiff against defendants for the taxes for the years 1896 and 1897, respectively, and hereafter all of said suits shall proceed as one suit under the said number 2788, and it is ordered

that all the orders, proceedings and pleadings in one shall be appropriated to each and all of said cases with the proper changes of dates and amounts for each of said years 1892, 1893, 1894, 1895, 1896 and 1897. This order is made to save the expenses and inconvenience of separate pleadings and trials in each case, and is not to be construed to the prejudice of either party, and all objections and exceptions are reserved which could be reserved if said orders, pleadings and proceedings were all separate.

This order, at the request of all parties, is entered as of the 4th day of July, 1898, and shall take effect as of that date, at which date the same was made."

Thereupon judgment *nil dicit* was rendered for the taxes of 1892 to 1897—a writ of inquiry being waived by defendants' counsel. R. 630 1.

There was an appeal from this judgment to the supreme court of the state to the October Term, 1898.

On November 22, 1898, the opinion of the supreme court was filed on the first appeal, and is found R. 638, no federal question is decided by that opinion, and reference is made to the full opinion.

The Yazoo and Mississippi Valley Railroad Company and Illinois Central Railroad Company moved to strike out this opinion, as too late and as improperly filed, R. 676; upon overruling this motion, the court delivered its opinion. R. 678.

On this last appeal to the supreme court, R. 183, numerous errors were complained of in regard to practice and procedure; and of the failure of the court to attach plaintiff's demurrer to defendant's pleas to the declaration; and that the court erred in overruling the defendant's objection to proceeding to trial in the absence of an opinion of the court under Section 4381, Code 1892; and because two weeks of the term had already expired, the effect of which was, as assigned, violative of the 14th amendment to the Constitution of the United States; that the court erred in denying the petition to remove to the

United States court; and in overruling the motion for continuance; and that, in overruling the objection to proceeding to trial in the absence of the opinion as required by said Section 4381, Code 1892, and in docketing the cause for trial after the term began, and in overruling the motion for a continuance, the effect was to violate said 14th amendment; that the court erred in striking out the 4th, 5th and 6th pleas of defendant.

On February 20, 1899, the supreme court of the state affirmed the judgment of the circuit court.

The opinion of the court, R. 685, does not decide any federal question, except that the refusal of the petition to remove was correct, and it places the decisions upon the questions of practice; and that all the taxes sued for accrued after the consolidation of 1892, and that by the former opinion it was held that such consolidation lost the exemption; and that the exemption was repealed by the Code 1892.

From this judgment the case comes to this court by writ of error from the supreme court of Mississippi.

There was a motion made in this court to dismiss for want of jurisdiction, and the court postponed the decision of the motion to the hearing on the merits.

We refer the court for a further statment of the case to the statement of Messrs. Critz, Beckett and Kimbrough, wherein is pointed out the erroneous statement of the case by the plainttffs in error.

BRIEF.

JURISDICTION.

No right was claimed by plaintiffs in error under the constitution and laws of the United States, as required by sec. 709, Rev. St. U. S., either at a proper time, or in a proper way; nor was any such right drawn in question

and decided adversely to plaintiffs in error; nor was any federal question decided adversely to plaintiffs in error except colorably in the denial of the petition to remove to the Federal court; and this because said petition did not comply with the act of congress.

1. To constitute a denial of such right, under sec. 709, it must *affirmatively* appear *by the record* that the right was *specifically*, i. e., *unmistakably*, set up and claimed, and that it was denied by the court.

Mut. Life Ins. Co. vs. *Kirchoff*, 169, U. S., 107.
Water Power Co. vs. *Street Ry. Co.*, 172, U. S., 488.
Schyler Nat. Bank vs. *Balling*, 150, U. S., 85.
Green Bay vs. *Patten Paper Co.*, 172, U. S., 68.

If the state court decides a federal question the jurisdiction of this court would not attach, where, as here, there were other questions, not federal, decided, in themselves sufficient to sustain the judgment.

McQuade vs. *Trenton*, 172, U. S., 636.
Allen vs. *So. Pacif. R. R. Co.*, 173, U. S., 479.
Henderson Bridge Co. vs. *Henderson, Id.*, 608.,

If the record does not show upon what ground the state court acted, the presumption would be that the state court exercised its discretionary powers rather than that it denied a constitutional right.

Dibble vs. *Bellingham Bay Co.*, 163, U. S., 63.
Meyer vs. *Richmond*, 172, U. S., 101, op. of the Chief Justice.

2. Such right should be claimed, specifically in the *trial* court; but it may be raised for the first time in the supreme court of the state "if it was involved in the case as presented to that court."

Oxley Stave Co. vs. *Butler Co.*, 166, U. S., 656.
Water Power Co. vs. *Street Ry. Co.*, 172, U. S., 488.
Chicago &c. Rd. Co. vs. *Chicago*, 166, U. S., 231.
Meyer vs. *Richmond*, 172, U. S., 93.

It cannot be set up for the first time on petition for rehearing.

Meyer vs. *Richmond*, 172, U. S., 92.
Citizens Sav. Bk. vs. *Owensboro*, 173, U. S., 643.

It cannot be set up after a decision of the cause on its merits by state supreme court, where the question might have been but was not raised before such decision.

Mut. Life Ins. Co. vs. *Kirchoff*, 169, U. S., 107.

And this, even where the pleadings were sought to be amended on the second trial so as, specifically, to present the federal question; and where a motion to so amend has been denied by the state court. The revisory power of this court does not extend to rights denied by the highest court of the state, unless the party plainly and clearly claims the right before the state court decides the case. *Id.* 110. In such case the state supreme court determines the rights of the parties on the first appeal, and after this the suggestion of a federal question comes too late. The supreme court of the state was bound on the second appeal by the previous decision, and could not enter into matters of defense which might have been availed of on the first appeal. *Id.* And this is true, even though, in the second opinion the court responded to the argument of counsel upon the federal question, but adhered to its former decision and did not re-open the questions previously decided. *Id.* 114.

An agreement of parties cannot confer jurisdiction in such cases.

Mills vs. *Brown*, 16, Peters, 525.

A decision in accordance with the practice and reasonable rules of the state court cannot confer jurisdiction.

Commercial Bank vs. *Rochester*, 15, Wall, 639.
Life Ins. Co. vs. *Francisco*, 17 Wall, 673.

The question must have been decided by the state court.

Commercial Bk vs. *Buckingham*, 5, How. 317.
Morrison vs. *Watson*, 154, U. S., 111.

It must be shown by the record.

R. R. Co. vs. *Rock*, 4, Wall, 177.

Re Robertson, 156, U. S., 183.

For this purpose specifications of error cannot be looked to.

Fowler vs. *Lamson*, 164, U. S., 252. *Id.* 454.

Clarke vs. *McDade*, 165 U. S., 168.

The certificate of the presiding judge that the question was raised is not sufficient.

Powell vs. *Brunswick*, 150, U. S., 439.

Applying these principles, we find:

1. That no federal question was even suggested, until after the cause had been decided on the first appeal by the supreme court of the state.

2. That no federal question was decided by the state supreme court on the first appeal. R. 513.

3. That the first suggestion of a federal question was upon a suggestion of error, complaining to the state supreme court that there was error of law in its opinion on the first appeal. R. 518.

4. This suggestion of error, as shown by the rules of practice of the state supreme court, is not a pleading in said court; it is an informal complaint of the opinion, and does not call for any order of the court, except at the pleasure of the court. The court thereon "will take such action as may seem proper." Rule 10, 70 Miss., xxiii.

5. No order was made on the suggestion of error. The court took no action of record thereon. The certificate of the clerk of the supreme court, R. 527, as to the usual practice upon suggestions of error, is not a part of the record and cannot be considered.

Walker vs. *Villaso*, 6 Wall, 124.

6. This suggestion of error does not rise to the dignity of a petition for rehearing, denied; and even that would not suffice.

7. When the cause was remanded by the supreme

court for a new trial, the decision of every question involved in the case had become *res aajudicata.*

Mut. Life Ins. Co., vs. *Kirchoff*, 169, U. S., 107.
McDonald vs. *Green*, 13, S. & M., 138.
Bridgeforth vs. *Gray*. 39, Miss., 136.
Leblanc vs. *Railroad Co.*, 73, Miss., 468.

The circuit or trial court was bound by the mandate of the supreme court, and that, as to the trial court, was 'the law of the case'.

8. Not only the circuit court but this court on this writ of error is bound by the opinion and judgment of the state supreme court, on this first appeal; because it involves a construction of the general principles of law, and an interpretation of its own constitution and laws, without any federal question being drawn in question and decided.

Bank vs. *Citizens Bank*, 14 Wall, 9. *Id.* 10. *Id.* 611.
Henderson Bridge Co. vs. *Henderson*, 173, U. S., 602.
S. C., 141, U. S., 689.
Covington vs. *Kentucky*, 173, U. S., 231.
Turner vs. *Wilkes Co.*, 173, U. S., 461.
Wilson vs. *North Carolina*, 169, U. S., 586.

The question of *res adjudicata, vel non*, did not raise a federal question.
Henderson Bridge Co. vs. *Henderson*, 173, U. S., 608.

9. The only way known to the law of raising the question of *res adjudicata* is to plead the judgment in bar; or to introduce the record of the judgment in evidence as an estoppel.

U. S. vs. *Bliss*, 172, U. S., 321.

This was not done; and the mention of the Lambert case, 70, Miss., 729, and of Miss. Mills vs. Cook, 56, Miss., 40, in the opinion of the court on the first appeal was in response to the argument of counsel and not upon any such issue made in the record.

10. Upon remand of the cause after the first appeal objection was made to proceeding with the cause because the opinion accompanying the mandate did not conform to

the state statute; and, also, because the cause was not properly docketed for trial at that term under the state statute; and a continuance was requested because the parties were not ready, and because of the absence of some of the attorneys. No suggestion was made in the trial court that these objections, and this application for continuance, drew in question any right under the constitution and laws of the United States. Such suggestion is made for the first time by the assignment of error in the state supreme court on the second appeal. R. 529, 54 , 634.

The decision of these questions of practice and proceedure would involve no violation of the federal laws or constitution. The right now claimed was not involved upon the record in the circuit court, and it could not be drawn in for the first time on appeal by the specifications or assignment of error. The decision of the supreme court on the last appeal did not decide any federal question as to these matters. It could not properly have done so, as no such question was made by the record.

11. The action of the court in striking out the Pleas 3 to 6, inclusive, did not draw in question nor decide any federal question.

Under the Code, 1892, sec. 722: "The defendant shall plead on or before the first day of the term to which the process is returnable, or within such other time as the court, by rule or otherwise, may allow."

"Where a plea is filed at a term subsequent to that at which the process is returned served on the defendants, and the record does not show that this plea is filed by leave of court, the plea will be so radically defective that it may be disregarded by plaintiff; nor will it make any difference if the plea recite, in the body of it, that it was filed "by leave of the court": the record must show the permission affirmatively: if therefore a verdict be rendered, and such plea be undisposed of in the record, and it does not appear by the record that it was filed by leave, it will not be error."

Wright vs. *Alexander*, 11 S. & M., 411.

The special bill of exceptions shows that the facts in regard to the leave of court to file the pleas were gone into, and they alone are preserved as the facts attendant upon the striking out. R. 608.

The motion to strike out embraced numerous grounds, among others: 1. That the pleas were *improperly filed*: 2. That they were no defense *as the case then stood*: 3. That they seek to review the decision of the supreme court: 4. That the matters have been adjudged: 5. That they were so vague, uncertain and indefinite as to prejudice, embarrass and delay a fair trial, etc., etc.

1. That the pleas were improperly filed, that is, without leave of court, is clear; therefore, the motion should have been sustained on this ground.

Price vs. *Sinclair*, 5, S. & M., 258.

2. That the pleas were no defense *as the case then stood*, because of the decision of the supreme court on the first appeal; and that in such case an amendment should not be allowed to set up the federal question is settled.

Mut. Life Ins. Co. vs. *Kirchoff*, 169 U. S., 107.

3. The code 1892, sec. 704, provides: "If the allegations of a pleading be so indefinite or uncertain that the precise nature of the complaint or defense be not apparent, or if any pleading be so framed as to prejudice, embarrass or delay a fair trial of the action, the court on the application of the opposite party, shall cause the same to be made more definite and certain, or may strike the same from the files."

An examination of the pleas 4, 5, and 6, of which complaint only is made here, will show that a reasonable interpretation of them would make them fall under the condemnation of this statute. Under this statute it was in the discretion of the court to strike out. A finding of fact that they violate the statute is not reviewable here.

Therefore, even if these pleas set up a federal question, they were filed and framed in violation of the prac-

tice and procedure of the circuit court; and because of this, and quite independent of any federal question, the court should have sustained the motion to strike out. As the record is silent as to the ground upon which the court acted,—except that it indicates it was because no leave was granted,—and as it was not assigned for error in the supreme court of the state that the striking out of these pleas raised a federal question, R. 584, this court would impute the action to matters of discretion of the trial court, if possible, rather than to a violation of the constitution.

Dibble vs. *Bellingham Bay Co.*, 163, U. S., *supra:*

Upon the record it does not unmistakably and affirmatively appear that the state court decided any federal question in striking out these pleas; and, if it did, the federal question was not raised at the proper time and in the proper way.

12. There was no request made for leave to file the pleas after the motion to strike out was sustained; nor was any application made to make the pleas certain and definite. The record stands on the general order sustaining the motion.

13. Complaint was made in the supreme court of the state, and here of striking out the 4th, 5th, and 6th pleas; but no objection is made in either court by the assignments of error that striking these pleas out raised or decided a federal question. R. 684, 703, 4.

14. If the motion to strike out should be construed as involving, by implication, an application to file the pleas —contrary to the fact—then this was addressed to the *discretion* of the court, and involved the finding of the facts, outside of the merits or demerits of the pleas, in respect to diligence and excuse for not pleading these matters sooner.

McAdory vs. *Turner*, 56 Miss., 666.

In Mut. Ins. Co. vs. Kirchoff, 169 U. S., *supra*., this

court held that such an amendment came too late after reversal on the first appeal.

15. Considering it as an application to file the pleas this court must examine them from the standpoint of the trial judge, and with regard to the facts within his knowledge, in determining whether there was a specific denial of such right under the federal laws or whether other good reasons might not have been the ground of that decision. The bill of exceptions is silent on this point, and as the plaintiffs in error must show that the court decided a federal question unmistakably, this very uncertainty would deprive this court of jurisdiction.

But considering plea 4, it appears that it attempts to set up that the obligation of the contract rights are impaired by this suit and the decision of this cause on June 20, 1898; and that thereby plaintiffs in error are denied equal protection of the laws; and that thereby they are deprived of their property without due process of law, in violation of the constitution of the United States; R. 557. When applied to the facts of record, and to those in the knowledge of the court, both of which must be considered, as, also, to the law of the case, it is clear that the court would be right in denying an application to file this plea: because,

1. The constitution of 1869, by sec. 13, art. xii, provides: "The property of all corporations for pecuniary profits shall be subject to taxation the same as that of individuals" and the state supreme court finds as a fact that this provision was not interpreted in Miss. Mills vs. Cook, 56 Miss., 40, nor in any of the subsequent decisions relied on in the plea as establishing a rule of property, a vested right or contract, with reference to the identical questions here involved, in that, in none of said decisions was considered or decided the effect of said section 13, in its relation to sec. 20, art. xii., const. 1869: "Taxation shall be equal and uniform throughout the state. All

property shall be taxed in proportion to its value to be ascertained as directed by law."

2. In Mills vs. Cook there was a general exemption law applicable to all persons and corporations alike, and not, as here, a grant of a special exemption by a special act to a particular corporation, while other railroad property was selected for taxation and taxed.

3. In Miss. Mills vs. Cook, there was no *irrepealable* exemption, while by said 21st section the exemption was declared to be *irrepealable.*

4. The opinion of the supreme court shows that none of the cases so relied on are authority for this case, and clearly and conclusively differentiates them. R. 659 *et seq.*

5. The supreme court held that the exemption, if existent, was repealed by the act of 1886 and code of 1892.

6. The supreme court *upon the facts,* as well as the law, (the Lambert case, 70 Miss., 779, was decided on demurrer) held that under sec. 180, const. 1890, and what was actually done by said consolidation of 1892, the exemption was lost, and neither said sec. 180, nor the facts as to the consolidation of 1892 were considered or determined by said Lambert case. And this, as declared by the court in its last opinion, was the main ground of the decision on the first appeal. P. 686-7.

The Lambert case relied on involved the taxes on property in Adams county only for 1891-2, and the exemption there claimed was under the charter of Natchez, Jackson and Columbus Railroad Company, as re-enacted, according to the opinion of the court, by the act of 1884, which exemption had been assigned to Louisville, New Orleans and Texas Railway Company, and by it carried into the consolidation of 1892, while in this case the exemption is claimed under the consolidated company's charter, under the acts of 1882 and 1884, as conveyed to the consolidated company, Yazoo and Mississippi Valley Railroad company, by consolidation of said companies under their respective charters, by deed of Oct. 25, 1892; therefore, an exemption

upon different property, under a different grant of exemption, acquired by a different title, and under different statutes.

In *N. O. Water Works Co.* vs. *La. Sug. Ref. Co.*, 125, U. S., *supra*, the court held that the finding of the state court as to the differences between its own decisions would bind this court.

In *Wood* vs. *Brady*, 150, U. S., 18–22, it is declared that assuming for the purposes of the case that there may be a vested right in an erroneous decision, the argument that the statutes are similar, and, therefore, a like construction should be placed upon them, must be addressed to the state court; and when the state court has assumed to distinguish between the two acts it is not the province of this court to say that the distinction is not well taken.

8. Because said plea 4 fails to aver, and it could not truthfully do so, that the decision was based on the federal question or that the decision of the federal questions averred was necessarily involved in that decision.

In fact, the whole defense was based upon the state statutes and constitutions, and it was not until after this defense had failed that refuge was attempted to be taken under the federal constitution.

9. Said 4th plea does not aver that any subsequent statute was passed after the consolidation of Oct., 1892, impairing the obligation of that contract; its complaint is that this decision does not sustain the interpretation of the former decisions of the court which plaintiffs in error aver they relied on, but which the court now holds was an erroneous interpretation and not sustained by the cases.

10. The first opinion decided what was the proper interpretation of the charter powers of consolidation of Louisville, New Orleans & Texas Ry. Co. and of Yazoo & Mississippi Valley Railroad Co., and the effect of sec. 180, const. 1890, upon these, then, unexecuted powers in respect to an exemption from taxation when said powers were executed in 1892.

11. Because the exemption, if existent, was repealed by code 1892.

12. Because the first opinion finds *as a fact* that what was actually done under the consolidation of 1892 formed a *new company*. This finding is binding on this court.

Backus vs. *Fort Street Depot Co.*, 169, U. S., 563.

13. Because there was no contract evidenced by said sec. 5 (21), the obligation of which was protected by the federal constitution. Louisville, New Orleans & Texas Ry. Co. acquired, under sec. 5, (21) acts of 1882 and 1884, authorizing consolidation, the only exemption the Yazoo & Mississippi Valley Railroad Co. as consolidated Oct. 24, 1892, had; for the charter of Yazoo & Mississippi Valley Railroad Co. contained only an unperformed, conditional exemption. Acts 1882, p. 847. Both of these charters were subject to sec. 13, art. xii, const. 1869, *supra*, which forbade *irrepealable* contracts of exemption. This 4th plea avers this to be the law under the rule in Miss. Mills vs. Cook and the other cases there relied on, and it is expressly so decided in the Lambert case.

Where the power to alter or repeal an exemption from taxation is reserved a subsequent statute taxing the property would not impair the obligation of the contract.

Louisville Water Co. vs. *Clark*, 143, U. S., 1.

Citizens Bank vs *Owensboro*, 173, U. S., 644.

14. Because the power to consolidate under the respective charters of the Louisville, New Orleans & Texas Ry. Co. and of the Yazoo & Mississippi Valley R. R. Co. was a mere license, revocable at will, at any time before exercise, and such revocation does not impair the obligation of any contract.

Galveston etc. *Ry. Co* vs. *Texas*,, 170, U. S., 226.

Hence, the framers of the constitution of 1890 were unfettered by any federal question in dealing with the future exercise of powers of consolidation or merger then existing.

15. By sec. 180, const. 1890, "All existing charters or

grants of corporate franchise under which organizations have not in good faith taken place at the adoption of this constitution shall be subject to the provisions of this article", etc., and by sec. 181 of "this article" it is provided that: "The property of all private corporations for pecuniary profit shall be taxed in the same way and to the same extent as the property of individuals", etc.

Hence, the state court in deciding that by consolidation in October, 1892, under powers granted prior to 1890, the exemption, if existent, was lost, could not have impaired the obligation of any contract.

16. As the record is silent as to the reasons of the court in sustaining this motion to strike out, and as the matter of permitting the filing of pleas out of time is addressed to the discretion of the court in great degree, as with motions for continuance the court is not bound by the face of the application, but may apply its knowledge of the facts to the solution of the question.

Strauss vs. *State*, 58 Miss., 54.

This would include the facts reasonably within the knowledge of the trial court, and if these facts do not appear in this record it is because of the fault of plaintiffs in error in not having the reasons for the decision of the court in this record.

The trial judge, as also the supreme court, must be presumed to have known what the record in the Lambert case sought to be pleaded in the 4th plea actually showed and that was this: that it was a bill by the Natchez, Jackson and Columbus Railroad Company as a going "concern," joining Yazoo and Mississippi Valley Railroad Company as grantee, as complainant, against Lambert, sheriff of Adams county, seeking to restrain by injunction the collection of the state and county taxes of 1891 and 1892 upon that part of the property of Natchez, Jackson and Columbus Railroad Company in Adams county, upon the ground: That by Act of the Legislature of August 8, 1870, the said 21st section was extended to Natchez, Jack-

son and Columbus Railroad Company, and that as amended by the act of March 5th, 1878, the benefits of the said 21st section were also granted, and that this 21st section was a contract "irrepealable and inviolable." That the Natchez, Jackson and Columbus Railroad Company on the faith of these Acts invested its funds in and constructed its railroad, and since its construction has employed its capital in the operation and maintenance thereof, relying on said contract; and reposing in the belief "that the taxes to which it was subject, would be appropriated by the state of Mississippi to the payment of its debts and liabilities incurred in the construction of said railroad, and as provided for by said 21st section, * * and that "said contract and agreement on the part of the state of Mississippi went far beyond the mere privilege of an exemption from taxation, the state having solemnly agreed in said contract and by the Acts of the Legislature aforesaid, that if said company should construct a railroad as provided for in its charter and amendments thereto and should incur debts and liabilities, in so doing, that unless the earnings of said company should entitle it to declare and pay to its stockholders a dividend of eight per cent upon its capital stock, over and above its liabilities, that the taxes to which it was subject for the term of 30 years from the date of incorporation, in 1870, should be appropriated by the state of Mississippi, to the payment of the debts and liabilities incurred by the company in building said road;" and that by a sale of its property, rights, franchises, privileges and immunities under the Act of 1890, said immunity from taxation passed to the purchaser, Louisville, New Orleans and Texas Railway Company; and that by said consolidation of 1892, said immunity from taxation passed to Yazoo and Mississippi Valley Railroad Company; that on Oct. 25. 1892, "the Louisville, New Orleans and Texas Railway Co., was merged into and consolidated with the Yazoo and Mississippi Valley Railroad Co., and that by said merger and consolidation the capital stock,

franchises, etc., of Louisville, New Orleans and Texas R'y Co., was merged into and became the property of Yazoo and Mississippi Valley Railroad Co.; that the franchise to be a corporation did not pass by said sale to Louisville, New Orleans and Texas Railway Co., but that since said sale Natchez, Jackson and Columbus Railroad Co., has preserved its organization, had meetings of stockholders and directors, and was a "going" corporation; that the amount of taxes of 1891 and 1892 had been applied upon its debts of construction by Natchez, Jackson and Columbus Railway Co.; and that the tax collector refused to accept the affidavit of either Natchez, Jackson and Columbus Railroad Co., or Louisville, New Orleans and Texas Railway Co., (Yazoo and Mississippi Valley Railroad Co.,) in payment of the taxes; and prays injunction. The bill was demurred to, but not upon the ground of the unconstitutionality of said 21st section; nor of the effect of Section 180 of the Constitution of 1890 upon said consolidation of 1892; nor of the repeal of the exemption from taxation by the Acts of 1878, 1836 and Code of 1892.

This demurrer was sustained in the chancery court, and the Natchez, Jackson and Columbus Railroad Co. and Yazoo and Mississippi Valley Railroad Co. appealed. There was also a plea filed setting up that Louisville, New Orleans and Texas Railway Co., on Feb. 29, 1892, before consolidation with Yazoo and Mississippi Valley Railroad Co., exhibited its bill against said Lambert to restrain the collection of the identical tax for 1891, to which bill a demurrer had been sustained, and that it was then on appeal, and that this pending suit was a bar.

The record in support of said plea shows a bill by Louisville, New Orleans and Texas Railway Co. vs. Lambert, substantially like that in N., J. & Co. R. R. Co. vs. Lambert, except that Louisville, New Orleans and Texas Railway Co., made the affidavit provided for by Sec. 21, and Lambert refused to execute receipt; (the affidavit showed that Louisville, New Orleans and Texas Railway Co., had,

"during the year 1891, actually and in good faith, paid and applied to the payment of debts and liabilities which they may have incurred in the construction of said road, for money borrowed by said company upon said lands or otherwise to be used in constructing said road, a sum equal," etc. This bill was demurred to, the demurrer sustained and bill dismissed by chancellor; and this appeal was pending when the bill was filed by Natchez, Jackson and Columbus Railroad Company, and Yazoo and Mississippi Valley Railroad Co., vs. Lambert, *supra*; and both appeals were decided by the case of Natchez, Jackson and Columbus Railroad Co., vs. Lambert, 70 Miss. 279. By the opinion it was held that the plea of former adjudication (pending suit) was bad because the suit was "fatally defective." The complainant (N. J. & C. R. R. Co.,) could not take any benefit from it. It was founded on an affidavit pleaded as a tender for the taxes of 1891, which had no reference to the N., J. & C. R. R, but to a different one," (L. N. O. & T. Ry Co.,) and the decree in L., N. O. & T. Ry Co., vs. Lam' was *affirmed*. The decree in N., J. & C. R. R. Co., vs. La. 'ert was reversed, the demurrer overruled, and leave given to answer.

By the *records* in these Lambert cases we find that the court holds; 1, that the alleged contract of appropriation was an exemption, a "mere grace", repealable at will: 2. that N. J. & C. R. R. Co., as a "going" corporation had the right to pay the taxes on the property it had conveyed to L. N. O. & T. Ry Co., by an affidavit that it had applied the amount of the taxes due upon said property to *its* debts of construction; 3. that L. N. O. & T. R. Co., the purchaser, did not have the right to pay the taxes on said property by an affidavit that L. N. O. & T. Ry. Co., had applied the amount of the taxes on said property to *its* debts of construction: 4. that N. J. & C. R. R. Co. was a going corporation in 1891 and 1892: that said 21st section was repealed by the act of 1875 and by the code of 1880 — there being no averment of any exemption under

the acts of 1884 or 1890 or const. 1890 no such question could be adjudged, *O. & M. R. R. Co.*, vs. *Wiggins* 142. U S. 396,—there could be no adjudication of any immunity from taxation under said acts recited in the opinion.

The bill in Lambert's case was filed in Nov. 1892, the chancellor dismissed the bill on this demurrer, and the supreme court reversed the decree in May 1893.

In the instant case the State Supreme Court finds as a fact from its records that the Lambert case held said 21st section to be an exemption not "a contract of appropriation;" that the constitutionality of said 21st section was not decided: that Sec. 180 const. 1890 in its effect upon said consolidation of 1892 was not drawn in question; that said act of 1886 and code of 1892, repealing the exemption, if existent, were not considered or decided.

This finding is binding upon this court.

New Orleans Water Works Co. vs. *La., Sug. Ref. Co.* 125, U. S. 136-7.

Backus, vs. *Fort Street Depot Co. Supra.*

17. The rule of identity prescribed would make applicable the principles of *res adjudicata.*

A judgment for one year's taxes is not a bar to a suit for another year's taxes is the rule announced in the instant case, as also in *Keokuk* vs. *Missouri* 152, U. S. 301. This case was differentiated in New Orleans, vs. Citizens Bank, 167 U. S. 317, by declaring that its reasoning was not considered as relating to a case where the validity of the tax was resisted *on a particular ground. which particular and special defense* had been previously held between the same parties to be valid under *identically the same conditions and circumstances.*" 173 U.S. 636. 174 U.S. 412

In *Dennison* vs. *U. S* 168, U. S. 249, the suit was not for the same but similar items, and it was held to fall within *Cromwell* vs. *Sac* 94, U. S 351, "where the sec. ond action between the same parties is upon a different claim or demand the judgment in the prior action operates as an estoppel only as to to those matters in issue or

points controverted, upon the determination of which the finding or verdict was rendered."

So in *So. Pac. R. R. Co.* vs. *U. S.* 168, U. S. 50, the court says: "the inquiry in such case being 'as to the point or question actually litigated and determined in the original action' not what might have been litigated and determined."

A rule of property cannot be created "upon a ground not put in issue there but *conceded* by counsel in favor of the company."

Keokuk vs. *Missouri* 152, U. S, 316.

Even a waiver of an exemption not introduced in evidence on the first trial may be shown on the second trial to defeat the exemption established by the former judgment.

Sloan vs. *Price* 84, Ga. 171

Where the exemption depends on the use of the property a suit for the taxes of one year is not a bar to an action for another year.

Red vs *Morris* 72, Tex. 554.

Or where the facts must vary from year to year. *Tubbesing* vs. *Burlington* 68, Iowa 691. and approving 38 Iowa.

Where suit was brought upon a certain statute to recover taxes for certain years and recovery was had, and afterwards suit was brought for subsequent year's taxes for a larger amount because the act upon which the former recovery was had was unconstitutional, it was held that the former recovery was not *res adjudicata*.

Philadelphia vs. *Ridge Ave Co.* 142, Pa, St. 484. S.P. Boyd v ala 94, US. 648.

18. Touching the good faith evidenced by the 4th plea, wherein it is averred, as if *res nova*, that this 21st section was not a contract of "exemption" but a contract of "appropriation," the court knew that the Lambert case had expresaly presented that view, and that it had been held to be an exemption, "mere grace." "It," the legislature, "had complete control of the matter, and could re-

voke the provision for immunity from paying taxes, which is undoubtedly immunity from taxation for *paying is the burden.* 70, Miss, 787. So, the very case relied on as a rule of property had held the 21st section to be an exemption, and the court could not accept this "contract of appropriation" plea.

Said plea 4, avers, also, that this suit is not to recover taxes on the property that formerly belonged to N. J. & C. R. R. Co. (R. 565), but is a suit to recover the taxes on the main line and branches of L. N. O. & T. Ry., under a different charter, and not under the identical facts involved in the Lambert case.

Said plea 4 avers that "proceeding under said charter and under said section 5 as a part thereof the Louisville, New Orleans & Texas Ry. Co. proceeded to construct and equip the railroads contemplated in said acts, beginning the construction thereof in the year 1892 and the connection of track through Memphis * * to New Orleans * * * over the route prescribed by said acts in the latter part of 1884." R. 659-60, and, also, that the Louisville, New Orleans & Texas Ry Co. was *not formed* by consolidation of the Memphis & Vicksburg R. R. Co. and the New Orleans, Baton Rouge, Vicksburg & Memphis R. R. Co. *until August 12 1884.* R. 12. Therefore, said railroad could not have been built under the consolidation of August 12, 1884, creating for the first time Louisville, New Orleans & Texas Ry. Co; and could not have been built by said consolidated Company on the faith of said section 5. (21st section). It was patent to the trial court that this allegation of the existence of the exemption, and of its derivation through section five of the acts of 1892 and 1894, in favor of the consolidated company, was untrue, and that the defendant company did not and could not acquire the exemption in the manner averred

It was also patent that this railroad constructed, as averred, from 1882 to the latter part of 1884, must have been constructed under one of the charters of the consoli-

dating companies. The charter of the Vicksburg & Memphis R. R. Co. contained the exemption, that of New Orleans, Baton Rouge, Vicksburg & Memphis R. R. Co., R. 21, contained no exemption. It was not averred under which of the charters of the constituent companies the road was built. Hence, the plea was fatally defective in its allegation of title to the exemption.

Said plea 4, also, averred that in or about July, 1892, Illinois Cen. R. R. Co. purchased of the mortgage bonds of L., N. O. & T. Ry. Co. a large amount, issued from 1882 to 1890, (R. 588, 589), and that about the same time Miss. Valley Co.—of which the Illinois Cen. R. R. Co. owned nearly all the stock—purchased nearly $4,000,000 of the shares of stock of L., N. O. & T. Ry. Co., contemplating and relying upon said sec. 5 (21), act of 1882, and upon said rule of law settled by Miss. Mills case and other cases named; and upon said section 181, const. 1890; and upon said Taylor case, and upon the uniform recognition of said right by all the state departments. Now, the trial judge knew that the Lambert case was not decided until May, 1893, and that the consolidation, by which the exemption was held to be lost, did not occur until Oct. 24, 1892, and, therefore, in this aspect the plea was fatally defective.

In so far as the case of Louisville, New Orleans & Texas Ry. Co. vs. C. E. Taylor, 68 Miss., 361, is relied on, it is answered by the opinion of supreme court holding, upon its own records, that that was a fictitious case founded on a mis statement of fact. R. 667-8.

And every case relied on in said 4th plea is shown by the opinion of the state supreme court, R. 659, *et seq.* not to have been a decision which controlled the decision of this case, but that every one of them was essentially different.

So, upon the facts and the law the state court could have decided that the 4th plea as the case then stood was no defense without deciding a federal question; in such case, this court, upon writ of error from the state supreme

court, will follow the state court in its construction of its own statutes and constitution.

Forsyth vs. *Hammond*, 166 U. S., 518-9.
Wood vs. *Brady*, 150 U. S., *supra*.
Backus vs. *Fort Street Depot Co.*, *supra*.
N. O. Water Works Co. vs. *La. Sug. Ref. Co.*, 125 U. S., 36-7.

Says this court: "We are not authorized by the judiciary act to review the judgments of the state courts because their judgments refuse to give effect to valid contracts or because those judgments in their effect impair the obligation of contracts." *Id.* 30.

EXEMPTION.—REPEAL.

Did any contract for exemption from taxation exist within the ~~protection~~ meaning of the federal constitution; if ~~so~~ not, was it repealed?

The 4th plea predicates its defense upon the existence in 1892 and in subsequent years of an exemption from taxation; first, through the charter of Natchez, Jackson & Columbus R. R. Co., as to the property of that road—really not involved in this suit; second, through sec. 5, (21) acts 1882 and 1884.

The Lambert case, as stated, *supra*, holds that said sec. 21, (5), is an exemption from taxation, and not a contract of appropriation.

First, as to the exemption of N., J. & C. R. R. Co.

This road was chartered July 21, 1870, acts 1870, pp. 221, 233, and its original charter contained no exemption. By sec. 26 of its charter it is provided: "And the rights, power and authority granted in and by this act of incorporation shall be perpetual, except that the same may be altered or amended as necessity may require." Therefore the charter was repealable at will.

Said charter so granted was subject to art xii, sec. 20, const. 1869: "Taxation shall be equal and uniform throughout the state. All property shall be taxed in pro-

portion to its value to be ascertained as directed by law"; and to art. xii, sec. 13: "The property of all corporations for pecuniary profits, shall be subject to taxation, the same as that of individuals."

By an amendment of the said charter, on Aug. 8, 1870, said 21st section was extended to said Natchez, Jackson & Columbus R. R. Co.

By the code of 1871, sec. 1662, it was declared: "The following property, and no other shall be exempt from taxation, towit:" specifying, but not including railroads.

There was no special mention made of railroads in the revenue chapter 22, code 1871, as subject or not to taxation; but it provided that "all incorporated banks or other companies, liable to taxation on their capital stock, shall be assessed," etc. Sec. 1668.

By sec. 1747, chap. 22, code 1871, a privilege tax was imposed on express, telegraph, and insurance companies, but none upon railroads.

In 1875, acts 1875, p. 66, "An act to regulate railroad taxation" was passed, whereby it was provided: "That every railroad company whose line is in whole or in part, in this state, shall pay to the state treasurer * * in each and every year, a privilege tax as follows * * and the said privilege tax shall be in full of all other taxes, state, county and municipal, due from such company, or for which such company or its property could, but for the passage of this act, be made in any manner liable; * * * Provided, That lands owned by railroad companies, and not acquired and used in operating railroads, shall be taxable as other property." This act was construed in Lambert's case to repeal the exemption and to require the payment of this privilege tax of the Natchez, Jackson & Columbus R. R. Co. 70 Miss., 787. This was a *general* taxing statute.

In 1878, an act was passed, acts, 1878, 233, approved March 5, 1878, in regard to the exemption of Natchez, Jackson & Columbus R. R. Co., reciting that 30 miles of the road had been built, and that the said act of 1870 extend-

ing said 21st section to N., J. & C. R. R. Co., was not approved until after the adjournment of the legislature, and that it was not passed upon an aye and nay vote; and, it then again, extends said 21st section to said N., J. & C. R. R. Co. as to future and past taxes. This was a *special* act.

By a general act of 1878, approved the same day as the last special named act, acts 1878, 87, the said general act of 1875 was amended so as to provide: "That every railroad company whose line is in whole or in part in this state, shall pay to the state treasurer * * in each and every year, a privilege tax of eighty dollars per mile, upon each of said roads and branch thereof, in this state, except that upon narrow guage roads the privilege tax shall be but forty dollars per mile, and the said privilege tax shall be in full of all state, municipal and county taxes; fifty *per cent* of which said privilege tax shall be placed to the credit of the counties through which said railroad may pass, to be drawn by the county treasurers o the counties in proportion, to the number of miles of said roads in said respective counties: *Provided*, That lands owned by railroad companies, and not used in operating the railroads, shall be taxable as other property; and that this act shall not apply to the West Feliciana Railroad. Sec. 2. That this act take effect and be in force from and after its passage."

By this act it is clear that railroad property was selected for taxation and subjected to taxation. On the day of the approval of the foregoing general act, as stated, under guise of a defective enactment, a special act was approved whereby said sec. 21 was "made to apply to Natchez, Jackson & Columbus Railroad Company, etc." * * "And that all taxes, state, county and municipal, which have heretofore * * been assessed against said company or assessed or levied on its property, be and the same are hereby appropriated and set apart and shall be applied" as provided in sec. 21, acts 1878, p. 233.

The bill in Mills vs. Cook, 56 Miss., 45, was filed Jan.

4th, 1878, and on March 12, 1878, the chancery court dismissed the bill, and thereby held that the legislature had the power to repeal the exemption. In April, 1878, the supreme court held that while the legislature had power to exempt a *general* class, still that all classes of property selected for taxation must be taxed alike. So, concurrently with the re enactment of sec. 21, in 1878, there was a tax imposed by *general act* on railroad property, and a judicial interpretation rendered that all property of corporations and individuals selected for taxation must be taxed alike. Hence, the act of 1878 re-enacting sec. 21 was unconstitutional and void under Mills v. Cook, and according to defendants theory. There was, therefore, no exemption in effect in 1880.

Code 1880, chap. 10, sec. 597, provided that "each railroad company owning and operating a railroad in this state shall * * in each year, file with the auditor * * a complete schedule of all its property, real or personal", specifying length of road, switches, capital stock, bonded indebtedness, etc., etc. Sec. 599 provides that the governor, auditor, and secretary of state "shall * * assess the value of each railroad for the purposes of taxation", etc. "Sec. 604. The taxes so assessed in behalf of the state shall be due as other taxes, and if the same be not paid to the auditor * * within the time allowed other taxpayers, he shall proceed to collect the same by distress." "Sec. 605. The collector of taxes for any county, shall collect the amount due the county, as is now provided by law in the case of delinquents." "Sec. 606. The property of any railroad company lying or being in any city or * * town may be taxed for city or town purposes, upon a valuation thereof, made upon the same basis as the property belonging to individuals and no more, and this section shall apply alike to the foregoing and following modes of taxation herein provided for."

"HOW COMPANY RELIEVED FROM FOREGOING REQUIREMENTS."

Sec. 607. "Each and every railroad company which will accept this act, and annually pay to the auditor * * the taxes hereinafter provided for, and will signify their acceptance in writing shall be exempt (except from the last preceding section), from the provisions of the foregoing sections of this act until otherwise ordered and provided by law, and the payment of the same shall be in full of all state and county taxes; * * * *provided* that lands owned by railroad companies, and not used in operating the railroads shall be taxable as other property for all purposes."

"PRIVILEGE TAX ON EACH RAILROAD COMPANY"

Sec. 608. "Each railroad company whose line is in whole or in part in this state shall, if it accepts the provisions of this act pay to the state treasurer * * * in each and every year a privilege tax as follows, to-wit: specifying the several roads, and the amount of privilege tax, and among those specified is: "Natchez, Jackson and Columbus Railroad Company, thirty dollars per mile; * * Provided that no railroad company shall be subject to taxation under this chapter while the same is in process of construction, but if any part of any road shall be finished and used for profit, the part so finished shall be taxed although the whole road may not be finished."

Sec. 468, code 1880, of chapter 10, on public revenue, of which secs. 597-608 are a part, provides: "The following property, and no other, shall be exempt from taxation, towit:" specifying—but these do not include railroads; and the only exemption granted railroads are to those under process of construction under sec. 608, code 1880.

The code 1880 changes the act of 1878, *supra*, in that there the privilege tax was imposed primarily as a

commutation tax; by the code *ad valorem* taxes were primarily imposed; and to those companies that would *accept, in writing*, the provisions of chapter 10, the right was given of paying a privilege tax in lieu of state and county taxes on the railroad proper, but all municipal taxes and taxes on outlying lands had to be paid *ad valorem*.

Code 1880, sec. 8, provides: " * * All acts and parts of acts, the subjects of which are revised, consolidated and re enacted by this revised code, or repugnant to any of the provisions contained therein, shall be, and the same are hereby repealed, subject, however, to any express regulation relating thereto, which may be contained in this code." And sec. 8: "No private act, or act of local application, not revised or brought into this code, shall be affected by its provisions."

The subject of railroad taxation is "revised, consolidated and re enacted" by the code, and "each railroad" is required to pay *ad valorem* taxes, except that if they will accept the provisions of the act, in writing —that is thereby indicating their election to pay privilege instead of *ad valorem* taxes, they may pay privilege taxes; and the Natchez, Jackson & Columbus R. R. Co. is *expressly named* as one of the companies that may pay the privilege instead of *ad valorem* taxes.

Therefore, as correctly held in Lambert's case, (the author of the code of 1880 delivering the opinion), and in this case, the code of 1880 repealed the exemption of Natchez, Jackson & Columbus R. R. Co.

The general act of 1884 (p. 29), entitled, "An act to amend sections 607 and 608 of code of 1880, in relation to privilege tax on railroads, and for other purposes," provides: "that section 607 of the code of 1880 be so amended as to read as follows:" copying the exact language of sec 607, and then adding these words: "Any exemption in their charters to the contrary notwith-

standing as to such lands. And said lands shall be listed by assessors, and taxes shall be collected by the sheriffs and paid into the state and county treasuries; *provided, further*, that the provisions of this act shall not have the effect to tax any of the lands of the Memphis and Vicksburg Railroad Company, until the 1st day of February, 1886."

Sec. 2 reads exactly as section 603 of code 1880, except that the privilege tax is increased in amount and the specification as to the N., J & C. R. R. Co. is as follows: "The Natchez, Jackson and Columbus Railroad Company, forty dollars per mile after expiration of exemption as provided in its charter, and acts amendatory thereof." And adds to sec. 608 these words: "All the railroads not named herein and not exempt from taxation by their charters, sixty dollars per mile; *provided*, that no railroad company shall be subject to taxation under this chapter while the same is in process of construction, but if any part of any road shall be finished and used for profit, the part so finished shall be taxed, although the whole road may not be finished nor where the same is now exempt from taxation by its charter."

This act of 1884 was construed by Lambert's case to have restored the exemption repealed by the code of 1880. In this case it was said that it was "doubtful" whether it was so restored.

Following the rule that exemptions are to be clearly and expressly granted; and that every presumption is against the grant, and that they cannot be extended beyond the express language of the grant; (*Y. & M. V. R. R. C. vs. Thomas, 66 Miss., 553*; S. C., 132; U. S., p. 174. *State vs. Simmons*, 70 Miss., 485.) This statute cannot be said to create an exemption. Applying this amendment to the code sections it amends, we find that it does not purport to amend secs. 597-606 of code imposing *ad valorem* taxes, but is confined to the amount

of privilege tax the several roads are to pay. In that light the statutes would read that Natchez, Jackson & Columbus R. R Co. must pay *ad valorem* taxes on the value of its road, unless that company will signify its acceptance of the act in writing and "pay to the state treasurer * * in each and every year, a privilege tax, as follows: * * The Natchez, Jackson & Columbus R. R. Co., thirty dollars per mile" under the code, and under act 1884. "forty dollars per mile after expiration of exemption as provided for in its charter, and acts amendatory thereof."

This would mean, strictly construed, that after the time, namely, thirty years from 1870, named in its amended charter, the N., J. & C. R. R Co. should pay a privilege tax of forty dollars in lieu of *ad valorem* taxes; but the *ad valorem* taxes of secs. 597-606 are for every year, *in presenti*, and not thirty years, *in futuro*. As there is no provision in the act of 1884 for a privilege tax on N., J. & C. Ry. Co., in lieu of *ad valorem* taxes of current years, but only for such privilege tax, after thirty years from 1870; and as the act of 1884 only amends secs. 607 and 608 of code of 1880, it would follow that no provision was made by the act of 1884 for the *ad valorem* tax of the N., J. & C. R. R. Co. for current years being commuted by a privilege tax.

If the words, "After expiration of exemption as provided in its charter and acts amendatory thereof," should be construed as meaning that the legislature assumed that the exemption then existed, and on this assumption provided the payment of the forty dollars privilege after its expiration, when, in fact, no such exemption then existed, it could not be held that it was the legislative intent to re-enact the exemption merely because it predicated the taking effect of the imposition of a tax at a future time upon this false assumption of fact.

Endlich Interpretation of Statutes, secs. 372, 3, and 4.

There is no repealing clause to this act; it provides

for amending secs. 707 and 708 of the code so as to read as there provided. The necessary result of not providing by the act of 1884 for a present privilege tax as commutation for present *ad valorem* taxes imposed by secs. 597-606," would be to leave the *ad valorem* taxes to stand and be exigible. The fact that provision is made for a privilege tax as commutation for *ad valorem taxes* imposed by secs. 597-606, *in futuro*, would be no modification of the statute imposing taxes *in presenti*.

When the code of 1880 and act of 1884 provided for general taxation of railroads, under const. 1869, art. 12, sec. 13, (as interpreted in Mills vs. Cook), all railroad property must be taxed, and the attempted restoration of special exemption to N., J. & C. R. R. Co., by the act of 1884 would have been unconstitutional.

But if the act of 1884 re enacted the exemption by providing that the time of payment of the privilege tax should not commence until after the expiration of the time granted by the charter, the general tax act of 1886, p. 23, repealed the exemption. Sec. 3 provides: * * "and hereafter all the railroads in this state shall pay the privilege taxes assessed against them under all the pains and penalties prescribed in sec. 589 of the code of 1880", and by sec. 6 it is provided: "That the act entitled 'An act to amend sections 607 and 608 of the code of 1880, in relation to privilege taxes on railroads, approved March 3, 1884', be so amended as to fix the amount of privilege tax to be paid by the several railroad companies mentioned and referred to in said act at sums twenty-five per centum greater respectively than the sums mentioned in said act; and hereafter said railroad companies shall pay privilege taxes respectively twenty-five per cent. greater per mile than as fixed in said act."

This act was an amendment to the act of 1884; the Natchez, Jackson & Columbus R. R. Co. was "mentioned" in said act: a privilege tax is imposed *in pre-*

senti of 25 per cent. more than the sums mentioned in said act; "and *hereafter said* railroad companies", *i. e.*, those "mentioned and referred to" in said act of 1884, "shall pay privilege taxes", etc. Not thirty years hence, but "hereafter", *i. e.*, after the passage of this act. There is not a squint at any exemption being further continued. Therefore, the supreme court of Mississippi correctly held in this case that this act of 1886 repealed any exemption created by the act of 1884.

In 1890 a general taxing act was passed, entitled "An act to amend the revenue laws", acts 1890, 6, which, after prescribing general privilege taxes, by sec. 5, provides: "That section (1) of the act of March 12, 1884, relating to railroad privilege taxes be amended by striking out the last proviso thereof, and that the same be re enacted as amended. That section two of said act of March 12, 1884, be amended by striking out all after the word "towit", in line nine, and inserting the following:

The Alabama Great Southern, per mile.....	$150 00
* * * * * * * * * * *	
The Natchez, Jackson & Columbus, per mile...	50 00
* * * * * * * * * * *	
The Yazoo & Miss. Valley, per mile.....	100 00
* * * * * * * * * * *	
The Mobile & Northwestern, per mile.....	150 00
And all other roads constructed and to be constructed, per mile.....	100 00

Provided no railroad shall be subjected to taxation while exempt by its charter, nor while the same is in process of construction, or within one year after completion, but such exemption shall not be for more than three years from the date the first rails are laid, and if any part thereof shall be finished and used for profit after such time, the same so used shall be taxed", etc.

In Lambert's case it was held that this act recog

nized the exemption if then in existence; but it did not hold that it created anew the exemption.

By this act taxes were imposed on railroads; that class of property was selected for taxation, and, when this was done, under secs 13 and 20, art. xii., const. 1869, it would be an unconstitutional exercise of authority to exempt any railroad therefrom. The body of this act imposes taxation on railroads, but the proviso by declaring that "no railroad shall be subjected to taxation while exempt by its charter" is an attempted legislative repeal of sec 13 art. xii., declaring that all property shall be subject to taxation, and of sec. 20, that taxation shall be equal and uniform. Under the rule of *Mills* vs. *Cook*, 56 Miss. 40; *Lambert's case*, 70 Miss., 779; *Worrell* vs. *Vicksburg Bank*, 67 Miss., 47, all of which are relied on by plaintiff in error as correct, and of *Adams* vs. *Miss. Bank*, 75 Miss., 701, this proviso would be unconstitutional, if it created anew an exemption.

The true construction of said secs. 13 and 20, art. xii., const. 1869, is that adopted by the court in this case, following the decisions of this court, in *Louisville* vs. *Palmes*, 109 U. S, 248; *St. Louis* vs. *Berry*, 113 U S., 475; *Schurz* vs. *Cook*, 148 U. S., 408; *Keokuk* vs. *Missouri*, 152 U. S., 310 12. whereby it is declared that these provisions are mandatory upon the legislature, and deprive it of the power to exempt from taxation.

The rule is settled that this court will interpret for itself the contract, *Dennis* vs. *V. S. & P. R. R. Co.* 116. U. S. 665, and in so doing it will find that under its own decisions, now concurred in by the State court, there never existed any legislative power to grant the exemption claimed. If this writ of error had come from the circuit court of the United States this court would have followed its own decisions upon this question With the writ of error from the State court, seeking to reverse the construction of the State court which fol-

lows the settled rule of construction of this court, it could hardly be that any other conclusion could be reached.

Citizens Sav. Bank vs. *Owensboro* 173, U. S. 643.

It follows, therefore, that when the constitution of 1890 was framed there was no existent exemption from taxation and could be none in Natchez, Jackson & Columbus R. R. Co.

EXEMPTION: L., N. O. & T RY. CO.

Let us now trace the exemption claimed under section 5. of the acts of 1882 and 1884 as applied to the consolidated corporation, Louisville. New Orleans & Texas Ry. Co.

The constituent companies of the Louisville, New Orleans & Texas Ry. Co. were New Orleans, Baton Rouge, Vicksburg & Memphis R. R. Co. (R. 21) whose charter was granted in 1882, and which contained, as granted, no exemption, and Memphis & Vicksburg R. R Co. (R. 31.) granted in 1870, and to which said 21st section was extended by the said act of Aug. 8. 1870.

By said act of 1875, p. 66, and said act of 1878, p. 87, and by the code of 1880, Secs. 597-606, it is indisputable that this exemption was repealed. The Memphis & Vicksburg R. R. Co. is not named in Sec. 608, code 1880, fixing a privilege tax in lieu of *ad valorem* taxes. There had at that time been nothing done under said Memphis & Vicksburg R. R Co.'s charter as shown by the evidence in this record on the first trial.

By the code of 1880, as shown, all railroad property was subjected to *ad valorem* taxes. Railroad property was then selected for taxation, and under Miss. Mill vs. Cook, supra, Vicksburg Bank vs. Worrell, supra, Lambert's case, supra, whenever this was done Sec. 13, art. 10, xii, required all to be taxed alike.

General taxation of railroad property was the rule established by the code of 1880.

In 1882 said Sec. 5 was enacted, and by the said act of 1884 it was extended to the consolidated company to be formed by Memphis & Vicksburg R. R. Co. and the other consolidating companies. By this said special exemption was granted by special act to a special corporation when by the code of 1880 railroad property had been selected for taxation and still so continued as evidenced by the act of 1884 amending the code of 1880 in this regard. Therefore, this special grant of an irrepealable exemption would be condemned as unconstitutional by the Miss. Mills and Vicksburg Bank vs. Worrell cases themselves. The grant of the exemption was void *ab initio*.

Said general taxing act of 1884, approved March 12, amended said section 607 code 1880 by adding these words: "provided further that the provisions of this act shall not have the effect to tax any of the lands of the Memphis & Vicksburg Railroad Company until the first day of February, 1886." and amended by Sec. 2, Sec. 606, code 1880, to read: "Each railroad whose line is in whole or in part in this State, shall if it accepts the provisions of this act, pay to the State Treasurer on the warrant of the Auditor, on or before the 15th day of December in each and every year, a privilege tax as follows, towit: The Mobile & Ohio Railroad Company and branches, one hundred dollars per mile; the Chicago, St. Louis & New Orleans Railroad Company and branches, or the Illinois Central Railroad Company and branches, one hundred dollars per mile; the Memphis & Charleston Railroad Company, one hundred dollars per mile; the New Orleans, Mobile & Texas Railroad Company, or Louisville & Nashville Railroad Company, $100 per mile; the Mississippi & Tennessee Railroad Company, $100 per mile; the Alabama Central Railroad Company, $100 per mile; the Alabama Great Southern Railroad Company, $100 per mile; the Vicksburg & Meridian Railroad Company,

$80 per mile; the West Feliciana Railroad Company, $30 per mile; the Grand Gulf and Port Gibson Railroad Company, $30 per mile; the Mississippi Valley & Ship Island Railroad Company, $40 per mile; the Ship Island, Ripley & Kentucky Railroad Company, $25 per mile; the Mobile & Northwestern Railroad Company, $20 per mile; the Greenville, Columbus & Birmingham Railroad Company, $40 per mile; the Natchez, Jackson & Columbus Railroad Company, $40 per mile, after expiration of exemption as provided in its charter, and acts amendatory thereof. All railroads not named herein, and not exempt from taxation by their charters, sixty dollars per mile; *provided*, that no railroad company shall be subject to taxation under this chapter while the same is in process of construction, but if any part of the road shall be finished and used for profit, the part so finished shall be taxed, although the whole road may not be finished nor where the same is now exempted from taxation by its charter."

It is clear that the proviso to section 1, *supra*, exempting *lands* of Memphis & Vicksburg R. R. Co until Febry., 1886, was unconstitutional, because all other lands were taxed. Memphis & Vicksburg R. R. Co. and New Orleans, Baton R., V. & M. R. R. Co. are not specifically mentioned in this section 2, and therefore, they, with their consolidation, Louisville, New Orleans & Texas Ry. Co., would come under the general clause of "all the railroads not named herein and not exempt by their charters, sixty dollars per mile;" and that its exemption or not must be controlled by the application of the proviso to section 2.

The attempted grant of the exemption in 1882 and 1884 to the consolidated company, Louisville, New Orleans & Texas Ry. Co. was, as we have seen, unconstitutional and void, and hence, the privilege tax of sixty dollars per mile in lieu of *ad valorem* taxes was absolute.

The said Sec. 5 applied only to the consolidated

company and conferred no exemption upon the several constituent companies. This act imposing the taxes was approved March 12, 1884. The act authorizing consolidation was approved three days later March, 15, 1884. Interpreting the language, *strictissimi juris*, it is clear that on March 12, 1884, Louisville, New Orleans & Texas Ry. Co., the consolidated road, was not within the exception of railroads "exempt from taxation by their charter; nor within that of the proviso, where the same is *now* exempt from taxation by its charter." On March 12, 1884, there was no corporation in existence answering these terms. Three days later one was authorized to be created, and this power was exercised Aug. 12, 1884. Therefore, it cannot be said, as was done in Lambert's case with reference to this act of 1884 in reference to N. J. & C. R. R. Co. that this act of 1884 "re enacted the exemption." If this general revenue act of 1884 did not preserve the exemption, then, by it the tax would be expressly imposed. In this view the act of 1884, R. 44, authorizing consolidation "with the rights, privileges and immunities in said act (1882) mentioned" would not be construed to create an exemption under Sec. 5.

Covington vs. *Kentucky* 173, U. S. supra.

But if said sec. 5, with its irrepealable exemption, did operate to vest such exemption in Louisville, New Orleans & Texas Ry. Co. upon its creation Aug. 12, 1884, by said code of 1880 and said general tax act of 1884 the legislature selected railroads for taxation, and all railroads must then be taxed under the rules of the cases cited and relied on by plaintiffs in error in this plea.

To create an irrepealable exemption as Sec. 5 (21) attempts to do would plainly violate said provisions of the constitution of 1869.

In an unreported case of Adams vs. Ga. Pacif. R. R. Co. it was held in 1892 by the circuit court of the

United State for the northern district of Miss., Eastern Division, that this 21st section granting an irrepealable exemption was unconstitutional and void.

The general taxing act of 1886, p 23, amending the code of 1880, distinctly imposes privilege taxes in lieu of *ad valorem* upon the railroads "mentioned and referred to" in said act of 1884. It is clear, as shown in reference to the N. J. & C. R. R. Co., and as held by the supreme court, that this act repealed the exemption, if then existent.

By the act of 1890, herein before set forth, Louisville, New Orleans & Texas Ry. Co. was embraced in the general language: "And all other railroads constructed, or to be constructed, per mile $100. Provided no railroad shall be subjected to taxation while exempt by its charter." etc. This, as shown, supra, would not create an exemption; if it did it would be unconstitutional for the reasons heretofore set forth.

The constitution of 1890 ordained by Sec. 112: "Taxation shall be uniform and equal throughout the State. Property shall be taxed in proportion to its value. * * * Property shall be assessed for taxes under general laws, and by uniform rules, according to its true value. But the legislature may provide for a special mode of valuation and assessment of railroads, and other corporate property, or for particular species of property belonging to persons, corporations or associations not situated wholly in one county. But all such property shall be assessed at its true value." etc.

"Section 181. The property of all private corporations for pecuniary gain shall be taxed in the same way and to the same extent as the property of individuals, but the legislature may provide for the taxation of banks and banking capital, by taxing shares according to the value thereof (augmented by the accumulations, surplus and unpaid dividends), exclusive of real estate, which shall be taxed as other real estate. Exemptions

from taxation to which corporations are legally entitled at the adoption of this constitution, shall remain in full force and effect for the time of such exemptions as expressed in their respective charters, or by general laws, unless sooner repealed by the legislature."

"Section 182. The power to tax corporations and their property shall never be surrendered or abridged by any contract or grant to which the State or any political subdivision thereof may be a party, except that the legislature may grant exemption from taxation in the encouragement of manufactures and other new enterprises of public utility extending for a period of not exceeding five years, the time of such exemptions to commence from the date of charter, if to a corporation;" etc.

This constitution removed all doubt as to the meaning of Sec. 13, art xii, const. 1869, for it requires the property of corporation to be taxed in the same way and to the same extent as that of individuals. It was construed in *Adams* vs. *Miss. Bank.* 75, Miss. 701, and it was there held that the property of corporations must be taxed when taxes were imposed upon that class of property, and that there could not be special exemptions from taxation.

In Lambert's case this clause of Sec. 181. "Exemptions from taxation to which corporations are legally entitled at the adoption of this constitution, shall remain in full force and effect for the time of such exemptions as expressed in their respective charters, or by general laws, unless sooner repealed by the legislature," was disposed of by this language: "Section 181 of the constitution has no effect as to the exemption claimed. It left the matter as if the constitution had not been adopted. It let it alone, to rest upon legislation, unaffected by the fundamental law," p. 790.

In 1892 there was a new code framed containing these provisions: Section 3875 requires that

"each railroad company owning and operating a railroad, shall, on or before the first Monday of April each year, file with the Railroad commission a complete schedule, under oath, of all its property, real or personal, taxable and non-taxable, setting forth therein the length in miles * * * its entire roadbed, switches * * * and showing how many miles or fractions thereof, lie in this State, and in each county in this State, and in each city * * * and the value of the whole and each part thereof, as subdivided herein; the total amount of the capital stock, its par value and its actual value, and the value of its franchise; the number of engines and their respective values; the gross amount of the receipts of the year proceding, etc. etc. * * and if any of said property is claimed to be exempt from taxation, it shall be separately stated, and the law cited under which the claim is made." By Section 3876, in case of failure to furnish the schedule, "the commission shall make out the schedule from the best information obtainable."

Section 3877. "The members of the railroad commission are constituted state railroad assessors, and they shall, upon the receipt or making and completion of the schedule provided for in the last two sections, assess all railroads, telegraph, sleeping car and express company property liable to taxation, affixing its true value, so that such property shall bear its proportion of taxation" etc.

By Section 3878, if the railroad assessors have reason to believe that the schedule, as furnished, is false or fraudulent, they shall not be bound thereby, but shall make proper assessment, giving notice to the railroad company to show cause: "such notice shall be served and returned as a summons from a court."

By Section 3879 full records of the proceedings are required to be kept of all things done by the State railroad assessors.

By Section 3880, the assessment, as made, shall remain on file subject to objections; and by Section 3881, the State railroad assessors shall hear and consider objections to said assessment; and "they shall remain in session until all objections are heard and disposed of, and they may, if they think objections just, sustain the same and amend assessments, if necessary, accordingly."

By Section 3882, the assessment is to be affirmed after all objections are disposed of.

Section 3744, Chapter 116, Code 1892, of which the foregoing sections are parts, provides:

"The following property, and no other, shall be exempt from taxation;" specifying, but not including railroads.

Chapter 108, Code 1892, on "Privilege Taxes," by Section 3317, provides: "A tax on privilege is levied as follows: * * * 3379, Railroads: Railroads are divided into four classes: first, second, third, and narrow gauge, and privilege taxes are levied on them as follows: On each railroad of the first class, per mile, $20: On the second class, $15: On the third class, $10: On a narrow gauge class, $2. The Railroad Commission shall, annually, on or before the first Monday of August, classify the several railroads according to the gross earnings of each, and the privilege taxes thereon shall be paid on or before the first day of December."

Code 1892, Section 3: "* * * All Acts or parts of Acts, the subjects whereof are revised, consolidated and re enacted by this Annotated Code, or repugnant to the provisions contained therein, shall be, and the same are hereby repealed," etc. And Section 8 provides, that "private and local laws not revised and brought into this Annotated Code are not affected by its adoption unless it be expressly so provided herein."

By these provisions of the code of 1892 the su-

preme court held that the exemption, if existent, were repealed.

There is no pretense that the code of 1892 under which these taxes were levied has ever been construed to uphold the exemption. These masterly opinions of the supreme court are referred to as a clear and conclusive presentation of the law and the facts upon this point, and they demonstrate that there is no vested right in any of the decisions of the State court, and that the question here decided was not decided by those cases.

CONSIDERATION OF CONTRACT.

The alleged contract of exemption is not such a contract as that its obligation cannot be impaired because of the Federal Constitution.

The Natchez, Jackson & Columbus R. R. was completed in 1883 — the plea is silent on this point; — the Louisville, New Orleans & Texas Railway, as the plea avers, was commenced in 1882 and completed in the latter part of 1884, adding branches thereto, as authorized by said acts and contemplated therein, from time to time, until the year 1891. (R. 560.) These "branches" are not averred to have been *constructed* by L. N. O. & T. Ry. Co. The Lambert case held that the code of 1880 repealed the exemption of Natchez, Jackson & Columbus R. R. Co., and that it was re enacted in 1884; so, when the exemption was re enacted it was upon the constructed road. The consolidation creating Louisville, New Orleans & Texas Ry. Co. was effected August 12, 1884, and the plea avers the road was constructed from 1882 to the latter part of 1884, whether before or after Aug. 12, is not averred — every presumption is against the plea and against the exemption.

The consideration to the State for the grant of said 21st section was benefits *to be received* by a railroad *to be constructed*; the language evidences an intention to

induce the investment of capital in railroads *to be built*, and not to grant a *bonus* to a road *already built*. There must be a good consideration to uphold an exemption as a contract.

Home vs. *Rouse* 8, Wall, 438.

"A past or executed consideration is not sufficient to support an assumpsit unless such consideration was moved by the preceding request, either express or implied of the party promising. *1 Chitty. Cont.* 11th, ed. 69.

This exemption was a 'mere grace.'

Lambert's case, 70 Miss. 789.

Where the contract of exemption is not based upon a good consideration no contract exists within the protection of the federal constitution.

Tucker vs. *Ferguson* 22, Wall. 527.

West Wis. &c. R. R. Co. vs. *Board* 93, U. S. 595.

Pearsall Great North, Ry. Co. 161, U. S. 667.

Grand Lodge vs. *New Orleans* 166, U. S. 143.

Where the exemption is granted by the same instru- that creates the corporation a consideration will be presumed, but where, as here, the exemption to the N. J. & C. R. R. Co. was not created until 1884, and that of Louisville, New Orleans & Texas Ry. Co. not until after the railroad had been built under the charter of one or the other of the constituent companies, and before the creation of the consolidated company no such presumption exists: and the consideration must be averred and proved as in declaring upon other contracts.

Grand Lodge New Orleans, 166, U. S. 148.

None of the property involved in this suit ever belonged to Natchez, Jackson & Columbus R. R. Co. and, therefore, the exemption of the charter of that road does not extend to this case; but the history of that exemption is so interwoven with the decision in the Lambert case that it was deemed best to show its true status in this connection.

Said plea 4. also averred that in 1892 3-4 and 5, had

been applied the amount of the taxes to the debts of construction of L. N., O. & T. Ry. Co., or in the payment of money borrowed and used in construction, and that the affidavits required by said sec. 21 had been made and delivered each of said years to the tax-collectors, and that said tax-collectors had executed the receipts for said taxes—but not averring that said road could not pay 8 per cent. dividend. R. 568.

These same matters, with the averment of the contract of appropriation evidenced by said 21st section, were set up in the 2nd plea, R. 551, and not embraced in the order to strike out.

So, whatever merit there was in this defense it was preserved, and not stricken out.

The fifth plea (R. 569) pleads the Lambert case as *res-adjudicata*, and the sixth plea pleads said decisions of the state court, the refusal of the legislature to repeal the exemption and the uniform conduct of the departments of State recognizing the exemption, as an estoppel. R. 573.

As hereinbefore shown these pleas could not avail if the fourth plea could not.

The state court in its opinion held that the Lambert case was *res adjudicata* as to the taxes for 1891 and 2 upon that part of the property acquired from N. J. & C. R. R. Co. in Adams county; and that as to the other years taxes, and as to the property involved in this suit these cases had the force of *stare decisis* only.

In this there was no federal question raised or decided, for the decision upon the first appeal was 'the law of the case,' and could not be varied by amendment to let in a federal question, even if these pleas raised such question.

Mut. Life Ins Co. vs. *Kirchoff*, 169, U. S. 107.
Citizens Sav. Bank vs. *Owenboro* 173, U. S. 647.

WITHDRAWAL OF PLEAS.

The withdrawal of all the pleas and the refusal to

plead further was a confession of the declaration, and precludes any complaint by plaintiffs in error of the judgment in this court.

When the court sustained the motion to strike out pleas 3. 4, 5, and 6, the plaintiffs in error withdrew all the pleas upon which the first trial was had, and plea 2 filed after remand, and *declined to plead further.* R. 610. 1.

1. The effect of such withdrawal did not deprive the court of jurisdiction of the person

Eldred vs. *Bank.* 17, Wall, 551.

2. The effect of withdrawing a plea under the Mississippi practice is the same as if a demurrer had been sustained to it.

Rocco's case 37, Miss. 357.

To withdraw a plea means to waive the defense set up by it.

Barker vs. *Shephard* 42, Miss. 281-2.

"The withdrawal of all pleas, after the testimony has been put before the jury, would be an abandonment of all the defenses, and the jury should be discharged and judgment rendered *nil dicit.* If one plea is withdrawn in such circumstances, it is a conclusive admission that further opposition to a recovery will not be made by reason of anything that had been proved, or that might be under that plea. That much of the case has been blotted out, * * If such be the consequences, the defendant is precluded from complaining that the circuit court admitted improper testimony under the plea thus withdrawn. If he proposed to controvert these rulings, he should not have surrendered that part of the case which called them forth. His 'confession,' implied by the withdrawal of the plea of *non assumpsit,* cured all defects in the plaintiffs testimony offered in proof of his cause of action, and waived any right he might have had to review the rulings of the circuit court on the questions pertinent to that issue, and to it alone."

Perkins vs. *Guy* 55, Miss. 180.

Lewis vs. *Buckley* 73, Miss. 61.

This withdrawal was a "confession" of the declaration, and of the averment that the Illinois Central R. R. Co. purchased all the railroad and other property of Louisville, New Orleans and Texas Ry. Co., and that in 1892 said Illinois Central R. R. Co. turned over and delivered to and merged all of said property and railroads of said L. N. O. & T. Ry. Co. with the railroad system and property of Yazoo Miss. Valley R. R. Co., and that since 1892 said Yazoo Miss. Valley R. R. Co. under the direction and control of the Illinois Cen. R. R. Co. has been operating said railroads of L. N O. & T. Ry. Co., and that by taking the property said defendants became liable to pay the taxes.

A confession of these facts takes the case outside of all questions decided on the first appeal in reference to the consolidation of Yazoo & Miss. Valley R. R. Co. and L. N. O. &. T. Ry. Co., under the powers contained in their respective charters, and the alleged guaranties of the federal constitution. If the Illinois Central R. R. Co. *purchased* the railroad, as confessed, then, none of the decisions of the Mississippi supreme court relied on in the pleas stricken out could have any hearing whatever.

The pleas withdrawn *traversed* this alleged purchase by Illinois Central R R. Co., and under the rule of the cases, supra, this withdrawal was a conclusive admission of record that the matters set up in the pleas constituted no defense.

The withdrawal of the pleas confessed that these matters set up thereby were no defense: 1. That Louisville, New Orleans & Texas Ry. Co. was authorized by and organized under said acts of 1882,1884. 2. That on Oct. 24, 1892, L. N. O. & T. Ry. Co. was consolidated with and merged in Yazoo & Miss. Valley R. R. Co. by the deed, and as authorized by their respective charters: 3. That in 1892, 3, 4, and 5, Yazoo & Miss. Valley R. R. Co. delivered to the several tax collectors the affidavit prescribed by section 21 and received a receipt in full for said taxes,

and that in said years 1892, 3, 4, and 5 respectively the profits of Yazoo & Miss. Valley R. R. Co., nor of Louisville, New Orleans and Texas Ry. Co. had ever enabled either to pay a dividend of 8 per cent on its capital stock. R. 55. 4. That said 21st section, through sec. 5, had been extended to the consolidated road and that Yazoo & Miss. Valley R. R. C. had acquired it by the consolidation of 1892; that said 21st section was not merely an exemption but an irrepealable contract of appropriation, and that in reliance upon and in pursuance of said contract large amounts of money had been expended in construction etc; that for each of said years debts of construction etc. conformably to sec. 21. had been paid, the required affidavit made, and receipts executed in full for the taxes; that Illinois Central R. R. Co. was not a purchaser of said railroad etc. traversing the declaration in this regard. R. 551.

Each and every of these defenses are confessed to be no defense. If the defendants confess that the profits enabled them to pay an 8 per cent dividend, as they do, then the contract of exemption or appropriation expired by the happening of that event and according to its terms.

It is distinctly declared in *Perkins* vs. *Guy*, supra, that error cannot be predicated of a withdrawn plea. Therefore, the state court could not reverse for any matters embraced in these pleas.

But defendants did more than to withdraw their pleas. They declined to plead further. This declining had reference to the pleas stricken out. Declining to plead further would imply that there was a willingness on the part of the court to allow proper pleas to be filed, in a proper manner, having regard for the court's control of the proceedings before it. Defendant's declined to have any further connection with the defense. This leaves them in the attitude of withdrawing the defense made, and attempting to stand on pleas not allowed to be filed—out of the record—and refusing to make them part of the record by obtaining leave to file, or making the pleas

stricken out conform to the views of the trial judge, so that their merits might be tested by demurrer or issue.

After a trial on the pleas, and a decision on the issues made by them in the supreme court, on the first appeal, and when, upon remand, the case stood for trial on them again, these pleas, and, also, the 2nd plea filed upon remand, were voluntarily withdrawn, leaving the case without plea. This "confession" of the issues made by them in plaintiffs favor entitled plaintiff to judgment, even though the decision of the supreme court on the first appeal had the effect to violate the federal constitution as averred in the 4th, 5th and 6th pleas; for, if by special verdict the finding had been, that the Illinois Central R. R. Co. had purchased the railroad, as averred; or that the profits had enabled Yazoo & Miss. Valley R. R. Co. to pay 8 per cent. dividend, etc.; that there existed no longer a construction debt, etc., to be paid, etc., then, the immunity from taxation by the terms of the act had ceased, by the happening of the condition subsequent upon which it was granted. These findings of fact constitute a satisfaction of the contract, and proceed upon the validity of the contract itself. The pleas stricken out seek to establish by appeal to the constitution of the United States the validity of the contract; the confession of the issues made by these pleas renders that unnecessary, for whether valid or invalid is immaterial if the conditions of the grant have happened. *Ipso facto* the immunity from taxation ceased.

3. The withdrawal of these pleas destroys every vestige of the right to invoke the jurisdiction of this court.

The pleas withdrawn were the pleadings and record upon which the first trial was had and the first opinion of the supreme court delivered. These pleas and the action of the supreme court on the first appeal thereon constitute the gravamen of the complaint of the suggestion of error and of the 4th, 5th and 6th pleas stricken out, and are the foundation of the jurisdiction, if any, of this court.

By the voluntary act of defendants on the second

trial not a single defense is left in the record as a basis of judicial action upon which the first trial and the first appeal was had. Upon the second trial and upon the second appeal the court did not have before it for decision, in the record, a single defense upon which its first opinion was predicated.

The cause was reversed on the first appeal and stood for trial *de novo* Upon the record, so made, and without judicial action on the defenses upon which the decision of the first appeal was predicated, it is sought to attack and review by this writ of error the action of the supreme court on the first appeal, when on the second trial, *de novo*, every defense made on the first trial was withdrawn, and thereby plaintiffs in error contend their constitutional rights were invaded. No possible prejudice could arise from the first decision unless it was given force by application on the second trial of the case. This court, therefore, to question this first decision must disregard this withdrawal of the pleas, and proceed to give effect to these pleas as if never withdrawn. This court must assert defenses here that the parties confessed were no defense on the second trial.

The second plea filed after remand, R. 551, set up that said section 21 was more than an exemption and was a contract of appropriation, and, therefore, as averred, outside of the purview of secs. 13 and 20, art xii., const. 186 , and that this contract had been performed.

This 2nd plea was, also, withdrawn after issue was taken on it. The supreme court had never passed on this plea, and it is confessed to be without merit by its withdrawal. And, yet, while refusing to try the case on the issue made by this plea in the state court, this theory of contract of appropriation is now here asserted as an avenue to attain jurisdiction. Plaintiffs in error refuse to contend below for the contract of appropriation—withdraw the plea setting up that as the contract—and here

make that the gravamen of their appeal to the protection of the federal constitution.

Counsel must be presumed to have been familiar with Lambert's case, and the method in the madness of withdrawal was, that that very case, upon which so much reliance is averred to have been placed, had set up this contract of appropriation theory, and the court had held it to be an exemption.

It cannot be shown *by the record* that any right passed upon on the first appeal was asserted and denied by the court on the second appeal. The withdrawal of all defenses made on the first trial stands an impassable barrier to their investigation now and here.

REMOVAL PROCEEDINGS.

After reversal, upon the first appeal, there was a petition filed to remove the cause, No. 2788, consolidated, the suit for the taxes of 1892, 3, 4 and 5, to the federal court by Yazoo & Miss. Valley R. R Co., a Mississippi corporation, and Illinois Cen. R. R. Co., an Illinois corporation, upon the ground that said decision upon the said first appeal deprived them of their rights under the federal constitution. This petition was denied by the court July 4, 1898. R. 544.

1. This petition was too late.

Rosenthall vs. *Coates*, 148 U. S., 142.
K. C. R. R. Co. vs. *Doughty*, 138 U. S., 303.
Galveston vs. *Texas*, 170 U. S., 226.
Mut. Life Ins. Co. vs. *Kirchoff*, 169 U. S., 103.

2. No federal question is raised by the declaration, and the defendants cannot by plea, even, much less by the averments of a petition as to the effect of a decision create a federal question. United States vs. Lewis, 178 U.S. 457

Chappell vs. *Waterworth*, 155 U. S., 102.
Walker vs. *Collins*, 167 U. S., 57 60.

Hence, as to suit No. 2788, consolidated, for the taxes of 1892, 3, 4 and 5,—the only taxes complained of in the

petition for removal—the petition was properly denied.

There was filed Dec. 24, 1897, (R. 611-8) a declaration between the same parties, returnable to the January term, 1898, of said state circuit court, seeking recovery for the taxes on the same property for the year 1897, upon the same allegations as for the years 1892 to 1895 inclusive, and numbered 3142.

There was filed Dec. 18, 1896, (R. 622 9) another declaration between the same parties, returnable to January term, 1897, to recover the taxes for 1896 on the same property, and numbered 3059, containing substantially the same allegations.

The summons in each case was omitted from the transcript under Rule 3, (Sup. Ct. Rules, 70, Miss. xx) providing: "A transcript shall not contain any part of the case except the pleadings, evidence, instructions, bills of exceptions, and order, judgment or decree appealed from, unless the appellant shall, by writing, request other matters specified to be embraced in the transcript, a copy of which request shall be annexed to the transcript," etc.

Code 1892, Sec. 722, provides: "The defendant shall plead on or before the first day of the term to which the process is returnable, or within such other time as the court, by rule or otherwise, may allow," etc.

No pleas were filed in numbers 3059 and 3142.

On July 7, 1898, (R. 610) all of defendant's pleas were withdrawn in No. 2788, consolidated. On July 8, 1898, an *agreed order* of consolidation of Nos. 2788, 2916, 3018 (comprising 2788, consolidated), with 3059 and 3142, was made, and reciting that "hereafter all of said suits shall proceed as one suit under number 2788, and it is ordered that all the orders, proceedings and pleadings in one shall be appropriated to each and all of said cases, with the proper changes in dates and amounts for each of said years 1892, 1893, 1894, 1895, 1896 and 1897. This order is made to save the expense and inconvenience of separate pleadings and trials in each case, and is not to be construed to the

prejudice of either party, and all objections and exceptions are reserved which could be reserved if the said orders, procedings and pleadings were all separate. This order at the request of all parties is entered as of the 4th day of July, 1898, and shall take effect as of that date, at which date the same was made" (R. 610-1).

These removal procedings did not embrace a petition or bond for either Nos. 3059 or 3142, but were confined to No. 2788 (R. 542-3), and, hence, the removal procedings, depending as they do on petition and bond, could not be embraced in the terms of said consolidating order.

2. Giving to that order its full scope, it is merely an agreement of counsel, entered on the minutes of the court, on July 8th, as of July 4th agreeing that the orders, procedings and pleadings from that date shall be taken as applicable to all the cases.

The court ruled on but one application for removal, and that was in No. 2788; and counsel by stipulation could not bring the cases under the act of congress by agreeing that the order made on one petition for removal should apply to another and a different case, nor substitute a petition and bond in each case.

1 Desty. Fed. Pro. 9th Ed., p. 518-9.

Nor can removal be effected without the action of the court. *Id.*

We ask the special attention of the court to the opinion of Mr. Justice Whitfield in this case (R. 638) as a demonstration of the true interpretation of the statutes, decisions and constitutions of the state of Mississippi under both state and federal jurisprudence. It is characterized by deep and intelligent research, clear and discriminating definition, cogent and logical reasoning, and it is an unanswerable application of the law to the facts.

Wherefore, the motion to dismiss should be sustained, or, at least, the judgment should be affirmed.

S. S. CALHOON,
MARCELLUS GREEN,
Of Counsel for Defendant in Error.

No. 244. 35

Brf. of Campbell for D. E.

Filed April 7, 1900.

Office Supreme Court U.S.
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APR 7 1900
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 244.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, ET AL.,

Plaintiffs in Error.

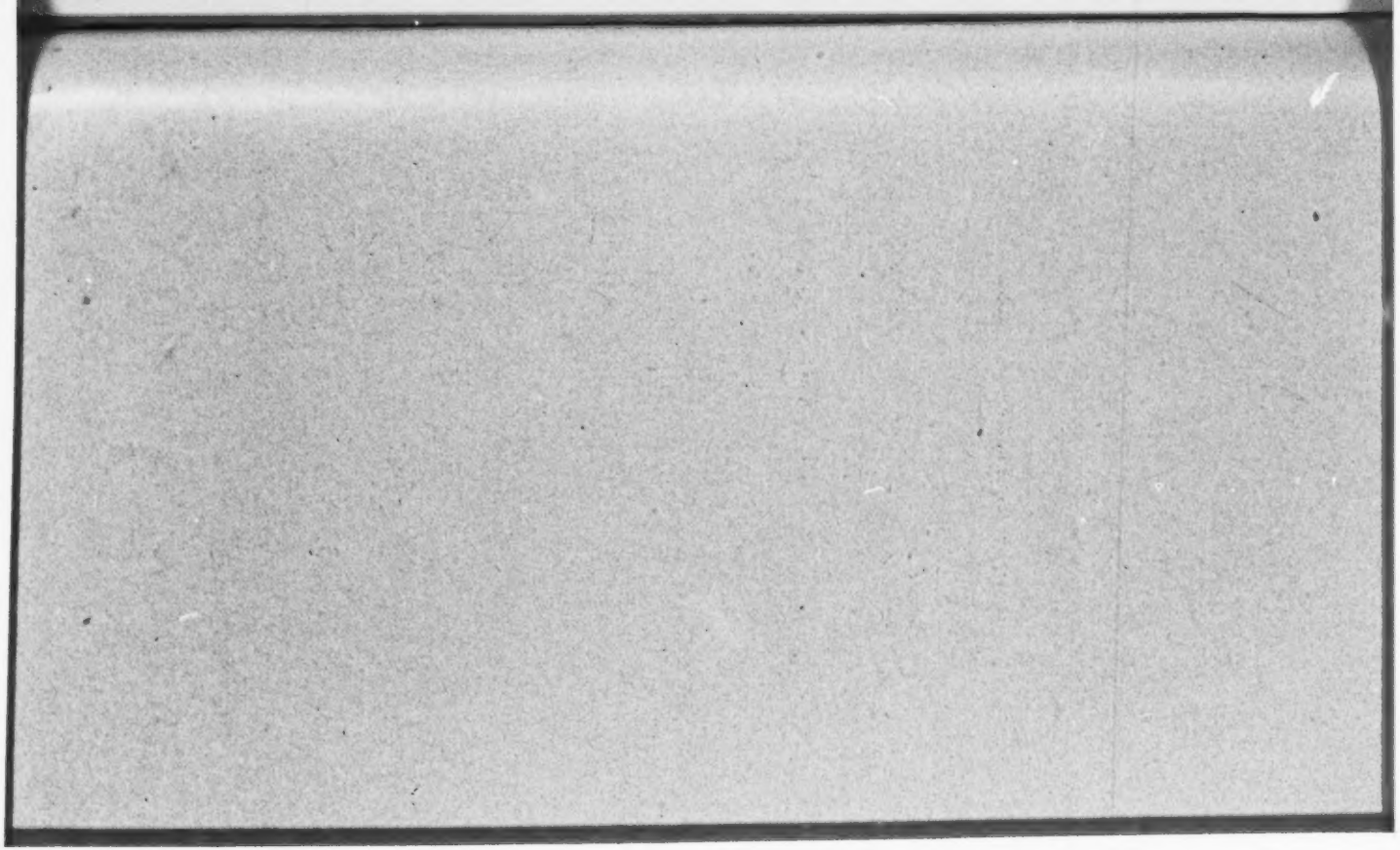
v.

WIRT ADAMS, STATE REVENUE AGENT,

Defendant in Error.

In Error to the Supreme Court of the State of Mississippi.

BRIEF OF J. A. P. CAMPBELL, FOR DEFENDANT IN ERROR.



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In Error to the Supreme Court of the State of Mississippi.

BRIEF OF J. A. P. CAMPBELL, FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

Wirt Adams, State Revenue Agent of Mississippi, sued the Yazoo & Mississippi Valley Railroad Company and the Illinois Central Railroad Company for taxes of the year 1892, and successive years, alleged to be due on the property of the Louisville, New Orleans & Texas Railroad Company. The first named was claimed to be liable, because of its consolidation with the Louisville, New Orleans & Texas Company, and the Illinois Central Railroad Company, because of its relation to the matter, as set forth in the declaration.

The two defendants filed a joint plea averring payment of all taxes assessed, by compliance with section 21 of the charter of the Mobile & Northwestern Railroad Company made part of the

charter of the Louisville, New Orleans & Texas Railroad Company, which was part of the Yazoo & Mississippi Valley Railroad Company, and denying liability on the ground of earnings. The Illinois Central Railroad Company pleaded separately denying that it had purchased the Louisville, New Orleans & Texas Company and property, or, had assumed liability for its taxes.

The first plea was demurred to. The demurrer was overruled, and fourteen replications were filed. These were all demurred to with varying success. Several issues of fact were joined, and they were tried by a jury with the result that a verdict was rendered for the plaintiff for the taxes of one year and for the defendants for the other years. From motions for a new trial made by both sides and overruled, both appealed to the Supreme Court, where errors were assigned by both. In the trial in the Circuit Court the plaintiff and defendants asked numerous instructions to the jury, some of which were given and many refused.

On these assignments of error the case was argued three times before the Supreme Court. On the 20th of June, 1898, it was decided, by reversing the judgment of the Circuit Court and granting a new trial. The announcement of the decision was accompanied by an opinion containing a summary of the views of the Court, showing the grounds of its conclusion. Chief of these is, that the consolidation of the Louisville, New Orleans & Texas Railroad Company and the Yazoo & Mississippi Valley Railroad Company, October 24th, 1892, caused the immunity from payment of taxes claimed, to be lost, by virtue of sections 180 and 181 of the Mississippi Constitution of 1890, operating on the act of the companies in consolidating. The companies had contended that the question at issue was *res judicata*, and the Court disposed of this adversely to them. In addition to this the Court declared that the act of the Legislature under which immunity from payment of taxes was claimed by the companies was prohibited by the Constitution of 1869, in force when the act was passed, and therefore that the immunity had never existed in legal contemplation.

When this decision was announced, counsel for the companies, pursuing the practice of the Court, presented a suggestion of

error, *i. e.*, a review and complaint of the opinion and holding of the Court. The judgment of the Supreme Court was rendered June 20, 1898, and the suggestion of error was presented June 27th. In this suggestion of error, the equivalent of an application for a re-argument or re-hearing, an effort was made among other things to interpose a federal question. *Not until then had there been a single objection, or suggestion, or intimation of this kind.* In the pleadings, objections to evidence, instructions for the jury, motions, assignment of errors, brief, argument, oral or written, there was never an allusion to a federal question as involved. On the contrary, it was contended by learned counsel for the companies that, if the Court should hold that the consolidation effected between the Yazoo & Mississippi Valley Railroad Company and the Louisville, New Orleans & Texas Railroad Company, October 24, 1892, was by virtue of sections 180 and 181 of the Constitution of 1890 a waiver of the exemption privilege conferred by section 5, Acts 1882, adopting section 21 of the charter of the Mobile & Northwestern Company, "it would terminate the controversy between the parties at once, and render all further considerations which have been mooted in this case superfluous." (p. 18, brief of Mayes & Harris, in Supreme Court of Mississippi). The case was staked on that. It was a question of State law. No other was thought of or suggested, and it was not until they had fought and lost on that, that they sought to shift their ground and introduce a new subject of controversy.

While the case was pending in the Supreme Court the revenue agent sued the same parties as before in the Circuit Court for the taxes of 1896 and 1897, and, when the case was remanded by the Supreme Court, an order of consolidation was made by consent by the Circuit Court for the trial of all the cases as one.

The Court in the summary of its views announced in deciding the case, June 20th, 1898, declared, it would thereafter furnish a more extended and elaborate view of its holdings, and soon after this decision it adjourned for the summer. The full opinion of the Court was not written until the kindly frosts had allayed apprehension of yellow fever, and the judges had assembled in Jackson. The term fixed for 2nd Monday of October was lost because of yellow fever, and a special term was begun

the 3rd Monday of November, when the full opinion was handed down. It re-affirmed what was in the summary, and elaborated it, and added other views not contained in it. A motion was made to strike this out, and was denied. The case had been retried in the Circuit Court, in pursuance of the reversal by the Supreme Court, and resulted in a verdict for the Revenue Agent, from judgment on which the companies appealed to the Supreme Court, where errors were assigned, and the case was heard thereon, and the judgment of the Circuit Court was affirmed. On this second trial in the Circuit Court and the Supreme Court, the reliance of the companies was on the federal questions attempted to be introduced into the case, for the first time, after the decision of the Supreme Court on the first appeal. There was nothing else except some questions of the practice of the State Courts in it; for all else had been decided against the companies, and the Circuit Court had followed the decision of the Supreme Court.

The federal question relied on by the companies, as set forth in their pleas, is the change of view by the Supreme Court, as to the interpretation of the Constitution of 1869 on the subject of temporary forbearance to tax railroad companies. The pleas stricken out by the Circuit Court, on the second trial of the case, merely amount to this, except wherein they deny some of the averments of the declaration, which denial is contained in former pleas not stricken out.

The certificate of the Chief Justice of the Supreme Court of Mississippi as to federal questions is untrue, except by confining it to what followed the decision of the Court. The record shows its falsity, as applied to the case before it was decided June 20, 1898, and I appeal to the record for the truth of my assertion.

ARGUMENT.

The claim of the Revenue Agent was, that the Yazoo & Mississippi Valley Railroad Company never had the immunity from taxes claimed, or if it had it, it was surrendered and lost by the act of consolidation, October 24, 1892, first, by the provisions of the charters involved, and secondly, by sections 180 and 181 of the Constitution of 1890, and that the matter was not *res judicata*. He also claimed that the earnings of the road were

and not raised in pleadings or evidence

sufficient to terminate the immunity. The contention of the companies was that the immunity had been possessed, and was not lost or surrendered, and that this was not an open question, having been adjudicated in favor of the contention of the companies, as was claimed.

This was the field of battle both in the Circuit and Supreme Courts. Neither party extended its lines beyond this. There was not even a feint beyond these well defined lines of operation. Within them all arguments were confined.

The view taken by the Court rendered unnecessary a deliverance as to the effect of the several charters or as to earnings; and the Court held that the consolidation, October 24, 1892, of the Louisville, New Orleans & Texas Railroad Company and of the Yazoo & Mississippi Valley Railroad Company caused the loss of the immunity claimed, if existent, by the operation of the Constitution of 1890, on this act, and that the matter was not *res judicata*. This might have properly ended the opinion, but it proceeded further, and thereby raised the clamor which succeeded, and is kept up here. With this, it is respectfully submitted, this Court has no concern. It comes too late, never having been raised until after the case was decided by the Supreme Court and an application for rehearing was made. A suggestion of error is an exact equivalent of an application for re-argument or re-hearing—a substitute for it—a means of communication between counsel and judges, *after decision*. The judgment or decree is entered, and this follows.

But, if it had been in time—if federal questions had been presented, at the outset, and had continued to be pressed and relied on, it would not avail, because of the rule of this Court not to review the decision of a state court resting on a question of state law, even, if a federal question is properly and in time presented by the record.

The early view of the Mississippi Court in Mississippi Mills v. Cook, 56 Miss. 40, decided in 1878, was that the constitution of 1869, Sec. 13, Art. XII, prohibited granting to corporations for pecuniary gain perpetual or irrepealable immunity or exemption from taxes, but permitted forbearance to tax, or the grant of temporary immunity to a general class with the right at any time to withdraw the grant.

The view of the State Supreme Court in this case is that that constitution prohibited and made void an irrepealable grant of exemption from taxes by special act to a special private corporation for pecuniary gain.

In this view the Supreme Court of the United States agrees, as shown by its utterances with reference to language similar to that contained in the constitution of Mississippi.

If this view is to prevail, the grant of exemption claimed was void *ab initio*. If the earlier prevails, the company held the right of exemption subject to repeal at the will of the State.

Concede that the Supreme Court will judge for itself independently, if there was a contract. Grant that there was a contract for exemption from taxes, as claimed by the other side, it was unauthorized and void, by the late view of the Supreme Court of Mississippi, and of this Court, from the beginning; and according to the early Mississippi view, it was lawful and valid, until it was lost, in accordance with the will of the State; and the Mississippi Court has held, it was lost *by the act of the company*, according to the will of the State as expressed in her constitution of 1890.

The Louisville, New Orleans & Texas Company came into being with full knowledge that the exemption claimed was subject to recall by the State, or to any regulation by the State, which might cause a loss of it to result.

It was certainly for the Mississippi Court to say what its Constitution and Statute meant, and it announced in 1878, before the Louisville, New Orleans & Texas Railway Company came into being, the extent of legislative power on this subject, and in 70 Miss. 779, it specifically declared that the appropriation of its taxes to its use could be nothing but an exemption from taxation. Plainly this is true, for paying is the burden of taxation, and to allow payment by swearing, as prescribed, was but an evasive form of exemption from taxation. What signifies the most exorbitant assessment for taxation, if payment is not required, or if the sum goes to the party's own use? Grant that the Legislature might have appropriated to the Company the money derived from its taxation, after it came into the treasury, it did not do this, but exempted the Company *from paying* any money into the treasury or to the collector, and freed it from the

obligation to pay, and nothing can be made of this but an exemption. If it was a violation of the constitution to free private corporations for pecuniary gain from the burden of taxation imposed on individuals, it matters not what form the exemption took, whether a direct exemption in terms or an evasive one in the shape of an appropriation—appropriation before collection, *i. e.*, release from payment or freedom from the burden of taxes. Taxes imposed but not collected!!

There is a wide difference between release from payment and appropriation. One is exemption—the other is not. If section 13, article 12 of the Constitution of 1869 meant, as held in the first or last view of it, the claim of appellants must fail. By the late view the exemption was void, and by the other it was subject to any regulation by the State, and, it declared that any exercise of corporate franchise after adoption of Constitution of 1890 should subject to the provisions of that Constitution, one of which is, that the property of private corporations for pecuniary gain shall be taxed.

The ingenious effort to have the 21st section of the charter of the Mobile & Northwestern Railroad Company characterized as an irrepealable contract, or as an appropriation, and not as an exemption from taxes, must fail. Its character was distinctly fixed before the Louisville, New Orleans & Texas Railway Company came into being, by *Mississippi Mills v. Cook*, 56 *Miss.* 40 If it had not been, there can not be a doubt about it. The perusal of the section suggests indirection, evasion and effort to avoid some difficulty. A stranger to the Constitution of Mississippi (that of 1869) would, on reading this 21st section, wonder why such circuity, in order to relieve from payment of taxes. No plausible explanation can be given except that it was an effort to avoid section 13, article 12, of the Constitution then in force. "The substance and not the shadow must determine the validity of the exercise of power," 155 U. S. 698, and the substance of the 21st section was certainly to relieve from payment of taxes, and no one cares for taxes never to be paid. Such a levy is a mere shadow, and not of substance—freedom from its burden. There was to be assessment, and pretense of payment —a subterfuge and sham. If the exemption was never valid, that is an end of controversy. If valid, it was lost by act of the

company in voluntarily exercising a corporate franchise it had, after the adoption of the Constitution of 1890, which in section 180 declares "All existing charters or *grants of corporate franchise* under which organizations have not in good faith taken place at the adoption of this Constitution shall be subject to the provisions of this article." Then section 181 (that article), is,

"The property of all private corporations for pecuniary gain shall be taxed," etc.

If there had been no exercise of the grant of the corporate franchise to consolidate, any exemption from taxation possessed would have continued by virtue of section 181. Plaintiffs in error invoke this provision as securing continuance of the "*exemption from taxation*," and yet deny that the immunity claimed is "exemption from taxation." If it is not that, the language of section 181 of the Constitution as to continuance does not apply, and no benefit results from it.

The several grounds of error specially assigned, though numerous, are resolvable (apart from those relating to the practice of the State Courts) into the complaint of a violation of the charter rights of the railroad companies, protected, it is claimed, by the Constitution of the United States.

The decision of the question thus raised involves principles so familiar to this Court as to relieve from the necessity of citing the cases.

It is certainly settled by the decisions of this Court, if anything can be thus settled, that the grant of power to consolidate is revocable at any time before its exercise, and, if revocable, *a fortiori*, may it be made so as a consequence of some act of the company possessing it; and the exercise of the power may be conditioned on certain consequences of the voluntary action of its possessor.

Here was no revocation of the power to consolidate, but its future exercise was made to cause a certain effect.

Late decisions of this Court vindicate the Constitution of Mississippi, adopted in 1890, from the reproach of violating the Constitution of the United States, and maintain the decision of the Supreme Court of Mississippi in this case.

This Court should not entertain the federal question—

1. Because not presented in time, not being brought up, in any way, until after the decision of the case by the Supreme Court.

2. Because the decision of the Supreme Court of Mississippi rests on a non-federal question, viz.: The interpretation of the Constitution and laws of Mississippi quite sufficient to sustain the decision.

Turner v. Commissioners of Wilkes Co., 173 U. S. 461.

3. But, if this Court shall review the decision, it should be affirmed. Because there is nothing in the federal question, raised after the Supreme Court of Mississippi had decided the case on the first appeal, and had settled the principles governing it in its further progress. That question in its full scope is, whether the history of legislative and judicial view, as set forth, is sufficient to secure the companies against the consequences of consolidation after the Constitution of 1890; in other words, whether the federal Constitution prohibited the State from providing, in its organic law, that corporate franchises not exercised before, and exercised after its operation, should subject the company to the operation of that Constitution, and this is too well set led in favor of the State's action for dispute.

If it was allowable for the State to provide in its Constitution, as it did, it is for the State Court to interpret and apply its Constitution, and this Court will regard its decision. If it is for the State Court to interpret its Constitution, this Court will not review its action, and consider whether its view is right or wrong, for, if a matter for the State Court, it is not one for this Court. So that really the precise question is, as to the validity of the provision of the State Constitution, held by the State Court to have had the effect of operating on the action of the companies in consolidating or merging, in the exercise of a corporate franchise, to deprive of the immunity claimed. To state the case is to decide it, if it may be assumed that this Court will stand by its repeated utterances.

The legislation of the State as to "back taxes," and the creation of an agent to collect them, and provisions for assessing them, are unexceptionable, and complaint of them is idle.

But if this Court shall review the decision of the State Court, I confidently appeal to the opinion of that Court as a vindication of its decision. And, if this Court shall consider the question of the right of the company to exemption from paying taxes as an original question, it should hold either that it never had any right to the exemption, because of want of power in the Legislature to grant it, being, as held by the present Supreme Court of Mississippi and this Court, prohibited by Sec. 13, Art. 12, Mississippi Constitution of 1869: and, if the immunity was possessed, being lost by consolidation, by express provision of the charter authorizing it, as well as by the exercise of the corporate franchise to consolidate after the Constitution of 1890, the effect of which was to subject the company to the provisions of that Constitution, one of which is that "the property of all private corporations for pecuniary gain shall be taxed."

The consolidation caused the loss of the exemption, if any, by express provision of the charter authorizing it. The Yazoo & Mississippi Valley R. R. Co. was chartered February 17, 1882, Acts, p. 838, (which was before the L. N. O. & T. Co. was made possible), and was by section 5 of its charter empowered, among other things, to consolidate with any other company, and the effect of its consolidation was declared to be that "the consolidated company shall have and enjoy all the property, rights, privileges, powers, liberties and immunities and franchises *herein granted*, but," etc. The exception was of a special exemption conditionally had by the Y. & M. V. Co.

The sixteenth section of the charter of the M. & V. R. R. Co., one of the components of the L. N. O. & T. Co., conferred on it the power "to consolidate the stock, property and franchises of the road with any other road or roads, in or out of this State, at any time that the president and directors of the road may deem proper, and upon such terms as may be *consistent with the powers conferred upon said company.*"

Sec. 25 of the charter of the N. O., B. R., V. & M. Co., another constituent, gave it authority "to purchase and hold any connecting railroad, and operate the same, or to consolidate the company with any other (such?) company, under the name of one or both; but, when such purchase is made or consolidation is effected, the *said* company shall be entitled to all the benefits, rights, fran-

chises, lands and property of every description, belonging to said road or roads so sold or consolidated."

It seems clear that the powers conferred on the respective companies by sections 16 and 25 did *not survive* their exercise in the formation of the L. N. O. & T. Co., but were thereby exhausted, and that the new company formed by the exercise of these powers did *not possess them.* The new company, made by consolidation, succeeded to all their respective rights and powers, *as to the road acquired from each.* It stood to each road just as the constituent companies did, and with its charter, as to the road it had, but consolidation did not invest the company with the rights and powers of each charter of the constituents, *as to the other roads.* There was not a transfer by the consolidation of the charter of one company, so as to apply to the other, and each to the whole of the consolidated road—no commingling of charters, but a vesting in the company authorized of the powers and rights of each component, *as to the road got of it*, so as to make one continuous road of several before disconnected. Hence, the right of the L. N. O. & T. Co. to consolidate, if it had it, was confined to such exercise of power, in that respect, as was conferred by section 16 of the charter of the Memphis & Vicksburg Railroad Company *as to the road got of it*, and by Sec. 25 of the N. O., B. R. & V. & M.'s charter, *as to the road got of it*—that is, it could consolidate the road obtained from each, as empowered by its charter made part of the consolidated charter. *There is no specific grant to the L. N. O. & T. Ry. Co. of power to consolidate, or otherwise dispose of itself.* It was to have all its constituents had, but the effect of this was to make it the successor, in ownership, rights and immunities, of each of the companies forming it, *as to the road acquired from it*, and not to invest the new company with greater or different power from that had by the formerly existing companies—to give the new creation, *as to each road*, exactly what the former company had; no more, no less.

That the first section of the act of March 3, 1882, which made possible the L. N. O. & R. Ry. Co., exhausted itself in the formation of the consolidated company, is *not denied. The truth is the L. N. O. & T. Ry. Co. was an end—an ultimatum aimed to be accomplished, and there is no provision looking beyond it, or contemplating its abandonment, or dis-*

solution, or merger. Its birth was provided for, but the pro-creation of its kind was not.

It is not conceivable that power was given to the companies to unite, and thus create a new company, with power in it to again consolidate, and unite with any other company and so on *ad finitum*, still acquiring exemptions and other immunities, possessed of the continuing power to acquire, and by the acquisition to receive, until the result would be colossal in the combination made by selection and union. A juster view is that the L. N. O. & T. Ry. Co., formed by the authorized union of other companies, got all the constituents had, in the way of property and powers necessary to a complete union, and formation of the new company, but the power to further consolidate was not given to the new company, and was exhausted, and *functus officio.* The charters of the uniting companies were to be taken as part of the act authorizing the consolidation, *to the end*, that the company so formed should have all possessed by the constituents necessary to its existence, and enjoyment as a corporation born of the union, but not to go on indefinitely acquiring, enlarging, etc. All that was necessary to its being accrued to the L. N. O. & T. Ry. Co. from the charters of its constituents, but no power to *dispose of or destroy itself*, was given it. *Power was given the constituents to create it, but none was imparted to it to further consolidate or unite with any other.* But, if the L. N. O. & T. Ry. Co. had any power of this sort, it arose from sec. 16 of the charter of the Memphis & Vicksburg Railroad Company, one constituent, and that applied only to the road it contributed in the consolidation, and did not extend to all the road of the L. N. O. & T. Ry. Co.

10 Howard U. S. 376; 15 Wallace 460.

And if it had power to act under sec. 25 of the charter of the other constituents, that was, *to continue to exist*, and buy, hold and operate *connecting* roads, or to consolidate with any (such?) road, and thereby acquire, use and enjoy all benefits etc. of the road sold to it, or consolidated with it. This sec. 25 contemplated the continued existence of the company, else how could it acquire, use and enjoy? It is not true that the words, "*the said company*," sec. 25, *supra*, relate to a company to be formed by consolidation, but the grammar and sense alike require the application of these words to the company empowered to buy or

consolidate, and *it* is, by a sale to it, or consolidation with it, to become entitled etc., as declared in said section. Either this is true, or the company had power by consolidation to impart all it had, and this is preposterous. The Y. & M. V. Road was not a connecting road with N. O. B. R. & V. & M., one of the constituents, and consolidation could not take place by virtue of that.

The power conferred by sec. 16 of the charter of Memphis & Vicksburg R. R. Co. was "to consolidate stock etc., upon such terms as may be consistent with the powers conferred upon said company." The power conferred by sec. 25 of the charter of the N. O., B. R., V. & M. R. R. Co. was to purchase and operate *connecting* roads, or to consolidate, *and draw to itself*, by purchase or consolidation; which required its continued existence. If the L. N. O. & T. Ry. Co. had, by charters of its constituents, any power to consolidate, it was by sec. 16 of the charter of M. & V. R. R. Co. as to the road got from it, and by sec. 25 of the charter of the other constituent, as to the road got from it, and did not have any other power, in this respect. *It did not act under this power, manifestly.* It could not by sec. 25, because the N. O. & B. R. road and Y. & M. V. were not *connecting* roads. For what are connecting roads, see 161 U. S. 677 and cases cited. It was by virtue of the ample power conferred by the charter of the Y. &. M. V. R. R. Co., that the consolidation of the L. N. O. & T. Ry. Co. was authorized, and effected, and the consequence of such consolidation must be determined by the charter authorizing it, for the question is as to the legislative will in the matter, and its expression is found in that charter. Its provision is, "the consolidated company shall have and enjoy all the property, rights, privileges, powers, liberties and immunities and franchises *herein granted*," etc, thus carefully providing that the charter of the Y. & M. V. R. R. Co. should be the measure of the enjoyment of power by the consolidated company. The purpose of this is made plain by the further provision, that in case of a lease, which is authorized, the lessee shall enjoy the rights of the lessor—that is, if the Y. & M. V. R. R. Co. should be the lessor its right should be enjoyed by the lessee, and, if it should be lessee, it should have, as far as could be, all the rights of the lessor, but, in case of consolidation, (amalgamation, complete union), the rights *herein granted*

should be those of the creation. This result followed consolidation with the Y. & M. V. R. R. Co., even, if the charter of the L. N. O. & T. Ry. Co authorized it, for such is the express provision of the charter of the Y. & M. V. R. R. Co., and whatever might have been the effect of consolidation of the L. N. O. & T. Ry. Co. with any other company, its union with the Y. & M. V. R. R. Co. was subject to the express provision of its charter. "*Herein granted.*" *Expressio unius, exclusio alterius.*

If the L. N. O. & T. Ry. Co. had an immunity from taxation in 1892, it might have retained it, by continuing to exist. It lost its existence in the consolidation forming the Y. & M. V. R. R. Co., and in surrendering its existence, and organization and name and all it had to the new company, the Y. & M. V. R. R. Co., it surrendered all that pertained to it. The grant of immunity from taxation is a personal privilege. No act of the legislature authorized the transfer of this immunity to another organization. It would not have passed by a sale. If a new Company was formed, exemption was gone, and, if as contended by opposing counsel, the Y. & M. V. Co. was enlarged, and extended by the absorption of the other, the charter of the Y. & M. V. R. R. Co., became the law of the being of the organization, for so it is declared. It acquired the property of the L. N. O. & T. Ry. Co., with its rights and powers as to such property essential to its enjoyment of it, and the charter of the Yazoo & Miss. V. R. R. Co. became henceforth the measure of its powers and rights and incidents as a consolidated company. Extensive powers were conferred on it, and a roving commission for universal consolidation, with the declaration that its charter should be the fundamental law of the consolidated company. The state consented for the Y. & M. V. R. R. Co. to take in another Company, and said, in giving such consent, that the consolidated Company should have what was granted by that charter, not what was granted by another, without or within this state, for the power to consolidate extended to charters granted by other states; and the Y. & M. V. R. R. Co. having absorbed the L. N. O. & T. Ry. Co., with all its belongings, can not claim any special immunity, except as conferred by its own charter. The L. N. O. & T. Ry. Co. can not, and does not claim anything, for it *does not exist.* If power to consolidate was in both char-

ters, but with different terms as the effect of consolidation, that most favorable to the state would prevail. In none of the provisions as to consolidation is there a declaration that continued exemption from taxation shall be incident to consolidation, but rather an indication of purpose to guard against that. The authority to agree on terms has no reference to preserving immunity from taxation by agreement, of course, for that would be ridiculous. It refers to other matters, such as stipulating for the respective rights, and status of the contracting parties.

The clause in the 5th sec. of the charter of the Y. & M. V. R. R. Co., "nor of exempting from taxation any property which the consolidated company may after such consolidation acquire under the provisions of the charter of such other consolidating company," was put in merely out of abundant caution, to guard against getting exemption from taxation, and is valueless as an indication of legislative purpose as to the effect of consolidation. It is merely negative, and has no office, except exclusion, and shows legislative purpose to deny exemption from taxation. As the right of the Company to consolidate was universal and unrestricted, it was deemed proper to guard against any claim of exemption from taxation in the manner mentioned. This was perhaps necessary to satisfy the Legislature, and obtain the extraordinary charter.

Granting that in case of a lease by the Y. & M. V. R. R. Co. it would have got the road leased with its immunities, that is no answer to the proposition, that, as the charter is written, it plainly provides that the effect of consolidation shall be to give the consolidated company the rights, etc., *herein granted*. Why the difference is immaterial, for this was a *consolidation*, and not a lease, and, if the railroad lawyer who wrote the charter so expressed it as to produce different consequences in the two conditions, that does not concern us. The charter was drawn for a purpose, and the provision that consolidation was not to give exemption from taxes, was intended to capture the Legislature, and doubtless had that effect. Being the work of the promoters, it must be taken most strongly against the corporation. The provision as to non-exemption of property acquired in future under the *other* charter has reference to the acquisition by eminent demain or other means of what was essential or convenient

to the operation of the road acquired by consolidation, as to which fundamental right, from necessary implication, the charter of the *other* Company was to continue in favor of Y. & M. V. R. R. Co., so it could enjoy what it acquired by consolidation. Whatever meaning may be attached to the clause of Sec. 5 of the charter of the Y. & M. V. R. R. Co. relied on as showing the legislative purpose to keep in force charters of consolidated companies, it is certain that the Legislature declared that the consolidated company should have what is "*herein granted*," which made this charter the exponent of the rights of the consolidated company. The fact that a declaration was made against any possible claim of certain exemption from taxation can not nullify the express declaration that was made specifically on the subject of the rights of the consolidated company. It should be remembered, that the charter was mainly the work of those interested in procuring the very *extensive* powers granted, and the purpose was to secure to the company, in its enlarged dimensions, the extensive grant of privileges contained in the charter. If now it operates in a way not designed, no complaint should be made. A multitude of words were employed promiscuously in the charter, but an explicit declaration was made as to what is "*herein granted*" being the measure of the rights of the consolidated company, and the exemption claimed is not among them.

The attempt of the consolidating companies to avoid the effect of the consolidation by their agreement can have no effect. They had the right to agree on terms, but could not vary the legal consequence of what they did, by any declaration or agreement. The law determines that.

The L., N. O. & T. Ry Co. went out of existence, lost itself and belongings in the new company, the Y. & M. V. R. R., and that alone owns, and represents, and stands for what was once the L. N. O. & T. Ry Co., and the rights and privileges granted by its charter ("*herein granted*") are all it can claim; and surely they are enough, for perusal of the charter will show a most extraordinary aggregation of powers, and will account for the *studied purpose* of the draftsman of the charter to make that the measure of the powers and privileges of the consolidated company.

THE EFFECT OF CONSOLIDATION UNDER THE CONSTITUTION OF 1890.

By sec. 180 of the Constitution of 1890, it is declared, that all existing charters or *grants of corporate franchise*, under which organizations have not in good faith taken place, at the adoption of this constitution shall be subject to the provisions of this article, among which is sec. 181 declaring that "The property of all private corporations for pecuniary gain shall be taxed, etc." (Existing exemptions to continue in force unless sooner repealed.) The power to consolidate is a corporate franchise, and where it was not exercised so as to effect organization before the adoption of the constitution, its subsequent exercise was subject to the provision for the taxation of all the property of private corporations for pecuniary gain, in view of which there can not be an exemption of the property of such corporations, except when like exemption is extended to individuals.

Thompson Corp. sec. 365; 112 *U. S.* 609; 113 *Id.* 465; 109 *Id.* 244; 152 *Id.* 301.

The constitution preserved the *status quo* of existing exemptions, but does not apply to exemption in a new organization effected by the exercise of a corporate franchise, *after* the adoption of the constitution. The purpose of the constitution was to leave existing exemptions to be dealt with by the legislature, and, if the L. N. O. & T. Ry Co. had continued in being, and the exercise of its rights, the exemption, if it existed, would have been unaffected, but as it was consolidated with the V & M. V. R. R. Co., and surrendered its existence, in pursuance of a corporate franchise, the organization resulting was subject to the provision that the property shall be taxed.

Keokuk v. Missouri, 152 *U. S.* 301; 161 *U. S.* 646-677.

Whatever the union of the companies was, it was certainly an organization in the exercise of a corporate franchise, and subjected to the operation of the provisions of the constitution of 1890 on that subject.

Sec. 279 of the constitution can have no influence in this case. It was wholly unnecessary—is a mere platitude, and could not serve any purpose, except as declarative of what was

true without it, viz: that the adoption of the constitution did not affect the status of existing claims as mentioned. It means this and no more; that the substitution of the new for the old constitution shall not *ipso facto* disturb the *status quo* under the old. *It did not in any way abrogate or qualify any of the specific provisions of the new constitution.*

F. A. Crity,
R. C. Beckett
of Counsel for Deft. in Error
with J. A. P. Campbell.

No. Orig. 35

APR 9 1900
JAMES H. McKENNEY,
Clerk

Reply Brf. of Critz v Beckett,

Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

Filed Apr. 9, 1900.

No. 244.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY ET AL., PLAINTIFFS IN ERROR,

vs.

WIRT ADAMS, STATE REVENUE AGENT, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

BRIEF OF F. A. CRITZ AND R. C. BECKETT IN REPLY TO BRIEF OF OPPOSITE COUNSEL ON THE MERITS.

F. A. CRITZ,
R. C. BECKETT,
Counsel for Defendant in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 4-6-1900

IN THE

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vs.

WIRT ADAMS, STATE REVENUE AGENT, DEFENDANT IN ERROR.

IN ERROR FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

Brief of F. A. Critz and R. C. Beckett in Reply to Brief of Opposite Counsel on the Merits.

In this brief, instead of reiterating points anticipated and already argued by us, we shall merely call attention to the pages in our various briefs where our answer appears. Unless otherwise noted, "our brief" will always refer to our big brief on the merits in this case, and the reference to pages of their argument is to their brief on the merits, lately filed.

1st. On pages 4 and 9 they speak of the *topography* of the country in Mississippi, the difficulty of building railroads, &c., but we suppose this court will take judicial notice of the fact that Mississippi is a level farming country, without a mountain or minerals in it, and an experienced railroad contractor who assisted in building this and other railroads, O. A. Gibson, shows that it was a very easy road to build.

Record, pp. 433–440.

2d. They speak on page 4 of the State being impoverished and applying to Congress to aid the Gulf and Ship Island railroad. In their opinion in this case, the Supreme Court show that there was great solicitude and anxiety to get that road built in order to build up a seaport for Mississippi.

Record, p. 674.

3d. They state on page 6 that the taxes of the *preceding* year were applied to the debts. We would not notice this but for the fact that the first suit here was for the taxes of 1892, and this statement might lead this court to infer that the consolidation did not apply, because the exemption was earned *in 1891*, the preceding year. The taxes of each year were not delinquent till December 15 of the same year, and they had till December 15, 1892, to make the appropriation, and, if the exemption was lost or repealed on October 25 and before the appropriation was made, there would be no authority to make it afterward. This section 21 is copied in their brief, on pages 7 and 8, and says the appropriation must be made *during the year*, not the preceding year.

Code 1892, section ~~3379~~ 3801

4th. That the legislature recognized the distinction between the exemption and appropriation forms (pp. 7, ~~11 43~~ 38-43). This is answered in our brief (pp. 87, 88).

Besides, the gentlemen must have short memories, as they show on page ~~15~~ 38 that the legislature of 1880 repealed the

useless requirement of "*an assessment*" under this twenty-first section, showing conclusively that the legislature knew there was no substantial difference.

5th. On page 9 they place the construction debt at $28,421,115. This included the cost of purchasing and also of building other roads not exempt. We show exactly and specifically what it cost to build the roads in controversy—that is, the main line, Riverside division, and Tallahatchie branch, excluding the parts in Louisiana and Tennessee. According to their own figures, it was only $9,101,563.01.

Our brief, pp. 53–56, 68, 69.

And it is not true that the whole business even cost $28,421,115. Maj. R. T. Wilson, the president of the road, says the cost was $26,339,101.29, *at 8 per cent. interest*, and $22,569,912.94, *at 6 per cent. interest*, computed up "to the time that we sold these securities" (Record, p. 305).

6th. They show on page 11 that the tax collectors, under section 3803 of the Code of 1892, could not receive affidavits, but could only receive in payment of taxes "United States Treasury notes and coins, national currency, and warrants drawn upon the State or county treasuries," thus themselves showing that the exemption had been repealed.

7th. They claim on pages 12, 13, and 24, 25 that there is a distinction between the suits for the taxes of 1896 and 1897 and those for the taxes of 1892–1895. We have noticed that in our brief on pages 25–27, and 99, 100.

8th. They still insist on pages 13, 22, 26, and 28 that the pleas were stricken out "as constituting no defense."

On this point see our brief, pp. 21–27, 33, 34, and 49, where we think we show this is not correct. For the full motion see our brief, pp. 12–15, and Record, pp. 606, 607.

They claim on page 28 that it is unfair for us to claim otherwise. We do not claim anything about it, but simply refer to the record to show that the order sustaining the motion to strike out was not limited to one ground, and the authorities to show that no one else has a right to so limit it.

Our brief, p. 23.

9th. They claim on pages 13 and 23 that the certificate of the Chief Justice shows jurisdiction. On this point see our brief, pp. 24, 102–104.

10th. They claim on pages 14 and 18–21 that this suit comes under the second class of section 709 of the Revised Statutes, where the Federal question need not be affirmatively raised. We answer that in our brief on pages 92–95 and 98, and also at length in our brief in case No. 318 here, on the motion to dismiss, on pages 30–37, where the revenue-agent act is copied in full.

11th. They claim on page 17 that the Keokuk case and in their brief on the motion to dismiss or affirm that the Y. & M. V. R. R. Co. *vs.* Thomas, 132 U. S., case are authority for this writ of error.

We answer that as in No. 10, *supra*. Besides in these cases the question was properly and directly raised in the original bills.

12th. They say on page 18 that the prevailing opinion in this case *studiously* avoided any reference to subsequent statutes. This we deny. They decided on the original invalidity of the twenty-first section, as this court admit they had a right to do in McCullough *vs.* Virginia, 172 U. S.,

122, and on the effect of the consolidation, and this court holds that a State court is not subject to criticism for declining to decide questions affecting the Constitution of the United States if they can find other questions to decide.

Baker *vs.* Grice, 169 U. S., 291, 292.

13th. On page 21 is a claim that a Federal question can be raised for the first time in a suggestion of errors. We answer this in our brief, pp. 96, 97.

14th. On page 22 they claim that they were entitled to raise the Federal question by new pleadings, although "it was already sufficiently raised." We deny this (our brief, pp. 33, 98, 99, 100).

15th. They claim on page 24 a statutory right to amend their pleadings. This is not a Federal question (our brief, pp. 24, 25).

16th. They claim on page 24 that as no writ of error lay from the first appeal, they should be allowed to raise the Federal question on the second trial. We do not dispute this, except to the extent that they have no right to raise it *for the first time* after the first appeal. That is a matter of practice and procedure, and discretionary with the trial court. If they had it already raised they could still insist on it, notwithstanding the decision of the Supreme Court, and indeed they would be bound to do this and not abandon or surrender it, as they have done here, if they had it already raised, as they claim.

See our brief, pp. 16, 17.

And our brief on the motion, pp. 12, 13.

17th. They claim on page 26 great things for their stricken-out fourth pleas, that they distinctly allege a compliance with the charter requirements, &c.

So they do, but the singular thing about these fourth pleas is that they nowhere set up *an irrepealable appropriation of taxes*, or raise any Federal question.

Our brief, pp. 41–43, 88–90.

18th. They say on page 27 that our claim that the judgment *nil dicit* is the equivalent of a default or consent judgment is, under the circumstances here, unwarranted. We think not. (See our brief, pp. 27–30, 33, and our brief on the motion to dismiss, pp. 22, 23.)

19th. They give as one reason on page 29 why we cannot claim that the tax collectors are necessary parties here that the record does not show that they were summoned. It is true that the question whether they are necessary parties is somewhat technical, and we care nothing about it and are entirely willing to leave it with the court, but we do not wish any decision based on that ground, because the rules of the Supreme Court require that the summonses, unless otherwise requested in writing, be left out of the transcript. (Our brief, p. 26.)

42 = 43

20th. On pages 34 and 49 and 50 they still insist that the legislature had the right to make this appropriation as a *donation*. We deny this.

Our brief, pp. 82, 83, 85, 86.

Our brief on motion to dismiss in No. 320, pp. 48–50, & 53 Miss. 240, 245

21st. On page 36 they claim that the exact point decided by the supreme court of Mississippi was that these exemptions were valid, the other reasoning being immaterial. This we strenuously deny, and appeal to the decisions themselves to the point that *the exact thing* decided was that the legislature could not grant irrepealable exemptions. The *exact point* in the Mississippi Mills case was the legislature

had actually partially repealed the exemption, and this repeal was *the thing* sustained. We here call attention to the fact that the legislature undoubtedly could repeal a void exemption as well as one only repealable, and this case did not necessarily involve the point whether the exemption was void or only repealable, because in either event *the repeal* and not the exemption would be *the valid thing*. The exact point decided and only point necessary to any of the decisions was that the exemption was repealable.

Mississippi Mills *vs.* Cook, 56 Miss., 54, 62.
Attala Co. *vs.* Kelley, 68 Miss., 44.
N. J. & C. R. R. Co. *vs.* Lambert, 70 Miss., &c., &c.

22d. On page 37 they ~~claim that~~ cite the case of Y. & M. V. R. R. Co. *vs.* Thomas, ~~goes so far as to overrule the prior decisions of the Mississippi supreme court, holding even that the exemption is repealable. What stuff is this on which our noble Cæsars feed~~? That case expressly states that the exemption was *conceded*, and the only point was when it commenced.

132 U. S., 188.

And both this court and all other courts hold that a point conceded is not the decision of the court, and is neither *res adjudicata* nor *stare decisis*.

Opinion of the court, Record, p. 664.
Keokuk *vs.* Mo., 152 U. S., 312, 316.
Our brief, p. 37.

Left out of their printed brief.

23d. They say on page 37 that "the reason why the court was urged below to overrule its prior decisions as to the validity of exemptions under the old constitution was to enable the recovery of taxes for the ten years prior to the consolidation." We cannot imagine why this insidious remark is flung into the arena, unless as a red rag, for it is extraneous and has nothing to do

with this case, which is for the current taxes falling due each year including and since the year 1892. The record and opinion of the court shows that we urged many points, some of which the court decided and some it declined to decide, and there is nothing in the record or *in pais* to show that we urged one point more strongly or persistently than another, unless it was the vital point of the effect of the consolidation, which had no application to back taxes. That point was urged from the beginning and continuously through every phase of the litigation.

24th. On page ~~38~~ 46 they argue the reference of the court to pages 118 *et sequitur* in the brief of opposite counsel. Our reply to this is our brief, pages 95, 96.

25th. On page ~~35~~ 38 they state that the legislature of 1880 repealed the requirement of *an assessment* in these 21st-section cases. If that is so, that repeal became a part of this 21st section, and when adopted, *in 1882*, as a part of the charter in controversy it was adopted *as it then stood*, with the requirement of *the assessment* repealed, and was an exemption pure and simple, for it is fundamental law that there can be no liability for taxes without an assessment of some kind; and counsel forgot to go further in this connection and state that the legislature of 1880 passed the Code of 1880, and that this code repealed all exemptions, whether of simple or appropriation form, showing conclusively that not only had the court in the Mississippi Mills case held that all exemptions were repealable, but that the legislature had actually acted on that construction and repealed them without cavil or complaint, there being thus both a legislative and judicial construction that these *appropriation* exemptions were repealable in force at the time of the grant of the charter in controversy in 1882. Many, indeed almost all the railroads taxed in the Code of 1880, had these twenty-

first-section appropriation charters, as will readily be seen by reference to § 608.

Code of 1880, sections 597–608.
N. J. & C. R. R. Co. *vs.* Lambert, 70 Miss.
Opinion of the court, Record, p. 671.

26th. Opposite counsel, on pages 35 and 36, attempt to illustrate their point that this appropriation is *taxation* by the case of R. R. Co. *vs.* McGuire, 20 Wall., 36, 44, ignoring the essential fact that that was an attempted subsequent legislative change of an irrepealable contract, which has no relevancy to the case at bar.

They also claim on page 48 that to hold that this appropriation is not as pure as Cæsar's wife and as unchangeable as the laws of the Medes and Persians would be to set traps for investors, forgetting that under both judicial and legislative construction it had been settled that such appropriations were repealable before this charter was granted, and ignoring the words of wisdom uttered by the courts that these catching phrases in charter exemptions are rather the words of the promoters than of the legislature.

Simmons *vs.* ——, 70 Miss. 485.

They also on pages 56–58 cite a lot of cases where a contract to furnish water, &c., is a valuable consideration for an exemption, utterly ignoring the fact that in such cases the contractor gets something real, substantial, and in hand, while in the case at bar the State does not get one single cent more than if it were an absolute and unconditional exemption.

27th. They also on pages 57 and 58 speak of the courts sustaining privilege and commutation taxes, but ignore the fact that where the legislature has *the power*, it is bound by section 20 of article 12 of the constitution of December 1, 1869, and section 112 of the constitution of 1890, to lay

them equally and uniformly, or, as the Mississippi supreme court puts it, in a decision rendered in 1877:

"It is well settled that if provisions of this character apply at all to privilege taxes imposed on business pursuits and professions, all that is necessary in levying them is that persons pursuing the same occupation shall be taxed to the same amount or in the same ratio."

Holberg *vs.* The Town of Macon, 55 Miss., 114, 115.

28th. On pages 60 to 63 they undertake to revive the old exploded doctrine that an exemption will pass into a consolidation *by presumption*. The last case among a host cited by them is the case of Tennessee *vs.* Whitworth, 117 U. S., the last of that line of unworthy ancestors which this court, commencing with the case of Pickard *vs.* Tennessee, 130 U. S., 637, has steadfastly and continuously refused to follow, saying in Phœnix Ins. Co. *vs.* Tennessee, 161 U. S., 178, that such a doctrine "is a complete overturning of the universal rule in regard to taxation." (See also opinion of court, Record, pp. 650 *et seq.*)

29th. On page 68 they assert that the *controlling* question is whether section 21 is in conflict with the constitution of 1890, and from that on to the end of the brief they devote to trying to show that there is no conflict.

In the first place, we deny that there is any such question, or, if there were, that it would be the *controlling* question, for both this court and the Mississippi supreme court have decided that it is not proper to decide constitutional questions unless necessary to arrive at a result; and there are other decisive issues.

Baker *vs.* Grice, 169 U. S., 291, 292.

Adams *vs.* Bank, 74 Miss., 316, 317.

And the earnest contention of opposite counsel, that the exemption was not cut off by the constitution of 1890, is untenable here. The Mississippi supreme court, as one

ground of decision, has decided that it was so cut off, and this is conclusive and binding on this court *if the power to cut off existed.* The only thing this court has jurisdiction of would be that conceding that the constitution of 1890 did prevent exemptions from passing into consolidations, does this impair the obligation of this particular contract? This court decides *cases* and has no jurisdiction to construe the laws or constitutions of a State. Its only prerogative is preventive—to shield, not to cure. The State court has exclusive jurisdiction to construe its own laws and constitutions, and the only duty of this court is to keep that construction from embracing a contract which it would impair. The State court has the exclusive right to say that the constitution of 1890 prevented exemptions from passing into consolidations, and this court has the veto power so far, and so far only, as to hold that that construction shall not be held to embrace this particular contract, because, and only because, it would impair its obligation. If it would not impair its obligation, you have no jurisdiction over the subject, and if it is repealable, its repeal could violate no contract, and, on the other hand, the State court has shown that this court in several late and well-considered opinions has held that the power to consolidate is a mere revocable license, and may be modified or repealed at any time before its exercise.

See opinion, Record, p. 638.

30th. As for their Appendix D, pages XV to XXI, giving a list of charters having appropriation and straight exemption forms, to show that the legislature recognized that there was an essential difference, we have only to say that this Appendix D is a substantial copy of the Appendix C, pages XIV to XVII in their brief on the motion to dismiss or affirm, with the exception that in the Appendix D are included some colleges, &c., previous to the year 1878, when the express provision of section 13, article 12, of the consti-

tution of December 1, 1869, only applies to corporations for *pecuniary profits*, and there is not a single railroad straight exemption in the list till the year 1878, when the Mississippi Mills case decided there was no essential difference. We have noticed this fully in—

Our brief, pp. 87, 88.

The foregoing is a mere answer to points attempted to be made in the brief of opposite counsel, and we do not wish the court to take it as a substitute for our full brief, which contains, as we believe, a full and complete analysis and argument of the case in all possible phases.

We ask the court to dismiss; and if that cannot be done, then to affirm.

F. A. CRITZ,

R. C. BECKETT,

Counsel for Defendant in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1900.

No. 35.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY ET AL., PLAINTIFFS IN ERROR,

vs.

WIRT ADAMS, STATE REVENUE AGENT, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR AND IN REPLY TO SUPPLEMENTAL REPLY BRIEF OF PLAINTIFFS IN ERROR.

As this court has made several pertinent decisions since our original brief was prepared, we will now bring the decisions and argument down to date. In fact, those decisions are so much in point that with a little explanation as to their application it renders the earlier briefs almost unnecessary.

This brief will be divided into eleven subdivisions.

First.

We will file as an appendix a list of railroad companies that were not exempted, and explain the reason and application.

Second.

We will copy for ready comparison by this court the charter in the Mississippi Mills case and the twenty-first section, or one in controversy here, with comments on the same in connection with the cases of Western Union Telegraph Co. *vs.* Ann Arbor R. R. Co., 178 U. S., and Bolin *vs.* Nebraska, 176 U. S.

Third.

We will then cite and apply the cases of Cincinnati, Hamilton and Dayton R'y Co. *vs.* Thiebaud, 177 U. S., and Western Union Telegraph Co. *vs.* Ann Arbor R. R. Co., 178 U. S., to other matters.

Fourth.

And Henkel *vs.* Cincinnati, &c., 177 U. S.

Fifth.

And Bryar *vs.* Campbell, 177 U. S.

Sixth.

And Werlien *vs.* New Orleans, 177 U. S.

Seventh.

And Houston and Texas Central R. R. Co. *vs.* Texas, 177 U. S., and Weyerhauser *vs.* Minnesota, 176 U. S.

Eighth.

And Adirondack R'y Co. *vs.* N. Y. State, &c., 176 U. S., and Minneapolis, &c., *vs.* Gardner, 177 U. S.

Ninth.

And Dickerman *vs.* Northern Trust Co., 176 U. S.

Tenth.

And Hopson *vs.* Louisville, New Orleans and Texas R'y Co., 71 Miss., and Louisville, New Orleans and Texas R'y Co. *vs.* Hopson, 73 Miss.

Eleventh.

And Telluride, &c., *vs.* Rio Grande, &c., 175 U. S.

First.

As the counsel for plaintiffs in error have put an appendix to their brief, showing that exemptions and appropriations were granted to many railroads after the constitution of December 1, 1869, out of abundant caution and in order that this court may not be misled into the belief that this was universal and the exemptions equal and uniform, we now add an appendix to this supplement to show that to many railroads no exemptions were given, and that there was no equality or uniformity in those that were granted.

And, in order that the court may understand our purpose in doing this, we will explain the Mississippi Mills case, in 56 Miss., p. 40, and the extent to which it was overruled by the State court in this case. Opposite counsel in their briefs

here persistently complain of the Mississippi Mills case as being overruled. In their parting shot at us, just before the case was continued at the last term—in their brief filed on April 12, 1900, on page 4—they say it would be astonishing if we should concede on the oral argument "that that decision was, after all, correct." We have no occasion to dispute this, for while it is true that in the summary, on page 514 of the record, the court overrules "Miss. Mills *vs.* Cook on that point," yet in the full opinion they explain this, and do not in fact overrule *that case* at all or in any particular, but only overrule some expressions in the opinion which went beyond and overreached the facts in the case.

In that case the facts were as follows: On April 1, 1872, the legislature had passed an act appropriating to their construction debts the taxes due on all factories with a paid-in capital stock of not less than ten thousand dollars, thereafter constructed. The Mississippi mills had been built before then, but in 1873 "all its buildings and machinery were destroyed by fire," and in order to put it within the letter, as it was then already within the spirit, of the law, and to induce it to rebuild and put it on an equality with other factories, the benefits of the above act of April 1, 1872, were expressly extended to it by the act of April 17, 1873. Indeed, the act of 1873 seems to have been merely precautionary, as the act of 1872 had no reference to the date of the charters, but to the date of building. However this may be, it is clear that the prime object of this statute of 1873 *was equality and uniformity.*

In 1877 the legislature passed an act amending the act of 1872, so as not to exempt any property except such as legitimately pertained to the business of the factories. Under

this amendment the sheriff was seeking to collect taxes on *outlying lands*, and the bill was filed to enjoin this (Record, p. 665). This is the Mississippi Mills case. Under the later decision of the court in McCulloch *vs.* Stone, 64 Miss., 378, and the confirmatory decision of this court in Ford *vs.* Delta and Pine Land Co., 164 U. S., 667 *et sequitur*, these outlying lands would not have been embraced within the original exemption. But this point was not made or passed on. The case was treated by everybody as if the act of 1877 actually repealed an exemption, and not merely as declaratory of the fact that as to outlying lands no exemption had ever existed.

Mississippi Mills *vs.* Cook, 56 Miss., 41–45.

We call the attention of this court to the following facts: That the attorneys for the appellant in that case contended that it was an irrepealable exemption (*ib.*, pp. 45–48).

While the attorney general, who appeared for and represented the State, did not deny that the legislature could grant repealable exemptions, he expressly conceded that and only contended that, construing sections 13 and 20 of article 12 of the constitution of 1869 together, the exemption must be by classes and on all property of the same class, and even then was repealable at pleasure (*ib.*, pp. 48–50).

And this was exactly what was decided by Chief Justice Simrall (*ib.*, pp. 59–65). Judge Chalmers dissented *in toto*, taking the strange view that the constitutional provisions were abortive and really meant nothing (*ib.*, pp. 65–72). While Judge Campbell's opinion is subject to the criticism of the court in this case, on record, pages 667 and 668, that it "went beyond the record," and is apparently much broader

than the case, a thing very unusual with this eminent judge, and apparently holds that the only limit on the legislative power is that it could not grant irrepealable exemptions, and that the law of 1873, partially repealing the exemption, was valid.

So it is entirely clear that the court in this case did not overrule *the case* in Mississippi Mills, for that case expressly sustained an act repealing an exemption. The only thing that was overruled was the intimation that the legislature could grant even a repealable exemption to a particular corporation and not exempt others of the same class and to the same extent, a thing which was not before the court in the Mississippi Mills case. Says the court in the case at bar:

"In no other respect do we interfere with the decision in that case. * * * The case before us most emphatically does not present a claim to an exemption under a charter identical with the charter in Miss. Mills *vs.* Cook, nor the case of any corporation which has acted on the faith of a decision construing a charter identical with the charter in the case of Miss. Mills *vs.* Cook, and which might thus be said to constitute for such corporation, acting on it and investing its capital on it, a rule of property. It will be time enough to decide that precise question when that question shall be presented."

Record, p. 669.

Now, in order that this court may not be misled by the citation of charters by opposite counsel, we append a list of charters also, showing that there was no uniformity about granting exemptions nor in the exemptions granted, as there was in the Mississippi Mills case.

In the Mississippi Mills case, 56 Miss., the opinion of Judge Campbell seemed to go the length of holding that these sections did not prevent the legislature from granting exemptions in all cases, but made them all repealable. But Judge Chalmers dissented, and as the opinion of Chief Justice Simrall went no further than to hold that the legislature could grant repealable exemptions, but they must be equal and uniform and extend to all property in a like class and condition, and as the exemption under discussion was of this kind and class, the decision could, under no view of it, be held to extend beyond the bounds set by the chief justice. Judge Campbell necessarily agreed with him, which made a majority of the court, but he did not agree to the full extent with Judge Campbell, or he would not have rendered an opinion at all, and he was careful to confine the opinion he did render to the case in hand.

To that extent the court in the case at bar did not interfere with the Mississippi Mills case, but it held that the grant of an irrepealable exemption to a particular railroad, and when, too, that exemption was not extended equally and uniformly to all railroads in the same class and condition, was in conflict with those constitutional provisions and void, and it bases its decision not only on its own judgment, but also on the express decisions of this court itself.

See Opinion, Record, pp. 638, 662, 669.

And the two lists of charters filed as appendices show that this twenty-first section was neither in fact nor in effect extended to all railroads in the same class or condition.

It was for thirty years, but there were differences both as to time and conditions in some of the charters cited in their

appendix D by opposite counsel in the Laws of 1872, pages 255, 311, 346, and the Laws of 1873, pages 488, 499, 509, 530, 553, 595, &c., and our appendix. The Law of 1880, pages 19, 86, referred to by opposite counsel, is chapter 9 of the Code of 1880, section 139 on page 86 being section 608 of the Code.

Now, this section 608 of the Code and the amendments in the Laws of 1884, pages 30, 31, and Laws of 1890, pages 12, 13, were general laws, and extended a short respite to the property without regard to ownership, whether by corporations or individuals, and conformed to the doctrine of equality and uniformity, as while "in process of construction" and "or within one year after completion"—that is, while substantially in an inchoate condition and virtually valueless.

But confining ourselves now to the year of the charter in controversy, whether 1882 or 1884, it is the only railroad company in either year which had an exemption or appropriation granted for so long a time as twenty-five years. Where exemptions were granted at all, the general rule was twenty years, with the exception of ten years in Laws of 1884, page 1023. No other *appropriation* was granted in 1884, and only one other in 1882, and that was for twenty years only, as shown in Laws of 1882, pages 896, 916.

Second.

THE CHARTER IN THE MISSISSIPPI MILLS CASE AND THE CHARTER IN CONTROVERSY HERE COMPARED.

From what we have just said, it is clear that the Mississippi Mills case was not overruled; but, taking it either in its entirety or with the restriction put on one of the opinions by the court in this case, it is evident that this court has no jurisdiction. In its facts and in the two prevailing opinions it undoubtedly did announce and establish the principle that all exemptions granted to corporations for pecuniary profits while the constitution of December 1, 1869, was in force were repealable. And now comes the really extraordinary and funny thing. It is that opposite counsel and not we are here claiming that the Mississippi Mills case has no application to their charter. It is their only possible avenue of escape, and that is closed by the fact that you cannot ride two horses going in opposite directions at the same time. Their fourth, fifth, and sixth pleas all claim that they relied on the Mississippi Mills decision and cases following it, to the effect that exemptions were repealable, but not void, and say theirs has never been repealed.

That is their *pleading*, but to avoid the force of it they now attempt to claim *in argument* that theirs is not an ordinary exemption at all, but an irrepealable contract of appropriation of the taxes to the construction debts. This court has often held that it is not every claim of a Federal right which will give this court jurisdiction, but it must be a *bona fide* claim, based on color of truth. Besides the author-

ities in our brief on the motions to dismiss or affirm, on page 21, see the late cases of—

Western Un. Tel. Co. *vs.* Ann Arbor, 178 U. S., 243, 244.

Bolin *vs.* Nebraska, 176 U. S., 90–92.

McCain *vs.* Des Moines, 174 U. S., 169, 170, 181.

The decision in the Mississippi Mills case was made in 1878 (56 Miss., 40). There was no other tax decision till the case of McCulloch *vs.* Stone, 64 Miss., 378, at the October term, 1886, and the charter in the case at bar had its inception in 1882; amendment in March, 1884; company organized under it on August 12, 1884, and road built in the years 1882–1884 (Record, pp. 14, 41, 44, 412, 415).

The State supreme court had differentiated the charter in the case at bar from that passed on in the Mississippi Mills case, in that the exemption or appropriation section in the case at bar being on its face irrepealable ("and which agreement is irrepealable") (Record, p. 558), rendered it unconstitutional and void even under the Mississippi Mills case (Record, pp. 514 and 659, 660), and in that in the Mississippi Mills case the exemption or appropriation was to all factories of a certain class, while in the case at bar it was to a single railroad company, and hence not equal and uniform, and which kind of distinctions this court holds is conclusive and binding on it in the case of Wood *vs.* Brady, 150 U. S., 20–23, and, being an original and independent construction of its own State constitution by the highest court of the State, raises no Federal question or question of the impairment of a contract by subsequent legislation.

But it is not even necessary for this court to pass on that, nor

to reaffirm the doctrine of Wood *vs.* Brady, *supra*, for the State supreme court, as we have above quoted, expressly says "in no other respect do we interfere with the decision in that case" (Record, p. 669).

It is incontestable that "the decision in that case" does adjudge that a statute repealing an exemption *pro tanto* was valid, and that an irrepealable exemption could not be granted. If it was an *exemption*, then the question of whether it was lost by the consolidation or cut off by section 180 of the constitution of 1890 or repealed by subsequent laws, or whether the supreme court has correctly or erroneously given effect to subsequent laws could raise no Federal question; but the plaintiffs in error try to avoid this by claiming that theirs is not an exemption at all, but an irrepealable appropriation of taxes, and even this claim is nowhere made in any pleading in the record except in the suggestion of errors, filed after the supreme court had decided the case, on June 20, 1898 (Record, pp. 521–523).

This does not meet either of the requirements laid down by this court in the above case of The Western Union Telegraph Co. *vs.* Ann Arbor Railroad Co., 178 U. S., 243, 244, that "it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States before jurisdiction can be maintained on this ground."

This claim, besides being made only in the suggestion of errors, which is too late, we think cannot be made under any color of right, and does not really and substantially in-

volve a dispute or controversy as to whether the provision in the charter is an exemption or irrepealable appropriation of taxes. For the convenience of the court and in the interest of accuracy, we will here copy and place in juxtaposition the charter relied on here and the one in controversy in the Mississippi Mills case, so that this court can readily compare them and see for itself that it is impossible in good faith to set up any claim that the one is an irrepealable appropriation of taxes, while the other is merely a repealable exemption from taxation. If one is but an exemption, the other is necessarily so, and as to this there cannot be any real and substantial dispute or controversy.

ACT OF 1872.

MISSISSIPPI MILLS *vs.* COOK, 56 MISS., 42.

"AN ACT to encourage the introduction of machinery and the establishment of factories in the State of Mississippi.

SECT. 1. *Be it enacted by the Legislature of the State of Mississippi,* That in consideration of the construction of factories, and the introduction of machinery for the purpose of erecting, furnishing and carrying on factories in this State, for the manufacture of cotton and woolen goods, or yarns, or fabrics, composed of those or any other materials, and for the making of all kinds of machinery and implements of husbandry necessary for the cultivation of the soil, and to manufacture all other articles or things, of whatsoever character or description, not inconsistent with the laws and constitution of this State, or of the United States, and of the great benefit which the State will receive in the development of its manufacturing resources by means of said factories, and the large and increased amounts of machinery and capital that will, by this liberal-spirited policy, be invited to the

State, thus giving employment to and supplying the wants of thousands of our people, and also the increased value, which will thereby be added to the property of the State, thus enabling the State to greatly increase its revenue without additional and burdensome taxation on the people, the State hereby agrees with any and all manufacturing companies in this State, whose capital stock shall not be less than ten thousand dollars paid in, not in operation before the passage of this act, that all taxes to which said company or companies shall be subject for the period of ten years are hereby appropriated and set apart, and shall be applied to the payment of the debts and liabilities which any of said companies may have incurred in the construction of factories, or the purchase of machinery, or paying debts incurred by any of said companies in constructing or purchasing the same; and it shall be the duty of the tax collectors in every county, in each and every year, for the period of ten years, to give to each of said companies a receipt in full for the amount of all said taxes due, upon receiving from each of said companies an affidavit, made by the president or treasurer of each of said companies, that the amount of said taxes have actually, and in good faith, been paid and applied by each of said companies during the year, in the payment of debts incurred, or money borrowed as aforesaid; and which receipt, so given, shall be in full of all taxes, county, State or municipal, to which said companies shall be subject: *Provided*, That whenever the profits of any of said companies shall enable it to declare and pay to its stockholders an annual dividend of four per cent. upon its capital stock over and above the payment of its debts and liabilities, then the appropriation of taxes aforesaid shall cease towards such company or companies declaring such dividends, and said taxes shall be paid by such companies declaring such dividends, to the tax collector, to be by him paid over as required by law."

TWENTY-FIRST SECTION OF CHARTER OF MOBILE & NORTHWESTERN RAILROAD COMPANY IN CONTROVERSY IN THIS CASE.

4th plea, Record, pp. 557–559.

"SECTION 21. *Be it enacted*, That in consideration of the construction of the railroads provided for herein, and of the great benefit which the State will receive in the development of its agricultural resources by means of said railroads as works of internal improvement, and also of the increased value which will thereby be added to the property of the State, thus enabling the State to greatly increase its revenue without additional and burdensome taxation upon the people, the State hereby agrees with said company, (and which agreement is irrepealable), that all taxes to which said company shall be subject for the period of thirty years, are hereby appropriated and set apart, and shall be applied to the payment of the debts and liabilities which said company may have incurred in the construction of said road, or for money borrowed by said company upon lands or otherwise, to be used in constructing said road, or paying debts incurred by said company in constructing the same; and it shall be the duty of the tax collector in every county in each and every year, to give to said company a receipt in full for the amount of said taxes, upon receiving from said company an affidavit made by the president or cashier of said company, that the amount of said taxes have actually and in good faith been paid and applied by said company during the year, in payment of debts incurred, or money borrowed as aforesaid, and which receipt so given shall be in full of all taxes, county, State and municipal, to which said company shall be subject: *Provided, however*, That whenever the profits of said company shall enable it to declare and pay to the stockholders an annual dividend of eight per cent. upon its capital stock over and above the payment of its debts and

liabilities, then the appropriation of taxes aforesaid shall cease, and said taxes shall be paid by said company to the tax collector, to be by him paid over as required by law."

PROVISIONS OF CONSTITUTION OF DECEMBER 1, 1869, CONSTRUED IN MISSISSIPPI MILLS VS. COOK.

"ARTICLE 12.

"SECTION 13. The property of all corporations for pecuniary profits shall be subject to taxation the same as that of individuals.

"SECTION 20. Taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value, to be ascertained as directed by law" (pp. 50, 51).

As to the present holding on the effect of these sections, see opinion, Record, pp. 662, 669, 638.

The idea, since the Mississippi Mills case, of calling this an appropriation of taxes as distinguished from an exemption from taxation is evidently an afterthought brought about alone by the necessity for some plausible ground to base an argument on here in this case.

The State supreme court has always called and decided this identical twenty-first section to be but an exemption.

McCulloch *vs.* Stone, 64 Miss., 393–396.

L., N. O. & T. R'y Co. *vs.* Taylor, 68 Miss., 361.

Railroad Co. *vs.* Lambert, 70 Miss., 786, 787.

In McCulloch *vs.* Stone, *supra*, page 388, the counsel for the railroad company says it is not necessary to discuss the question whether it is an exemption or appropriation, but in L., N. O. & T. R'y Co. *vs.* Taylor, *supra*, pages 361, 362, and

in the Lambert case, pages 782, 783, they speak of it everywhere as an exemption, and in the latter case, on page 782, they expressly admit that it is governed by the Mississippi Mills case and is repealable. They say: "But acts granting such exemptions were always subject to repeal. * * * Although the legislature in granting exemptions did not part with its right to repeal them, it has never done so in this case."

We cite these admissions not to show what the law is, for the first two were fictitious cases at best, but to show that as a matter of fact, and that is the point, that the railroad company did not rely on any belief or theory that it was an irrepealable appropriation.

And so, also, it seems that this court lost its discriminating power, and fell into the common and universal error of calling this same twenty-first section an "exemption," or else through a sense of delicacy and great circumspection failed to properly characterize this "thin disguise," and simply treated it *sub silentio* as an exemption. The court quotes the substance of this twenty-first section, and then speaks approvingly of the decision of the supreme court of Mississippi in holding in the case of McCulloch *vs.* Stone, *supra*, that outlying lands were "not within the exemption."

Ford *vs.* Delta and Pine Land Co., 164 U. S., 667,668.

And the charters, of which a list is furnished by opposite counsel in the appendix to their brief, show that before the Mississippi Mills case decided that this was but an exemption and repealable all charters had this appropriation form, but that after this decision, IN THE YEAR 1878, all railroad charters had the straight exemption form, except in a few instances,

like the case at bar, where this twenty-first section was re-enacted by reference only and for mere convenience, showing that it was universally recognized at that time as a mere repealable exemption.

Third.

This court has also decided that a Federal question cannot be raised for the first time in the assignment of errors or in the petition for rehearing, both of which are attempted by the plaintiffs in error here, but that it must be raised by the pleadings and before judgment.

To authorities on page 33 of our main brief add—

Cin., Ham. & D. R'y Co. *vs.* Thiebaud, 177 U. S., 619–621.

Western Un. Tel. Co. *vs.* Ann Arbor, 178 U. S., 243, 244.

Fourth.

And it cannot be raised by any certificate of the chief justice. On pages 24 and 102 of our brief add—

Henkel *vs.* Cincinnati, 177 U. S., 170, 171.

Fifth.

The Lambert case cannot be used as *res adjudicata* here, because not pleaded or offered in evidence before judgment. To authorities on page 40 of our main brief add—

Bryar *vs.* Campbell, 177 U. S., 649, 653–655.

Sixth.

That the decision on the first appeal in this case for the taxes of 1892–1895 is *res adjudicata* as to the taxes also for the years 1896 and 1897, as held by the court on the second appeal. To the authorities cited on page 43 of our main brief add—

Werlien *vs.* New Orleans, 177 U. S., 396, 397.

Seventh.

To the contention in the sixth plea of the defendants, setting up the acts and conduct of the State officers as an estoppel, even if said pleas had been filed in time. To the authorities in our main brief on page 36, showing that this doctrine has no application to cases like the one at bar, add a late one by this court expressly holding that it has no application to acts which are *unconstitutional* and beyond the power of the officers or legislature to waive.

Houston, &c., *vs.* Texas, 177 U. S., 66, 97, 98.

See also Weyerhauser *vs.* Minn., 176 U. S., 550, 559.

Eighth.

That an unexecuted power is not a vested right, as decided by the supreme court in this case in reference to an unexecuted power to consolidate (Record, p. 638, citing various decisions of this court). Add the cases of—

Adirondack R'y Co. *vs.* N. Y. State, 176 U. S., 344, 345.

Minneapolis *vs.* Gardner, 177 U. S., 332, 340–344.

Ninth.

To the authorities on pages 66 and 76 of our brief, to the effect that plaintiffs in error and their assignors were not as against the State of Mississippi entitled to inflate the debts and issue to themselves fictitious stock, add—

Dickerman *vs.* Northern Tr. Co., 176 U. S., 203–206.

Tenth.

To the record in No. 5513 from the supreme court of Mississippi, on file, and the cases in 64 Miss., 479 and 713, and 69 Miss., 943, cited on page 58 of our main brief, to show that it was notorious in the public records of the State, in addition to the testimony on file, that the railroad was built before the Louisville, New Orleans and Texas Railway Company was formed on August 12, 1884, and was not built by it, but by a company which had no exemption, and that therefore the circuit court was right in refusing to receive or accept the indefinite and unsworn pleas, stating that it was built in the years 1882–1884, add the cases of—

Hopson *vs.* L., N. O. & T. R'y Co., 71 Miss., 503, 504.

L., N. O. & T. R'y Co. *vs.* Hopson, 73 Miss., 774, 776.

Eleventh.

As to supplemental reply brief of plaintiffs in error, filed on October 9, 1900, we have to find fault with their quotation on page 3 of the order of consolidation of July 8, 1898, on page 610 of the record, in that it leaves out the concluding portion, "this order at the request of all parties is entered as of the 4th day of July, 1898, and shall take effect as of

that date, at which date the same was made." We call attention to the fact that this agreement and order not only makes all pleadings, but also all "*orders and proceedings*," applicable to each case, and that as a matter of fact the 4th, 5th, and 6th pleas had been stricken out and all other pleas withdrawn on July 6 and 7 before then, and if it be treated as an order of July 8, then the defendants have agreed to make certain stricken-out pleas, and also the order striking them out, a part of their case *by consent;* and if it be treated as an order of July 4, then it stands as an agreement that the defendants may have the benefit of certain pleas already on file, but certainly not an agreement that they might file any others whatever, and we still insist that so far as this record shows they were in default and entitled to no rights whatever as to the taxes of 1896 and 1897, and that because we consented that they might make one *defense which they refused to make* cannot be construed into any agreement or any right to make any other defense. As they were in default, we had a right to prescribe the terms on which they should plead, *at least by our consent*, and any attempt to plead beyond this was beyond the pale of the agreement and without any excuse or showing.

We also find fault with their citation of the opinion of the court on pages 7 and 14 of said supplemental brief, because it omits in each instance the material statement that "these matters of practice and procedure, and all other assignments of error touching matters of practice and procedure, were correctly settled by the court," when they were arguing that the supreme court did not treat it as a matter of practice and procedure, and, on page 14, omitting that part of the opinion which says the pleas were an effort "*to have the circuit court*

disregard," when they were arguing that the supreme court did not regard it as *res adjudicata*, in each instance leaving out the part which contradicted their argument.

Now, as to the other points made in said supplemental brief:

This court has decided that its jurisdiction does not extend to questions of fact or of local law, which are merely preliminary to, or the possible basis of, a Federal question.

> Telluride, &c., *vs.* Rio Grande, &c., 175 U. S., 639, 643–647.

We think this decision is the key to this whole case.

In the pleas of the defendants which were not stricken out, and which no motion was made to strike out, the defendants set up this twenty-first section, and a compliance with its terms. On this the plaintiff took issue. Here was a square issue on the facts unincumbered by any legal questions.

But the defendants were not satisfied with this, and insisted on trying to file their fourth pleas, in which, besides setting up this twenty-first section and a compliance with its terms, they sought to inject into the case a statement that the decision of June 20, 1898, on the first appeal violated the Federal Constitution. Now, if this had constituted a Federal question and had been well pleaded, it is evident that the questions of fact or local law set up in the other pleas on which issue had been taken were preliminary to and the basis on which this Federal question would necessarily have rested, for, before any Federal question could possibly arise, it was necessary to allege, as a preliminary matter or inducement, that the terms of the charter as to

the application and payment of the taxes on construction debts, making the affidavit, &c., had been complied with. This is admitted and could not avoid being admitted by the defendants, plaintiffs in error here. On pages 32, 33, of their brief in opposition to our motion to dismiss or affirm, and on page 20 of their main brief, they admit that the exemption depended on certain facts, and that the declarations on their faces stated a good ground of action, "the only requisite allegation in defense being of these facts which brought the railroad companies within the provisions of the statute." And "this allegation of the plea was made in almost the very language of the statute," as indeed it was.

Of the pleas in controversy which were stricken out, the fifth was a plea of *res adjudicata* (Record, pp. 571, 599), where it is claimed that the Lambert case is *res adjudicata*, "and it is hereby pleaded as such," and the sixth plea is a plea of estoppel by conduct, averring the previous decisions and action of the State officers, and then pleading, "Wherefore the defendants herein aver that the State of Mississippi and the various counties and municipalities mentioned in the plaintiff's declaration herein, the said plaintiff, as revenue agent herein, each and all are estopped to claim and assert the said taxes severally and collectively, as herein demanded" (Record, pp. 577, 605, 606).

These pleas, of course, raise no Federal question, the doctrine of *res adjudicata* and estoppel not being such.

The suggestion of errors, as before stated, claims that this exemption or twenty-first section is an irrepealable appropriation of taxes and protected by the Federal Constitution, but that besides being filed too late to raise such a question

in the supreme court, was not a pleading at all in the circuit court. In the fourth pleas, which were attempted to be filed and were stricken out, it is nowhere claimed that this twenty-first section is irrepealable, but only that it had not been repealed, and not that any subsequent law, but "that this suit by the plaintiff and said decision of June 20, 1898," are violative of the Federal Constitution (Record, pp. 566, 594). It was not claimed that the exemption had not been repealed in the sense that the legislature had no right to repeal it. On the contrary, this right is admitted all through this fourth plea, and the contention is not as to the right, but as to the fact that it had not in fact been repealed. The allegations on this subject are that "at various sessions of the legislature during said period members thereof introduced bills for the purpose of repealing said privilege of said section, but each successive legislature at which such efforts were made refused to repeal the same;" * * * "and at the sessions of the legislature held in the years 1894, 1896, and 1898 renewed efforts had been made to repeal said privilege of said section, but the legislature again and each time refused to do so" (Record, pp. 561, 566, 589, 593).

It will be noted that these pleas were attempted to be filed on July 6, 1898 (Record, pp. 578, 606). At that time it had not been decided that the exemption had been repealed. This was first held in the full opinion filed November 22, 1898 (Record, pp. 638, 671).

Hence, at that time, on July 6, 1898, there was no ground to claim that the supreme court had given effect to any subsequent laws repealing the exemption, and no such claim was made.

We premise this much in order that this court may not be led into the supposition that we concede that any Federal question is even raised by the stricken-out pleas, but if the fourth pleas had raised a Federal question, then the fact of compliance with the provisions of the charter was a question of local law and the necessary preliminary or basis for the Federal question. The plea would not and could not have been good without this.

Now, the pleas, which were not stricken out and were not asked to be stricken out (Record, pp. 54, 55, 83, 551, and 578), set up a strict compliance with all these charter provisions. On these pleas the plaintiff took issue (Record, pp. 58 and 609).

Here was a square issue on the facts, and it is plain that if after the fourth, fifth, and sixth pleas had been stricken out the defendants had gone to trial on these other pleas, as they should have done, and the facts had been found against them, no Federal question would have been possible. This was substantially what was done in the Telluride case, *supra*—that is, the court below decided on the local law and the facts, which necessarily had to be decided before the Federal question could be reached—and this court decided that it had no jurisdiction to review this finding.

The only difference here is that the defendants, instead of going to trial and risking a judgment against them on the facts, chose rather to voluntarily withdraw all their pleas, not already stricken out, thus admitting the facts, and we cannot see any difference in principle, so far as this point is concerned, between an adjudication against them on issue joined on the facts and a voluntary confession of the facts by a withdrawal of their pleas. We think they could not

thus avoid a trial on the merits squarely tendered them and force this court to decide on constitutional questions not properly before it.

Perkins *vs.* Guy, 55 Miss., 154–155, 179–180.

F. A. Critz,

R. C. Beckett,

Attorneys for Defendant in Error.

APPENDIX.

Railroads Not Exempt.

Laws of 1870.

Southern Railroad Association, p. 214.
West Feliciana, p. 250.
Brownsville and Holly Springs, p. 295.
Raymond and Bolton, p. 312.
Vicksburg and Meridian, p. 308.

Laws of 1871.

Winona and Yazoo River, p. 156.
New Orleans and Northeastern, p. 160.
New Orleans, Jackson and Great Northern, p. 172.
Prentiss and Bogue Phalia, p. 253.

The following railroads were given the privileges, but not *immunities* of other roads:

Macon and Tombigbee River, § 16, p. 155.
North Mississippi, § 13, p. 228.
Corinth and Nashville, § 1, p. 262.

Laws of 1872.

Natchez and New Orleans, p. 234.
Vicksburg and Natchez, p. 256.
West Point, Starkville and Kosciusko, p. 268.

The following railroads were given ostensibly the same privileges as the Mobile and Northwestern, but required to

transport fertilizers free and pay a tax of one mill per mile on passengers:

Mississippi River and Sardis, § 15, p. 386.

Natchez and Brookhaven, § 15, p. 367.

New Orleans and Northeastern, § 1, p. 314.

Corinth, Kossuth and Kosciusko, § 27, p. 346.

LAWS OF 1873.

Floryville and Bogue Phalia, p. 581.

Hillsboro Branch, p. 599.

Mississippi and New Orleans, p. 598.

Grand Gulf and Brookhaven, p. 490.

The following railroads were required to transport fertilizers free and pay one mill per mile on passengers, as *supra*:

Pascagoula and Jackson, § 9, pp. 496, 499.

Mobile and Little Rock, § 8, pp. 576, 579.

LAWS OF 1874.

No railroad charters granted.

LAWS OF 1875.

Aberdeen, Fulton and Eastport, p. 198.

No other railroad charter granted.

Privilege or commutation tax levied on all railroads, p. 66.

LAWS OF 1876.

No railroad charters granted.

LAWS OF 1877.

Yellow Creek and Tombigbee, p. 165.

No other railroad charter granted.

LAWS OF 1878.

Alabama Central, p. 448.

West Point and Tombigbee, p. 473.

Port Gibson, Utica and Crystal Springs Railroad Company was granted exemption for five years, § 21, p. 472.

Privilege or commutation tax laid on all railroads, p. 87.

LAWS OF 1880.

Exemption of New Orleans and Northeastern repealed, p. 248.

Yazoo, p. 215.

Holly Springs and Memphis, p. 234.

Yazoo Delta, p. 252.

Mississippi and Sunflower, p. 264.

Liberty and Mississippi River, p. 687.

Ripley railroad released from subsidy, but required to pay all other taxes, §§ 1 and 2, p. 269.

Mobile and Northwestern released from back taxes, p. 271.

LAWS OF 1882.

New Orleans, Baton Rouge, Vicksburg and Memphis, p. 920.

Memphis and New Orleans Railroad and Levee Co., § —, p. 883.

Richmond and Danville Extension Co., p. 1036.

Some charters exempted railroad, its stock, franchises, &c., for twenty years after completion to some point, not to extend beyond twenty-five years from date of charter, as to State taxes, and perpetually as to county and town taxes, as—

Yazoo and Mississippi Valley, § 8, p. 847.

Alabama and Mississippi, § 8, p. 870.

Others not to extend beyond twenty years from date of charter, as—

Meridian, Brookhaven and Natchez, § 22, p. 1064.

Canton, Aberdeen and Nashville, § 8, p. 1009.

Others had straight exemption for twenty years from State, county, town, and special taxes, but no exemption as to stock, as—

Helena, Sardis, Pontotoc and Birmingham, § 25, p. 895.

Others exempt railroad, its stock, &c., from taxation, but does not specify county or municipal taxation, as—

Mississippi and Arkansas, § 13, p. 942.

Others exempt the railroad, but say nothing about either its stock or counties and towns, as—

Birmingham and Northwestern, § 18, p. 1049.

Another exempts from State taxes for twenty years, and counties and towns perpetually, except as to the city of Meridian, as—

Meridian, Winona and Helena, § 22, p. 959.

Others exempt from State taxes for twenty years after completion to some point, and from county and town taxes for twenty years absolutely, as—

Mississippi and Mexican Gulf, § 27, p. 974.

Others exempt the railroad, but say nothing about the company or its stock, &c., as—

Mississippi, Alabama and Georgia, § 26, p. 988.

Others exempt the company, its stock subscriptions, and mortgage obligations, as—

Tennessee and Mississippi Rivers, § 26, p. 1000.

LAWS OF 1884.

Baldwin, Marietta and Purple Shell, p. 883.

Aberdeen and Fulton, § 3, p. 953.

The following railroads are given the exemption specified in section 22 of the charter of the Meridian, Winona and Helena Railroad Company, *supra*, except that the exemption as to cities and towns is stricken out. It will be noted also that said railroad is to be exempt for twenty years from completion to the Mississippi river, when some of the other railroads were not intended to go to the Mississippi river:

Macon and Tuscaloosa, § 2, p. 916.

Memphis, Oxford and Columbus, § 3, p. 920.

Mississippi River and Deer Creek, § 3, p. 918.

Helena, Memphis and New Orleans, § 3, p. 938.

Terry, Brandon and Northeastern, § 3, p. 937.

Arkansas City, Winona and Eastern, § 3, p. 971.

LAWS OF 1886.

The following railroads were exempted till one year after completion:

Kansas City, Memphis and Birmingham, § 11, p. 199.

Memphis, Birmingham and Atlantic, § 7, p. 206.

Pensacola and Memphis, § 21, p. 221.

Vicksburg, Yazoo Delta and Northeastern exempt one year from State but perpetually from city and town taxes, § 8, p. 227.

LAWS OF 1888.

Brookhaven, Columbia and Mobile, § 3, p. 509.

Corinth, Birmingham and Bolivar, p. 472.

Mobile, Hattiesburg and Jackson, p. 481.

The following railroads were exempt for one year after completion:

Macon, Tuscaloosa and Birmingham, § 17, p. 499.

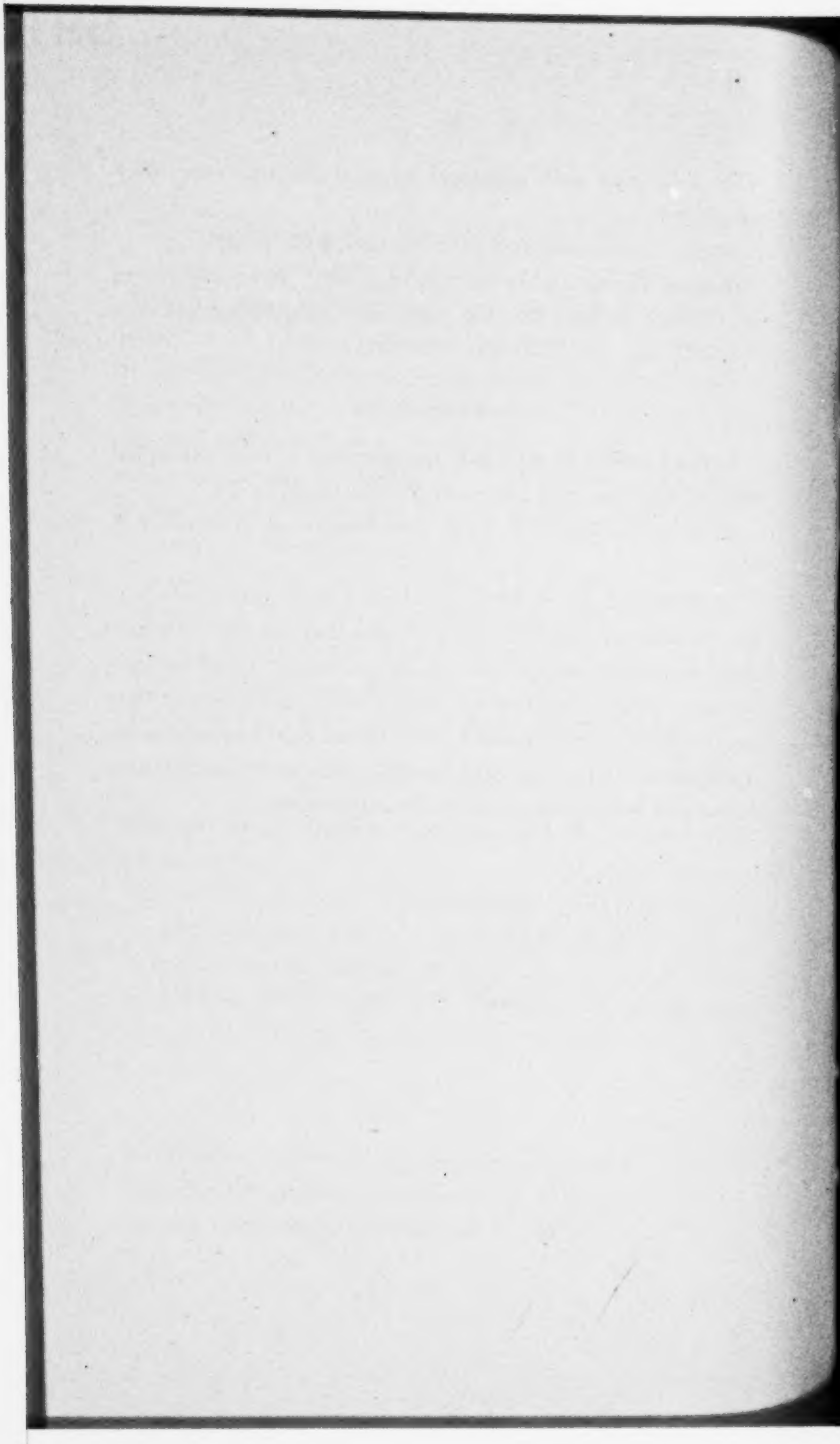
Helena, Tupelo and Decatur, § 17, p. 508; and many others not exempt, or only till one year after completion, pp. 511, 514, 526, 531, 546, 557, 559, 570, 591.

LAWS OF 1890.

Large number of railroads incorporated. None exempted longer than one year after completion, pp. 677–778.

Then comes article 7 of the Constitution of November 1, 1890.

And then Code of 1892, in which § 3379 puts a privilege tax on railroads, and § 3884 provides that the tax collectors shall collect the *ad valorem* tax on railroads "in all respects as they collect other taxes;" and § 3803 provides that they shall collect other taxes in United States coin, treasury notes, and national currency, and, besides, State warrants for State taxes and county warrants for county taxes.



No. 35.

Appeal to Dep. of Commerce Bldg.

Filed Oct. 16, 1900.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 35.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY ET AL. PLAINTIFFS IN ERROR,

Vs.

WIRT ADAMS, STATE REVENUE AGENT.

In Error to the Supreme Court of the State of Mississippi.

This is case No. 35 as the same will appear in 77 Mississippi Reports.

her rights under the trust deed, by becoming administratrix, with the will annexed, of the estate of Eldon C. Field, deceased, and his heir at law, though she was not his heir at law at all. She was led to revive the suit of Eldon C. Field against herself and others, as administratrix and sole legatee and devisee under the will of Eldon C. Field, deceased. She took leave to withdraw her answer and change her position from that of defendant to that of sole complainant—a position hostile to her interests, and if maintained, destructive of her clear rights under the trust deed.

In this strange attitude of the case, on the pleadings, the cause came on for hearing. After the complainant had introduced all the evidence desired to be presented by her, the respondents, appellees here, amended their answer so as to completely reverse their former position as to the validity of the trust deed of August 30, 1890. Their answer as originally made, and as adhered to until the cause was actually being tried, had affirmed the validity of that instrument; the change made was a denial of its validity, and an affirmation of its fraudulent character. The appellant then asked leave to amend her bill so as to affirm the validity of that trust deed, and to strike out the allegation of fraud in its procurement, as charged in the original bill filed by Eldon C. Field, and reaffirmed by her in her bill as administratrix and sole devisee.

Our opinion is that, in this remakable case, the cause should have been remanded to the docket, with leave to complainant and defendants to reform their pleadings as they might be advised, in order that the real issues might be presented, and the merits of the controversy fairly acted upon.

That substantial right is with Miss Field in the case as thus far developed, we have a strong conviction, and to deny her assertion of those rights by reason of any rules of pleading or practice prevailing in courts of equity, or for any other reason, in the view of the case which we have indicated as being entertained by us, should not be permitted until all the powers of

Syllabus.

the court of conscience to have the case properly presented have been exhausted.

Reversed and remanded.

WIRT ADAMS, STATE REVENUE AGENT, *v.* YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY

AND

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY *v.* WIRT ADAMS, STATE REVENUE AGENT.

1. RAILROADS. *Consolidation.*

The power of one railroad company to consolidate with another is wholly derived from the state, and being a mere license, and not resting in contract, a charter provision authorizing consolidation "on such terms as they [the corporations concerned] may agree upon" must be construed as meaning such terms as are consistent with the law as announced in their charter or otherwise.

2. SAME. *Effect of consolidation in other states.*

The effect of consolidation of two railroad companies in other states in which the railroads are located, is pertinent in determining the effect of consolidation in this state, as creating a new company or not.

3. SAME. *Stock. New corporation. When created.*

A new corporation, rather than a mere merger of two corporations, necessarily results from a consolidation of their stock, and the existence of the new company begins at the date of the consolidation, and not that of the legislation authorizing it.

4. SAME. *Statutory construction. Laws* 1882, *p.* 932.

No consolidation, except such as would create a new company, is authorized by legislation providing that a certain railroad company may consolidate with any other under the name (not the name and charter) of one or both, and that when such consolidation should be effected, "said company" should be entitled to all the benefits, franchises, property, etc., of every descrip-

tion belonging to the companies "so consolidated," especially in the absence of any term expressing merger, or that the words "said company" referred to any other company than the new one resulting from consolidation.

5. SAME. *Laws* 1882, *p.* 843.

A new company, and not a mere merger by union, results from the consolidation of two railroad companies under an act incorporating one of them, and providing that the same might consolidate with any other company, and that thereupon the consolidated company "should have and enjoy all the property, rights, privileges, powers, liberties, immunities, and franchises" therein granted.

6. SAME. *Deed of consolidation.*

Facts considered in a case where there was a consolidation of the stock of two railway companies, and held to create a new company instead of effecting a mere merger, although the deed of consolidation referred simply to a merger of the stock, property and franchises of the one company, which had fifty thousand shares, with and into the stock, property and franchises of the other company, which had six thousand shares, "without disturbing the corporate existence" of one of the companies, "or the formation of any new distinct corporation."

7. SAME. *New corporation. Status. Date of consolidation.*

On the consolidation of two railroad companies whose existence is thereby extinguished, the new corporation comes into being exactly as if it had been organized under a charter granted at the date of consolidation.

8. CORPORATIONS. *Corporate franchise. Existence. Consolidation. Constitution* 1890, *section* 180.

Both the right to exist as a corporation and the power to consolidate with another corporation are within section 180, constitution of 1890, providing that grants of "corporate franchises" under which organizations have not taken place shall be subject to constitutional provisions, one of which prohibits exemptions from taxation.

9. SAME. *New company. Exemption from taxation. Constitution of* 1890, *sections* 180, 181.

A new corporation resulting from a consolidation of two railroad companies since the adoption of the constitution of 1890 pro-

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hibiting exemptions from taxation, is not entitled to an exemption from taxation contained in the charter of one of the consolidating companies, although such charter was granted prior to the adoption of the constitution.

10. SAME. *New company. Constitution* 1890, *sections* 181, 279.

A corporation which, since the adoption of the constitution of 1890, has lost its individual corporate existence by a consolidation with another company, can claim no benefit from the constitutional provisions that exemptions from taxation to which corporations are legally entitled at the adoption of the constitution shall thereby be not impaired, and that the rights of bodies corporate and charters of incorporation shall continue under the constitution.

11. SAME. *Constitution* 1890, *section* 180.

An exemption from taxation contained in the charter of a railroad company, which afterwards loses its corporate existence by consolidation with another company, is cut off by the adoption of a state constitution prohibiting such exemptions while the right to consolidate remains unexecuted, although the charter expressly provided that such exemptions shall pass to any consolidated company that might be afterwards formed.

12. TERMS OF CHARTER. *"Immunities." Taxing power. Favorable construction.*

If it be doubtful that a charter exempts a corporation from taxation, the doubt must be resolved in favor of the taxing power; and such an exemption contained in the charter of one of two consolidating railroad companies, does not pass to the new company resulting from the consolidation under a charter granting to the same all the rights, privileges, etc., of the constituent companies, but failing to employ the word "immunities."

13. SAME. *Res adjudicata. Estoppel.*

A decision in a suit between a tax collector of a county and a railroad company upholding the latter's claim of exemption from taxation under its charter in that county, is not *res judicata*, and does not estop the state revenue agent in a suit for unpaid taxes against a different railroad company claiming exemption under its charter, which is an entirely different charter.

14. SAME. *Different subject-matter of suit.*

Although the same contention be involved, a decision concerning the taxes of a particular year is not *res judicata* so as to preclude suit for the taxes of another year.

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15. SAME. *Pleading. Evidence.*

The thing adjudicated, and not the reason given therefor, is that which makes a previous decision operate as an estoppel, and, to be effective, such decision must be pleaded or offered in evidence by way of estoppel.

16. SAME.

A decision enjoining a tax collector from collecting taxes on the property of a railroad company within his county for a certain year, is *res judicata* as to the taxes on the property for the year in question, and precludes a suit for the same by the revenue agent against a corporation resulting from the subsequent consolidation by such company with another.

17. CORPORATIONS. *Exemption from taxation. Constitution* 1869, *section* 13, *article* 12.

The provision of the constitution of 1869, section 13, article 12, that the property of all corporations for pecuniary profit shall be "subject" to taxes the same as that of individuals, together with the other provision (sec. 20) requiring that taxation shall be equal and uniform throughout the state, and all property taxed in proportion to its value, is mandatory, and deprives the legislature of all power to exempt the property of such corporations from taxation. *Mississippi Mills* v. *Cook*, 56 Miss., 40, and *Railroad Company* v. *Lambert*, 70 Miss., 779, overruled.

18. STARE DECISIS. *Identity of charters construed.*

The doctrine of *stare decisis* cannot be invoked on the construction of a particular charter unless the charter previously construed was identical therewith.

19. SAME. *Taxing power.*

And the courts are reluctant to recognize this doctrine when invoked by a private corporation for profit in order to abridge the taxing power. *Peck* v. *Allen*, 58 Miss., 173; *Lombard* v. *Lombard*, 57 *Ib.*, 177, cited.

20. RAILROADS. *Taxation. Ad valorem and privilege taxes. Exemption. Code* 1880, §§ 597 *to* 608, *inclusive; Laws* 1884, *p.* 29; *Laws* 1886, *p.* 23; *Laws* 1890, *p.* 12.

When the chapter of the code of 1880, subjecting all railroads to taxation, but making it optional with them whether they paid *ad valorem* or privilege taxes, was amended by the act of 1886 (Laws, p. 23) providing that every railroad in the state should

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thereafter pay a privilege tax at certain fixed rates, without alluding to any exemption, such amendment operated as a repeal of all repealable exemptions from taxation, and the act of 1890 (Laws, p. 12) purporting to continue, if still in existence, an exemption in favor of the Natchez Railroad Company, recognized by the act of 1884 (Laws, p. 29), but repealed by act of 1886, is wholly ineffective.

21. SAME. *Code* 1892, §§ 3379, 3744, 3875. *"Nontaxable" property.*

The provisions of the code of 1892 imposing a privilege tax on all railroads (§ 3379), and providing that certain property, not embracing that of railroads, "and no other," should be exempt from taxation (§ 3744), repeals all exemptions contained in statutes not irrepealable, since the word "nontaxable," as employed in that code (§ 3875), imposing *ad valorem* taxes, and requiring every railroad company in the state, without exception, to return all of its property and its value, nontaxable as well as taxable, means property like government bonds that are not taxable in any event.

22. PRACTICE. *Compromise verdict.*

A compromise verdict on an indivisible issue as to liability for four years taxes will be set aside where the finding is for plaintiff for three years and defendant for one.

ON MOTION TO STRIKE OUT OPINION.

23. SUPREME COURT. *Opinion. Mandate. Code* 1892, § 4352.

It is not essential, under § 4352, code 1892, to the authority of an inferior court to proceed in a cause which has been remanded on reversal of its judgment, that the opinion of the supreme court should accompany its mandate.

24. SAME. *Revision of opinions.*

In its opinion filed after trial in the lower court of a remanded cause, the supreme court may include other reasons for reversal in addition to those set out in its summary of holdings filed at the time of its decision.

25. SAME. *Due process of law. Constitution United States, amendment* 14.

The decision or judgment remaining undisturbed, the revision of an opinion which expresses but the reasons of the decision does not involve "due process of law" as guaranteed by the federal constitution.

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SECOND APPEAL.

26. REMOVAL OF CAUSES. *Time of application.* 24 *Stat. U. S., c.* 373, *p.* 554; 25 *Ib., c.* 866, *p.* 435.

The statutes of the United States imperatively require that application to remove a cause from a state court to a federal court be made before the plea is due under the laws and practice of the state.

27. CORPORATIONS. *Consolidation of railroad companies.*

When a new corporation resulting from the consolidation of two railroad companies is sued for taxes which accrued after consolidation, it is immaterial that the new company relied on a decision of the supreme court recognizing an exemption from taxation like that contained in the charter of one of the constituents, since the exemption was lost by the consolidation.

28. RAILROADS. *Exemption from taxation. Constitution* 1869, *article* 12, *section* 13.

Legislative recognition of an exemption from taxation granted to a railroad company prior to the adoption of the constitution of 1869, does not involve judicial recognition of a like provision in the charter of another railway company granted after the property of all corporations had been, by that constitution, subjected to taxation the same as individuals.

29. SAME. *Ad valorem and privilege taxes. Code* 1880, §§ 597, 608; *Laws* 1870, *p.* 327; *Laws* 1878, *p.* 268.

The provisions of the code of 1880, subjecting all railroads to taxation, and providing that they may, at their option, pay privilege instead of *ad valorem* taxes, must be taken to include a company the privilege tax whereon is fixed by another provision of that code, notwithstanding an exemption from taxation contained in its repealable charter granted prior to the adoption of that code, the payment of privilege taxes being a mode of escaping *ad valorem* taxes secondary to the main purpose of the legislation.

30. SAME. *Privilege taxes. Express reference to particular company. Code* 1880, § 806.

The reasons for naming a particular railway company in imposing privilege taxes do not exist in the case of *ad valorem* taxes, since each company is required to pay a privilege tax graduated according to its class.

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31. SAME. *Repeal of exemption. Code* 1892, § 3875; *Laws* 1882, *p.* 838.

The code of 1892, subjecting all railroads to taxation, repealed an exemption therefrom contained in a charter granted in 1882.

FROM the circuit court of Hinds county, first district.

HON. ROBERT POWELL, Judge.

The state revenue agent, proceeding under the authority conferred upon him by chapter 126, code 1892, and the act of 1894, amendatory thereof, instituted three successive actions of debt to recover from the Yazoo & Mississippi Railroad Company and from the Illinois Central Railroad Company taxes which had been assessed by the state railroad assessors under authority conferred upon them by the revenue chapter of the code and by the aforesaid act of 1894, against the railroad property which formerly had belonged to the Louisville, New Orleans & Texas Railway Company, and had been acquired by the Yazoo & Mississippi Railroad Company by a consolidation effected October 24, 1892.

The taxes assessed and sued for were for the years 1892, 1893, 1894, and 1895, respectively. The defendants, in response to said action, pleaded the grant made to the said Louisville, New Orleans & Texas Railway Company, by sec. 5 of the act of March 3, 1882, under which act the said company had been organized. Said sec. 5 extended to said company the right and privilege conferred upon the Mobile & Northwestern Railroad Company by sec. 21 of its charter. Said sec. 21 of the Mobile & Northwestern charter so extended to the Louisville, New Orleans & Texas Railway Company, was, so far as is material to be set forth herein, as follows:

"All taxes to which company shall be subject for the period of thirty years are hereby appropriated and set apart, and shall be applied to the payment of the debts and liabilities which the said company may have incurred in the construction of said road, and it shall be the duty of the tax collector in every county, in each and every year, to give to the said company a receipt in full for the amount of said taxes, upon receiving

from said company affidavit made by the president or cashier of said company that the amount of said taxes had actually, and in good faith, been paid and applied to said company during the year, in payment of the debts incurred, or money borrowed as aforesaid, which receipt, so given, shall be in full of all taxes, county, state, and municipal, to which said company shall be subject."

The plea interposed by the defendants set forth the performance of the conditions of the said statute. To this plea the plaintiff interposed fourteen replications, seven of which were held bad on demurrer, the remainder resulting in issues of fact on which the three cases were consolidated into one. The fifth replication to the defendants' plea was as follows:

"And for further replication the plaintiff says that by the consolidation of the said Louisville, New Orleans & Texas Railway Company and the said Yazoo & Mississippi Railroad Company, a new corporation was formed, after the adoption of the present constitution of this state, and that by reason thereof, all the property of said consolidated railroad company became and was liable to taxation; and this he is ready to verify," etc.

There was a trial of the consolidated cause before a jury at the July term, 1896, which resulted in a verdict and a judgment for the defendants as to the taxes of 1892, 1893, and 1894, and a verdict in favor of the plaintiff as to the taxes of 1895.

From the judgment so rendered in favor of the defendants as to taxes of 1892, 1893, and 1894, the state revenue agent appealed, and from the judgment in favor of plaintiff as to the taxes of 1895 the defendants took a cross appeal.

The constitutional and statutory provisions mentioned in the opinion of the court in disposing of this appeal, are the following: Const. 1869, sec. 13, art. 12: "The property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals." *Ib.*, sec. 20, art. 12: "Tax-

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ation shall be equal and uniform throughout the state; all property shall be taxed in proportion to its value, to be ascertained as directed by law." Const. 1890, sec. 180: "All existing charters or grants of corporate franchise under which organizations have not, in good faith, taken place at the adoption of this constitution, shall be subject to the provisions of this article." *Ib.*, sec. 181: "The property of all private corporations for pecuniary gain shall be taxed in the same way and to the same extent as the property of individuals." *Ib.*, sec. 279: "All writs, actions, causes of actions, proceedings, and rights of individuals and bodies corporate, and of the state, and charters of incorporation shall continue."

Act 1882 incorporating New Orleans, Baton Rouge, etc., Railroad Company, approved March 9, 1882 (Laws, pp. 920, 932, sec. 25): "That the company shall have power and authority to purchase and hold any connecting railroad and operate the same, or to consolidate the company with any other company, under the name of one or both, but when such purchase is made, or consolidation is effected, the said company shall be entitled to all the benefits, rights, franchises, lands, and property of every description belonging to said road or roads so sold or consolidated."

Act of 1882, incorporating Yazoo, etc., Railroad Company, approved February 17, 1882 (Laws, pp. 838, 849, sec. 5, p. 843): "Said company may consolidate with any other railroad company in or out of the state of Mississippi, upon such terms as the consolidating companies may agree upon, and it may lease its railroads and all its property and franchises, rights, privileges, and immunities then owned, or thereafter to be acquired, or lease other railroads, in or out of this state, for a term of years or in perpetuity, and upon such consolidation the consolidated company shall have and enjoy all of the property, rights, privileges, liberties, and immunities and franchises herein granted, but such consolidation shall not have the effect of exempting from taxation the railroad or property

owned by such other consolidating company prior to its consolidation with the company hereby chartered, nor of exempting from taxation any property which the consolidated company may, after such consolidation, acquire under the provisions of the charter of such consolidating company," etc.

Code 1880, § 597, provides that each railroad company operating in this state shall, on or before the third Monday in August in each year, file with the auditor of public accounts a schedule of its property for *ad valorem* taxation, and prescribes what such schedule shall contain by way of description, valuation, etc.

Section 598 provides that the Mobile & Ohio Railroad Company shall, on or before August 1, 1880, make out and file with the auditor of public accounts (in addition to what is required in the preceding section) a sworn statement of the capital expended in the construction of its road. Sections 599, 600, 601, 602 regulate the assessment of railway property for *ad valorem* taxation.

Section 603 provides for the due ascertainment and certification of the amount of *ad valorem* taxes due by each company.

Sections 604, 605, provide how such *ad valorem* taxes shall be collected.

Section 606 provides for municipal taxation of railroad property for municipal purposes.

Section 607 is as follows: "Each and every railroad company which shall accept this act, and annually pay to the auditor of public accounts the taxes hereafter provided for, and will signify their acceptance in writing, shall be exempt (except from the last preceding section) from the provisions of the foregoing sections of this act until otherwise ordered and provided by law, and the payment of the same shall be in full of all state and county taxes, fifty per centum of which said tax shall be placed to the credit of the counties through which said railroads may pass, to be drawn by the county treasurers

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of the counties in proportion to the number of miles of said roads in said respective counties; *provided,* that lands owned by railroad companies, and not used in operating the railroads, shall be taxable as other properties and for all purposes."

Section 608 is as follows: "Each railroad company whose line is in whole or in part in this state shall, if it accepts the provisions of this act, pay to the state treasurer on the warrant of the auditor, on or before the thirty-first day of December, in each year, a privilege tax as follows, to wit: The Mobile & Ohio Railroad Company, and its branches, $80 per mile. . . . . Provided, that no railroad company shall be subject to taxation under this chapter while the same is in process of construction, but if any part of any road shall be finished and used for profit, the part so finished shall be taxed, although the whole may not be finished."

The act of 1884 (Laws, p. 29) was one to amend §§ 607 and 608 of the code of 1880 as to accepting the provisions for payment of a privilege tax in lieu of *ad valorem* taxes, and in fixing the rate, per mile, of each railroad company, employs the following language: "The Natchez, Jackson & Columbus Railroad Company, forty dollars per mile; after expiration of exemption, as provided in its charter and amendments thereof."

The exemption referred to is expressed in the act of August 8, 1870, extending the exemption in favor of the Mobile & Northwestern Railroad Company, heretofore quoted, to the Natchez & Jackson Railroad Company, which afterwards became, by change of name, the Natchez, Jackson & Columbus Railroad Company. Laws 1870, p. 327.

By the act of 1886 (Laws, p. 23), is was provided as follows: "And hereafter all the railroads in this state shall pay the privilege taxes assessed against them, under all the pains and penalties prescribed in § 589 of the code of 1880."

The act of 1890 (Laws, pp. 12, 13) fixes the rate, per mile, of the privilege tax to be paid by the several railroad companies

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of the state, the Natchez, Jackson & Columbus Railroad Company among others, and contains a proviso that "no railroad shall be subjected to taxation while exempt by its charter," etc.

Code 1892, § 3379, divides all the railroads of the state into four classes, levying a specific privilege tax on each class, and provides that the railroad commission shall annually classify the several railroads according to the gross earnings of each, and that the privilege taxes thereon shall be paid on or before the first day of December.

Section 3744 of the same code prescribes what property shall be exempt from taxation, and mentions no railroad property.

Section 3875 provides that each railroad company owning and operating a railroad shall file with the commission a schedule of its property for assessment of taxes, prescribing in detail what such schedule shall contain.

The case was decided on the 20th day of June, 1898, and resulted in a reversal on both the appeal and the cross appeal. The court then delivered the summary of holdings set out in the opinion on the motion to strike out the opinion outlined by the summary. The opinion outlined by the summary (post, p. —) was filed November 22, 1898, and is the one next following herein.

Critz & Beckett, for appellant and cross appellee.

We insist, first, that the exemption claimed in this case was unconstitutional and void, under secs. 13 and 20, of article 12, of the constitution of December 1, 1869. Such seems now to be the settled rule under similar constitutional provisions. *Louisville* v. *Palmes,* 109 U. S., 248; *St. Louis* v. *Berry,* 113 U. S., 475; *Keokuk* v. *Missouri,* 152 U. S., 303, 310–312, and authorities cited in *Mississippi Mills* v. *Cook,* 56 Miss.

But there is another idea we wish to impress on the court. It is that this twenty-first section of the Mobile & Northwestern charter is different from the charter passed on in the Missis-

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sippi Mills case, in that it expressly provides in the body of it that it shall be "irrepealable." Now, it seems to have been generally accepted that the Mississippi Mills case settled the principle that the legislature could grant temporary exemptions repealable at will, and no one has raised this distinction, or called the attention of this court to it. What was settled in the Mississippi Mills case was that the legislature could not grant an irrepealable exemption. So it seems to us that this provision was undoubtedly unconstitutional, and being part of the body of the section and not severable, rendered the whole section illegal. *Fant* v. *Gibbs,* 54 Miss., 396, 411, 412; *Baldwin* v. *Franks,* 120 U. S., 685, 686; *Field* v. *Clark,* 143 U. S., 695, 696; see Mr. Lamar's opinion, 143 U. S., 700.

The pretended exemption of the L., N. O. & T. Ry. Co. has twice been brought before this court on a purely imaginary state of facts, and passed on in that shape. In both cases it appeared that this L., N. O. & T. Ry. Co. was formed by a consolidation of the Memphis & Vicksburg and Mississippi Valley & Ship Island Railroad companies, both of which had these exemptions; whereas, the undisputed evidence shows, and it is now openly admitted by all parties, that it was formed by the consolidation of said Memphis & Vicksburg with the New Orleans, Baton Rouge, Vicksburg & Memphis Railroad Company, which latter company never did have any exemption. *McCullough* v. *Stone,* 64 Miss., 393; *L., N. O. & T. Ry. Co.* v. *Taylor,* 68 Miss., 364.

Second, the Lambert case.—But opposite counsel insist that this case is settled by the Lambert case in 70 Miss., which is claimed to be *res adjudicata.*

Res adjudicata is "a thing adjudged." It is essential that the subject-matter must be the same, and that the parties, directly or derivatively, must be the same. In the Lambert case, the parties were the N. J. & C. R. R. Co. and the sheriff of Adams county, and the subject-matter was a railroad held by the L., N. O. & T. Ry. Co. under an alleged purchase from the

N. J. & C. R. R. Co., and the exemption claimed was under the charter of the N. J. & C. R. R. Co. In the case at bar, the parties are the I. C. R. R. Co. and Y. & M. V. R. R. Co. on the one side, and the state revenue agent on the other, and the exemption is claimed under the charter of the L., N. O. & T. Ry. Co., an entirely different, but similar, charter. So neither the parties nor the subject-matter are the same. See *Wilmington* v. *Alsbrook,* 146 U. S., 279, 302. Besides, *res adjudicata* must either be pleaded, or offered in evidence, where there is no opportunity to plead it, and neither was done in this case, although there was opportunity for both. George's Dig., p. 215, sec. 6; *Majors* v. *Majors,* 58 Miss., 806; *Land* v. *Kiern,* 52 Miss., 347; *Marshall* v. *Hamilton,* 41 Miss., 235; Freeman on Judgments, secs. 283, 284. And it is not the reasons which a court gives, but the thing it adjudges, which is *res adjudicata. Buckner* v. *Calcote,* 28 Miss., 432. And a conclusive reason is that in the Lambert case itself it is expressly held not to be *res adjudicata* in a case like this. The L., N. O. & T. Ry. Co. filed a bill in its own name, enjoining the collection of the taxes for the year 1891 on its own line, and the decision was against it, and this decision was pleaded as *res adjudicata* to the suit filed in the name of the N. J. & C. R. R. Co., and court very properly said that the decision in the L., N. O. & T. Ry. Co. case was not *res adjudicata,* because it "had no reference to the N. J. & C. railroad, but to a different one," and the converse must be equally true. *Railroad Co.* v. *Lambert,* 70 Miss., 781, 782, 790, 791.

Third.—The consolidation forming the L., N. O. & T. Ry. Co. was made on August 12, 1884. The main line was built before that time by the Baton Rouge company, which had no exemption. The exemption conferred by the fifth section of the act of 1882 was prospective, and only applied to such road as should be built by the consolidated company, and none was built by it. The Riverside division was a partly built road purchased from the Memphis & New Orleans Railroad &

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Levee Company, and afterwards connected with the main line by a continuation from its north and south ends. There was no authority to build this division under any of the constituent charters of the consolidated company. It was built, and could only have been built, under the charter of the purchased road, which had no exemption (see Laws of 1882, p. 876), and hence no exemption was transferred in its sale under the act of 1884, p. 935. *Wilmington* v. *Alsbrook,* 146 U. S., 279; *L. & N. R. R. Co.* v. *Kentucky,* 161 U. S., 685, 686; *Keokuk* v. *Missouri,* 152 U. S., 311.

Fourth.—The decision of the railroad commission in assessing the property for taxation is, under the code of 1892, §§ 3875, 3877, a judicial act, and cannot be assailed collaterally. Burroughs on Tax., p. 238, sec. 102; 2 Desty on Tax., p. 625, note 2; Cooley on Tax., p. 749, note 1; *Louisville Water Co.* v. *Clark,* 94 Ky., 47, etc. And under sec. 112 of the constitution of 1890, when an assessment has been made, no county, at least, can be denied the right to levy and collect the taxes.

Fifth.—A general exemption from taxation does not embrace privilege or occupation taxes, such as are imposed by § 3379 of the code of 1892. Cooley on Tax., pp. 205, 206, notes 1 & 2.

Sixth.—The consolidation as actually made was not authorized by the acts of 1882 and 1884, under which it was claimed to have been made, but, to be sustained, must be referred to the powers of consolidation contained in the charters of the original constituent companies. Sec. 1 of the act of 1882, under which the L., N. O. & T. Ry. Co. claims to be formed, only gave the consolidated company the rights, powers, and immunities now possessed by the companies which may enter into such consolidation. Acts 1882, pp. 1011, 1012. The word "now" is peculiar, and for that reason due effect must be given to it. If the legislature uses an unusual word, used in no other charter, they must have intended it to have its proper meaning. It is not such rights as the consolidated company may have at the date of the consolidation, but "now," at the date of the act,

March 3, 1882. The N. O., B. R., V. & M. R. R. Co. was not chartered till March 9, 1882. Acts of 1882, p. 932. Hence a consolidation with it as a constituent part could not have been contemplated. Now, the purpose of the act of 1882 is plain. Its prime object was to authorize a consolidation of M. & V. R. R. Co. with the M., V. & Sh. I. R. R. Co., and thus insure a great thoroughfare for the State of Mississippi from or near Ship Island, by way of Vicksburg and Memphis, to the marts of the west and northwest. It has always been a cherished hope, a dream of the people of Mississippi, to have a great seaport of their own. The M. & V. R. R. Co. could build from Memphis to Vicksburg, and the M., V. & Sh. I. R. R. Co., from Vicksburg to Ship Island, or in its vicinity. Acts of 1871, p. 237; acts of 1873, p. 562. But the M., V. & Sh. I. R. R. Co. would not consolidate under the act of 1882, and the legislature, by the act of 1884, authorized the M. & V. R. R. Co. to consolidate with any railroad company or companies, whether the M., V. & Sh. I. R. R. Co. went into the consolidation or not, but gave to the consolidated company only the "rights, privileges, and immunities" mentioned in the act of 1882. Laws of 1884, p. 936. Now, what were those rights and privileges? Manifestly and primarily to build a railroad from Ship Island, by way of Vicksburg, to Memphis. They had the power to consolidate under secs. 16 and 25 of their own charters, and there was no possible excuse for claiming to consolidate under the act of 1882, except to escape taxation. This court should hold that, as a matter of law and fact, they consolidated under their own charters, and never were exempt from taxation, as the Baton Rouge company had no exemption, and that of the Memphis & Vicksburg had been repealed by the code of 1880, as decided in the Lambert case. 70 Miss., 787. The scheme of the consolidation provided for in the act of 1882 was for the building of a railroad from Ship Island. Certainly that act could never have intended to extend any

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exemption to a railroad from Vicksburg to New Orleans. Such a railroad was outside the pale.

Seventh.—That the consolidation created a new company, into which an exemption could not enter under the constitution. It is true that sec. 181 provides that "exemptions from taxation, to which corporations are legally entitled at the adoption of this constitution, shall remain in force," etc., but it is certain that a new corporation, formed after the adoption of the constitution, could not be legally or otherwise entitled to an exemption at its adoption. That would be a perversion of terms and a reversal of the flight of time. Was the consolidated company, formed on the 24th of October, 1892, a new company? Now, in the Lambert case, this court approves the case of *Tennessee* v. *Whitworth*, 117 U. S., 139, which expressly holds that the effect of a consolidation is to form a new company, and that a new company was formed in that case. 117 U. S. Rep., 139, 149, 150. The difference between the Whitworth and Lambert cases and this one is that in those cases no new constitution intervened. If a new constitution had intervened in the Whitworth case, then, under every precedent laid down by the United States supreme court, it would have prevented the exemption from passing into the new company. This is universal. *Keokuk* v. *Missouri*, 152 U. S. 304-312; *Trask* v. *McGuire*, 18 Wall., 391; *Shields* v. *Ohio*, 95 U. S., 320-324; *R. R. Co.* v. *Georgia*, 98 U. S., 360, 361, 363, 364; *L. & N. R. R. Co.* v. *Palmes*, 109 U. S., 248, 254; *Memphis* v. *Commers*, 112 U. S., 621-623; *St. Louis* v. *Berry*, 113 U. S., 466-468. And as to the Whitworth case, the court expressly holds that a new constitution, forbidding future exemptions, would have prevented the exemption from passing into the consolidation, and would not have been "the impairment of the obligation of a contract." *Keokuk* v. *Missouri*, 152 U. S., 311, 312. Permission in the charter of a railroad to consolidate is not a right, but a mere license, and if not availed of before the policy of the state has changed, the license is considered with-

drawn. *Pearsall* v. *G. N. Ry. Co.*, 161 U. S., 667; *L. & N. R. R. Co.* v. *Kentucky*, 161 U. S. 695; *Keokuk* v. *Missouri*, 152 U. S., 312; 2 Morawetz Priv. Corp. secs. 945, 948.

Opposite counsel laid stress on the provision in the charter of the Y. & M. V. R. R. Co. (Laws of 1882, sec. 5, p. 843), that the Y. & M. V. R. R. Co. might consolidate with any other railroad company "upon such terms as they may agree upon," but this only means such terms as are consistent with the powers of the other company under its charter, and the charter of the Memphis & V. R. R. Co. expressly provides that any consolidation shall be "on such terms as may be consistent with the powers conferred upon said company." Acts of 1870, sec. 16, p. 326. But even where there is no such express restriction, the same construction is given to such general words like those in the Y. & M. V. R. R. Co. charter, which occur in many charters. *Keokuk* v. *Missouri*, 152 U. S., 302, 308, 309; *Atlantic* v. *Georgia*, 63 Ga., 486; *R. R. Co.* v. *Georgia*, 98 U. S., 360-364; *St. Louis* v. *Berry*, 41 Ark., 518; *Arkansas Midland* v. *Berry*, 44 Ark., 22, 23.

Now, the question of whether there is any consolidation, and many administrative features, are questions of fact, but the settled law is that the effect of a consolidation depends wholly on the law of the charters under which it was made. A corporation has no powers, and can do nothing not authorized by its charter. 2 Morawetz Priv. Corp., secs. 944, 945, 948; *Keokuk* v. *Missouri*, 152 U. S., 305. And this doctrine is held in the very case under which, apparently, the consolidation was attempted to be made, the court there distinctly holding that it was a question not of corporate, but of legislative, intention, and that the statute, by its terms, preserved the identity of the consolidating companies. *Central R. R. Co.* v. *Georgia*, 92 U. S., 665. And the court observe, in a later case, that of the *Central Railroad* v. *Georgia*, it was the railroad company which had an exemption which was preserved intact, and that the one merged into it had no exemption. It is evident the court, in the

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Keokuk case, would not have approved any other rule. Their whole reasoning is against it. They quote all other cases, but refuse to notice the *S. W. R. R. Co.* v. *Georgia,* following the *Central R. R. Co.* v. *Georgia,* supra. *Keokuk* v. *Missouri,* 152 U. S., 307.

Now the L., N. O. & T. Ry. Co. had no original power of its own to consolidate at all. It derives that power, if at all, under the first section of its charter, which gave it "the rights, ways, privileges, franchises, property, grants, and immunities, which are now possessed by the companies which may enter into such consolidation," and for that purpose their charters were expressly made part of the act. Acts of 1882, pp. 1011, 1012. What were those rights and franchises? The N. O., B. R., V. & M. R. R. Co. had no exemption and was authorized "to consolidate the company with any other company under the name of one, or both, and when such consolidation is effected, the said company shall be entitled to all the benefits, rights, franchises, lands, and property belonging to the roads so consolidated." Acts of 1882, sec. 25, p. 932; same as *St. Louis* v. *Berry,* 113 U. S., sec. 43, p. 467. There was no intention to pass an exemption here, whatever words had been used, for there was none to pass. Under the charter of the M. & V. R. R. Co. it could consolidate by consolidating the "stock, property, and franchises" of the road with those of the other road, "upon such terms as are consistent with the powers herein granted." Acts of 1870, sec. 16, p. 920. Now, a consolidation of stock universally means the formation of a new corporation. Green's Brice's Ultra Vires, p. 538, note; *R. R. Co.* v. *Georgia,* 98 U. S., 360, 361, 363, 364; *Clearwater* v. *Meredith,* 1 Wall., 25; *Ridgeway* v. *Griswold,* 1 McCrary, 151; *Atlantic* v. *State,* 63 Ga., 486; *St. Louis* v. *Berry,* 113 U. S., 466, 473; *Keokuk* v. *Missouri,* 152 U. S., 308. And an exemption would not pass under this charter for two reasons: First, it provides that the company may consolidate "the stock, property, and franchises" of the road with those of any

other road, but does not say a word about what rights the consolidated company shall get, and both the weight of authority and the better opinion now is that such expressions only pass the ordinary right to exist as a corporation, have stock, and run the railroad, and that unless it is expressly provided that the consolidated company shall have the "immunities" of the consolidating companies, or an intention to pass an exemption from taxation is clearly manifested by other parts of the statute, it will not pass. *Phenix Ins. Co.* v. *State,* 161 U. S., 176, 182; *Covington* v. *Sanford,* 164 U. S., 586, 587; *Norfolk, etc.,* v. *Pendleton,* 156 U. S., 672, 673; *Pickard* v. *E. T., V. & G. R. R. Co.,* 130 U. S., 640; *L., N. O. & T. Ry.,* v. *Palmes,* 109 U. S., 251, 252; *Home Ins. Co.* v. *State,* 161 U. S., 198-200; *Atlantic, etc.,* v. *State,* 63 Ga., 484-486; *Keokuk* v. *Missouri,* 152 U. S., 304-312. This is now established "by the weight of authority and the better opinion." *Phenix, etc.,* v. *Tennessee,* 161 U. S., 183.

Mr. Mayes puts great stress upon the provision in the first section of the act of March 3, 1882—the L., N. O. & T. charter—that "the charters of said consolidating companies shall be taken and held to be part of this act." We meet him upon this ground, and ask for literal enforcement of this provision, as contended for by him.

(1) This necessarily excludes the Baton Rouge company from the consolidation, because it was impossible to treat that charter, which was not enacted until March 9, 1882, as copied into the act of March 3, 1882. How could it be so copied before it came into existence?

(2) Even if these charters were copied into the charter of the consolidated company, this would give it no more strength than a mere transfer of the powers, etc., of the constituent companies by reference to their charters. 66 Maine, 514.

(3) If each charter were thus copied bodily into the charter of the L., N. O. & T., each charter, so copied, by its

very terms, would, of necessity, be limited to that part of the road to which it applied before the consolidation. The M. & V. charter, if so copied, would be limited to that part of the road north of Vicksburg, if any part of the road was built under that charter. The Baton Rouge charter, if so copied, would be limited to that part of the road south of Vicksburg, if the other part was built under the M. & V. charter, and would apply to the whole road if all of it was built under the Baton Rouge charter. The Baton Rouge charter could bring no exemption into the consolidation, because that charter gave no exemption. The M. & V. charter could bring no exemption, even to that part of the road north of Vicksburg, (1) because its original charter brought no exemption; (2) because, if copying the whole charter carries the exemption in the amendment to the charter (Laws of 1870, p. 327), that exemption was repealed by that provision of the code of 1880 subjecting all railroads to taxation, as shown in the Lambert case; (3) because section 16 of the charter of the M. & V. Co., which gave it the right to consolidate, gave no power to pass any exemption to the consolidated company.

As above shown by us, it is necessary for the section of the law providing for the consolidation to use the word "immunities," or words equivalent thereto, in order to pass an exemption from taxation; and our position is strengthened on this point when we consider the charters of the consolidating companies, as copied into the L., N. O. & T. charter, as contended for by Mr. Mayes. Treat the Baton Rouge and M. & V. charters as part of the L., N. O. & T. charter, or as copied therein. Then, in this consolidated charter we find the word "immunities in the first section of the act of March 3, 1882. In the fifth section of the same act, exemption from taxation is given to the consolidated company, but sec. 16 of the Baton Rouge charter and sec. 25 of the M. & V. charter, the only provisions claimed for right of future consolidation, omit the word "immunities," and contain no words equivalent thereto.

All of these sections, being thus put in the same charter, demonstrate that it was the purpose of the legislature to pass the exemption into the L., N. O. & T., under the word "immunities," but to withhold it from any future consolidation by omitting the word "immunities" in said secs. 16 and 25, and by using therein no words to indicate the intention of passing an exemption to any future consolidation; and, in this connection, the court will bear in mind that the act of 1890, as to the sale of the N. J. & C. R. R., on which the Lambert case is based, used the word "immunities," as elsewhere shown. When the legislature passed the act of March 3, 1882—the L., N. O. & T. charter—it necessarily had in mind the provisions of the charters of the M. & V. Co. and the Mississippi Valley & Ship Island Co., because both of these companies are mentioned in the very beginning of the act, and it was passed for their express benefit; and the legislature made these charters necessary parts of the act, because, by its terms, it could not be made effectual without "the charters of said consolidating companies be taken and held to be a part of this act." Said M. V. & S. I. R. R. Co. was incorporated in 1871 (Acts of 1871, p. 237), as the Vicksburg, Pensacola & S. I. R. R. Co. In 1873 its name was changed to M. V. & S. I. R. R. Co. (Acts of 1873, p. 562). The fifteenth section of the original charter of this company gave the power of consolidation (Acts of 1871, p. 247), but omits the word "immunities," and gives no power to vest in the consolidated company the exemption from taxation contained in the twenty-first section of the charter. Besides, the amendatory act of 1873, which vested this exemption from taxation in the charter as amended, uses the word "immunities" in sec. 1, p. 562, acts of 1873. All these things were in the minds of the legislature as parts of said act of March 3, 1882, and show they used the word "immunities" advisedly, and did not intend any exemption should pass into any future consolidation after the formation of the L., N. O. & T., and this sec. 15 of the M. V. & Ship Island R. R. Co.

expressly provided that any consolidation should form one company and have a joint and common stock. Neither could there be a merger. It must be a consolidation, which means the formation of a new company. There is no authority in any of the charters involved in this case to merge one company into another without forming a new company. Every provision of the statutes to which the opposing counsel can appeal provides for a consolidation. Acts of 1870, p. 326, sec. 16 (M. & V. charter); acts of 1882, p. 932, sec. 25 (Baton Rouge charter); acts of 1882, pp. 842, 843, sec. 5 (Y. & M. V. charter).

The three leading cases relied upon by Mr. Mayes as authority for merger in this case are wholly unlike the case at bar, for each of said three cases not only provides for a merger pure and simple, but expressly excludes the power to consolidate: (1) *Tomlinson* v. *Branch*, 15 Wall., 460, was decided upon a statute providing in express terms for a merger; (2) *The Central* v. *Georgia*, 92 U. S., 666, 671, and (3) *Meyer* v. *Johnson*, 53 Ala., 313, are both decided upon statutes which provide for what is called consolidation, but these are misnomers, for the statute in each case provides for a strictly technical merger, but not a consolidation. In each of these three cases the statute provided that one company should merge or pass into the other, leaving the charter of the latter company and the company itself intact, without any change of its officers, organization, or stock, while in the case now under discussion before this court:

1. There is a consolidation of stock.

2. There is a new organization, and the selection of officers for a new company in the deed.

3. A conveyance of all rights and property of both constituent companies to the consolidated company.

4. The articles of consolidation express a doubt as to what it is, and expressly provide that the agreement shall stand whether it be a consolidation or merger.

5. At any rate it forms a new company as to the L., N. O

& T., and its exemption is thus cut off by sec. 180 of the constitution.

Mr. Mayes cites many authorities to establish the claim that there may be a merger without the loss of the exemption of the company merged. This position we have never disputed, but in case of such merger the exemption never passes unless the legislature expressly so directs. The passing of such exemption is not provided for in this case, and the legal presumption in every case is that it does not pass unless the contrary is clearly shown. "It is incapable of transfer without statutory direction." *Morgan* v. *Louisiana*, 93 U. S., 223; *Chesapeake & O. Ry. Co.* v. *Miller*, 114 U. S., 186.

And even if the statutes provided for the transfer of the exemption of the L., N. O. & T. to the Y. & M. V., the same would be cut off by sec. 180 of the constitution. *Keokuk* v. *Missouri*, 152 U. S., 311, 312; *L. & N. R. R. Co.* v. *Kentucky*, 161 U. S., 695; *Pearsall* v. *G. N. Ry. Co.*, 161 U. S., 667.

Opposite counsel contend that the testimony of Welling shows the stock had never been exchanged. But he is mistaken. Maj. Welling did say that, but after reflection, added: "I do not know as to that question. I do not recall the fact just what was done." (Rec., p. 339.)

The notice for a meeting for August 1, 1893, is for a meeting of the stockholders of the Y. & M. V. R. R. Co. The minutes of that meeting recites that it is a meeting of the stockholders of the Y. & M. V. R. R. Co., and gives the number of shares and names of the holders, and the same is true of the meeting of October 4, 1893. (Rec., pp. 278, 279, 283, 285.)

On August 1, 1893, a resolution was passed that "the stock, property, and franchises of said two corporations had been merged or united in one single corporation under the corporate name of the Y. & M. R. R. Co." We suppose authority for this would be claimed under the charter of the N. O., B. R., V. & M. R. R. Co., which authorized the consolidation to be "under the name of one or both," not "under the name and charter of one

or both," as in *C. R. R.* v. *Georgia*, 92 U. S. (Rec., pp. 285, 286.)

And they also passed a resolution reciting that the Y. & M. V. R. R. Co., the defendant in this case, was "the successor or assignee of the L., N. O. & T. Ry. Co." (Rec., p. 286, and *Keokuk* v. *Missouri*, 152 U. S., 309–312.)

It makes no difference whether the stock has been actually exchanged or not. It is fixed at ten millions of dollars, and a method of exchange is provided for, and a power to exchange. In fact, each share of stock is given the right of a vote in the "consolidated company." There are no old companies to vote in.

Opposite counsel contend that their rights are preserved by sec. 279 of the schedule to the constitution, which, among other things, provides that "the rights of bodies corporate and charters of incorporation shall continue."

To this there are three answers:

1. The power to consolidate is not a right till exercised, but a mere license.

2. As we have shown, under the words or wording of the charters, no exemption would have passed if there had been no constitution. In the Keokuk case, after showing that an exemption would have been cut off by the new constitution, the court, in response to the very point urged here, said it was true sec. 3, art. 11, preserved all existing rights, but that as a matter of law "the exemption ceased not by the operation of the constitution, but by the dissolution of the original companies to which it had attached," and they went on to show that the new constitution simply prevented its revivor in the consolidated company. It extinguished no right but simply prevented its extension to another company. 152 U. S., 311, 312.

3. Shall continue. Continue how long? Forever? Could not the legislature change it? Could not the corporation forfeit or surrender its charter? The plain purpose of sec. 279

was to prevent chaos, to preserve things as they were until changed by the act of the legislature or of the corporation. Any other construction would entirely nullify secs. 180, 181, 197, and many other parts of the constitution. In the deed of consolidation all the property, rights, and franchises of the two companies are transferred to the "consolidated company, without any further act or deed."

Then, where are the other companies?

The same language was held to create a new company in *St. Louis* v. *Berry,* 113 U. S., 475; *Keokuk* v. *Missouri,* 152 U. S., 308.

To still further strengthen this view, it must be observed that the stock was in the entire L., N. O. & T. Ry. Co., a part of which was in Tennessee and a part in Louisiana. The statutes in those states were similar at the time of this consolidation to the Ohio and Missouri statutes in the Keokuk case. 152 U. S., 308-310; Code of Tennessee (1884), secs. 1263-1269; *Board* v. *Gaslight Co.,* 40 La. Ann., 384-387.

Now, the Tennessee and Louisiana ends are a part of this new Y. & M. V. R. R. Co. It is, necessarily, a new corporation as to these ends. It is an entire corporation, and we cannot see how it can get along and do business as a Dr. Jekyll and Mr. Hyde—at one time and place single, and at another time and place double; single stock as to Tennessee and Louisiana, and double stock as to Mississippi, and all created out of the same $5,000,000 stock. Which part of the $5,000,000 is single, and which part is double? Which is Louisiana stock, which is Mississippi stock, and which is Tennessee stock?

There is no creed which requires us to believe that Jonah swallowed the whale, and it is a physical and metaphysical impossibility for a corporation with 6,000 shares of stock to absorb one with 50,000 shares, and allow one vote to each share. The voting power of the latter is more than eight times that of the former, and it could absorb the former and seven more like it, and no legislative declaration or judicial dictum

could alter this fact, for it is founded in the nature of things.

It is admitted that in the act of consolidation the L., N. O. & T. Ry. Co. was dissolved, and is extinct. We have shown that it could not be absorbed by the Y. & M. V. R. R. Co. and leave the voting power of the shares equal. The deed of consolidation provides for the contingency, and says "whatever the effect, the consolidation shall stand and be effective." What is, then, the effect? If the L., N. O. & T. Ry. Co. is extinct, and the voting power of each share of stock is equal, and extends equally all over the property, rights, operations and franchises of the consolidated company, you may put it in what name or call it what you may, but the actual result is a complete and prefect consolidation with the combined voting power of both. One cannot absorb $8\frac{1}{3}$, but 1 and $8\frac{1}{3}$ can make $9\frac{1}{3}$, a new number.

Eighth.—The power to consolidate is "the grant of a corporate franchise," and as the consolidation did not take place till after November 1, 1890, any claim of exemption would be cut off.

While the framers of the constitution took care to preserve and protect all those existing rights of corporations which are ordinarily classed under the head of contract or vested rights, yet it was clearly their intention not to extend any unusual privileges beyond that, nor to continue them in any case where it was not required by good faith based on some consideration. Const., sec. 180.

This is made plain by the whole article on corporations, and especially by sec. 180, which is as follows: "All existing charters or grants of corporate franchise under which organizations have not taken place in good faith at the adoption of this constitution, shall be subject to the provisions of this article," etc.

If no organization had been effected under a charter or grant of corporate franchise, there could be no right or obligation to be impaired, and there could be no more reason for continuing exemptions in the one case than in the other, nor than in case of the grant of a new charter. They are all on the same legal

footing, and all take water through the same quill. The power to consolidate is "the grant of a corporate franchise," and called by that expression. 2 Morawetz Priv. Corp., sec. 945, p. 903; *Ashley* v. *Ryan*, 153 U. S. 436, 445. It is not a right but a mere license. *Pearsall* v. *G. N. Ry. Co.*, 161 U. S., 667. And takes effect, not as of the date of charter, but as of the date of the consolidation or exercise of the power. *Keokuk* v. *Missouri*, 152 U. S., 308, 310. And a corporation can have no status or existence till organized. 1 Morawetz Priv. Corp., sec., 288. Hence, unless it had been consummated and organized at the adoption of the constitution, it could not possibly have been legally, or in any other way, entitled to an exemption at that time. *Planters' Fire* v. *State*, 161 U. S., 193.

What is meant by the word franchise, as used in the constitution?

(1) A corporate franchise is the right to exist as a corporation. This franchise is vested in the individual stockholders before the corporation is organized, authorizing them to form such corporation by organization. This is the corporate franchise spoken of in sec. 180 of the constitution.

(2) The right to build and operate a railroad after the corporation is organized is also a franchise, but this franchise belongs to the corporation as an artificial person, and not to the stockholders. This is not the franchise spoken of in sec. 180 of the constitution, because that section treats only of franchises under which no organizations have taken place. Anderson's Law Dic., p. 473; *Pierce* v. *Emery*, 32 N. H., 507; *R. R. Co.* v. *Commissioners*, 112 U. S., 619.

(3) The right to consolidate is a corporate franchise, and may be vested in two or more corporations, giving them the power to exist as one united corporation. This franchise belongs to the constituent corporations just as the franchise first above mentioned belongs to the individual stockholders. These constituent corporations, as artificial persons, may unite under this franchise, organizing themselves into a single new corpo-

ration, which is consolidation. This franchise, therefore, like the first mentioned above, is embraced in the provisions of sec. 180 of the constitution, and, hence, a failure to so "organize" under this franchise as to form the consolidation prior to the adoption of the constitution, forfeited all exemptions when made.

(4) This consolidated corporation, when so organized, may likewise have the right to build and operate a railroad. This is a franchise the same as the one second above mentioned.

There is a perfect analogy between the franchise vested in individuals as natural persons, authorizing them to organize themselves into a corporation, and the franchise vested in constituent corporations as artificial persons, authorizing them to organize themselves into a consolidated corporation, and in neither case can the franchise become effectual without the "organization" of a new company.

The exception in sec. 181 of the constitution, by which exemptions from taxation are continued in force, can only apply to corporations organized before the constitution was adopted, otherwise this exception would nullify that part of sec. 180 as to "existing charters or grants of corporate franchise under which organizations have not, in good faith, taken place." We have shown that this previous "organization" was as necessary in case of the formation of a consolidation by the union of constituent corporations as in case of the formation of an original corporation by the union of individuals. The exemption in sec. 181 applies to "corporations," not to charters. A corporation has no existence until it is organized, and a consolidated corporation has no existence until the consolidation is actually made, and this exception applies alone to corporations as they existed when the constitution took effect, but was never intended to save dormant rights in charters or upon the statutes. If the L., N. O. & T. Co. had any exemption, the same was protected as long as it had a corporate existence, but when it ceased to be a corporation its exemption ceased, for there could

be no exemption to a thing or person that had no existence. The new corporation formed by the consolidation did not exist when the constitution was adopted, and, hence, it is not within the terms of the exception. There is nothing in sec. 181, or in any part of the constitution which justifies the assumption that the constitutional convention intended to allow these exemptions to be transferred from one company to another, by consolidation or otherwise, even in cases where such thing was allowed by their charters. The presumption is that such was not their intention. *Morgan* v. *Louisiana*, 93 U. S., 223; *C. & O. Ry. Co.* v. *Miller*, 114 U. S., 186.

The exception, by its express terms, applies alone to "corporations," and there can be no corporation till the individuals have accepted and organized under the charter, or the constituent companies have accepted and organized under the power to consolidate.

Ninth.—The stock was fictitious and not entitled to any dividends as against the state. The railroad companies and the Financial Improvement Company, which built the road, were all owned by the same parties, C. P. Huntington and associates, and R. T. Wilson & Co., in the proportion, respectively, of sixty to forty per centum of the stock. Under such circumstances they were required to deal fairly with the state. *M. & O. R. R. Co.* v. *Tennessee*, 153 U. S., 506, 507.

The amount of the bonds was largely in excess of the cost of the road, and the stock was a mere gratuity, issued as a bonus with the bonds, and issued by themselves to themselves. There was no authority for this. 2 Thompson's Comm. Law Priv. Corp., secs. 1562–1564, 1586; 1 Morawetz Priv. Corp., secs. 286 and 289.

Tenth.—The affidavit of Willis Chiles, and the fact that four cases were tried together, and that the jury returned a verdict in favor of the plaintiff in one of the cases, and in favor of the defendants in the other three, on the same evidence, show plainly that it was a compromise verdict, and in such cases the

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courts will not hesitate to set it aside. 2 Thompson on Trials, sec. 2606.

J. A. P. Campbell, on the same side.

Any immunity from payment of taxes had by the L., N. O. & T. R. R. Co. was lost by its consolidation with the Y. & M. V. R. R. Co., November 24, 1892, first, by virtue of the provisions of the charter of the latter company, which alone authorized the union; secondly, because of secs. 180 and 181 of the constitution of Mississippi, adopted in 1890.

(The first proposition was fully argued with reference to the several charters involved, but as the court gave no expression of its views on this, the argument of counsel on it is not given.)

By sec. 180 of the constitution of 1890, it is declared that all existing charters, or grants of corporate franchises, under which organizations have not, in good faith, taken place at the adoption of this constitution, shall be subject to the provisions of this article, among which is sec. 181, declaring that "the property of all private corporations for pecuniary gain shall be taxed," etc., existing exemptions to continue in force unless sooner repealed. The power to consolidate is a corporate franchise, and where it was not exercised so as to effect organization before the adoption of the constitution, its subsequent exercise was subject to the provision for the taxation of all the property of private corporations for pecuniary gain, in view of which there cannot be an exemption of the property of such corporation, except when like exemption is extended to individuals. Thompson Corp., sec. 365; 112 U. S., 609; 113 *Id.,* 465; 109 *Id.,* 244; 152 *Id.,* 301; 18 Wall., 391; 119 U. S., 191; 32 N. H., 507; Angell & A., 3.

The constitution preserved the *status quo* of existing exemptions, but does not apply to exemption in a new organization effected by the exercise of a corporate franchise after the adoption of the constitution. The purpose of the constitution was to leave existing exemptions to be dealt with by the legislature.

and, if the L., N. O. & T. Co. had continued in being, and the exercise of its rights, the exemption would have been unaffected, but as it was consolidated with the Y. & M. V. Co., and surrendered its existence, in pursuance of a corporate franchise, the organization resulting was subject to the provision that the property shall be taxed. *Keokuk* v. *Missouri*, 152 U. S., 301.

Sec. 279 of the constitution can have no influence in this case. It was wholly unnecessary, is a mere platitude, and could not serve any purpose, except as declarative of what was true without it, viz.: that the adoption of the constitution did not affect the status of existing claims as mentioned. It means this and no more: that the substitution of the new for the old constitution shall not *ipso facto* disturb the *status quo* under the old. It did not, in any way, abrogate or qualify any of the specific provisions of the new constitution.

The case of *Lambert* v. *R. R. Co.*, 70 Miss., 779, so far from being an adjudication of any question here involved, can have no influence on this case. It must be considered with reference to its facts. It was about taxes claimed for years preceding the consolidation here involved, and the transfer by the N. J. & C. R. R. was in March, 1890. The case did not present any of the questions here presented, and whatever was argued by counsel or said by the court in deciding that case, has no relation to this. The effect of the consolidation of the L., N. O. & T. with the Y. & M. V. Co., except as to the right to pay taxes accrued before the consolidation on the N. J. & C. road, was not involved or decided, and could not have been properly remarked upon. There was a careful avoidance of any expression of opinion, even, as to the effect of the consolidation of the L., N. O. & T. Co. with the Y. & M. V. Co., as to anything except the matter before the court. 94 U. S., 351; 152 U. S., 301. In the Lambert case no distinction was made by counsel or court between the taxes of 1891 and 1892. Both were treated as resting on the same proposition. It did not involve anything except the taxes of 1891 and 1892 on the N.

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J. & C. R. R. Co. The effect of consolidation between the L., N. O. & T. and the Y. & M. V. Co. was not before the court or considered, except as to the single thing—the right to pay for 1891 and 1892 on the N. J. & C. R. R. Co.

The effect of the constitution upon a new organization, in whatever form, resulting from the exercise of a corporate franchise after November 1, 1890, was not involved in that case, for the sale of the N. J. & C. road was made in March, 1890, and the answer which might, and perhaps should, have been made was that the effect of the constitution was not involved. But what was said is correct, although said unnecessarily, and in no manner affects this case. It was said in response to the arguments of counsel. The exercise, after November 1, 1890, of a corporate franchise could not transfer a pre-existing immunity from taxation as to property of a private corporation for pecuniary gain. The Y. & M. V. Co. cannot claim it, and the L., N. O. & T. Co. is defunct.

To constitute *res adjudicata*, the very matter involved in the second suit must have been decided in the first, and this must not be left to inference or be matter of argument. The very same question must have been involved and decided. If the cause of action in the latter suit may co-exist with that determined in the former suit, the judgment in the former is not conclusive. *Duchess of Kingston case;* Herman on Estoppel, 279; Freeman on Judgments, secs. 256-462, 257, 258. The test is whether the same evidence will support both issues. Freeman on Judgments, sec. 259.

Right or wrong, the decision in the Lambert case related solely to the right of the Y. & M. V. R. R. Co. to pay for 1891 and 1892 on N. J. & C. R. R., and even if it be held to have settled forever the right to pay on that for future years, it cannot be stretched to cover anything else. Because the court held in the Lambert case that the right to pay by affidavit on the N. J. & C. road was not lost by the consolidation, it is now claimed that this adjudicated the right to pay on the L., N.

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O. & T. road, a totally different road, when the ground of the decision plainly is the act of 1890, relating alone to the N. J. & C. road. The claim is preposterous. If the court erred in holding that the immunity continued as to the N. J. & C. road, it must be confined to that road, and not extended to another no part of it, and not even consolidated with it legally, though it was practically, and so spoken of by the court.

Why did not the defendants plead the *res adjudicata?* Test it by special pleading, and the claim becomes ludicrous. Let the court draw the plea and consider the effect of a demurrer to it, if the facts are all stated, or a replication, if not.

It should not be forgotten that in the Lambert case the N. J. & C. Co. was complainant, and the Y. & M. V. R. R. Co. was co-complainant, because of its interest as assignee. The N. J. & C. Co. was, and perhaps still is, an existent corporation, never having been consolidated, but alive to claim the immunity secured to it and successors in ownership so solicitously by the act of 1890. It is manifest that the act of 1890, and that alone, carried the court to its conclusion in the Lambert case. Perhaps it gave undue effect to the act of 1890, as insisted by opposing counsel, but it is settled forever. *Res adjudicata* is applicable to that, and to that alone.

As to the matter in issue, Wells on Res Judicata, sec. 200; directness of issue, *Id.*, sec. 203, *et seq.;* certainty of issue, *Id.*, secs. 223, 224; materiality of issue, *Id.*, p. 193, *et seq.*; identity of issues, *Id.* p. 240, *et seq.*

Calhoon & Green, on the same side.

Commencing with the code of 1880, we will trace the legislation cognate to the existence of an exemption from taxation, or not, of railroad property under the code of 1892. In the Lambert case (70 Miss., 787) it was held that each railroad in the state was subjected to taxation by the code of 1880, and, hence, all exemptions were thereby repealed. That case also held, without the act being pleaded as an exemption, that the

act of 1884, p. 29, restored the exemption to the Natchez, Jackson & Columbus R. R. Co. This declaration is not supported either by the language of the act itself or by its relation to the legislation it amends. Every presumption is against the grant. The code of 1880, §§ 597-606, imposed *ad valoren* taxes. This general law repealed all the special charters in this regard. The Natchez railroad charter had passed under general laws by the acts of 1875, p. 66; 1878, pp. —, in respect to taxation. Privilege taxes were imposed in lieu of *ad valorem* taxes by the acts of 1875 and 1878. The code of 1880 imposed *ad valorem* taxes primarily, but by §§ 607, 608, railroad companies which accept the provisions of the code, in writing, may pay privilege taxes in lieu of *ad valorem* taxes, except municipal taxes. Sec. 606. The policy inaugurated by the code of 1880 continued through all legislation (Acts of 1884, p. 29; 1886, p. 23; 1890, p. 12) to the constitution of 1890 and to the code of 1892. There is no averment in the bill in Lambert's case that the Natchez, Jackson & Columbus R. R. Co. ever accepted, in writing, the provisions of the code of 1880, or of the acts of 1884, or 1886, or 1890. Under these acts there was no exemption from taxation, but only the privilege of substituting privilege for *ad valorem* taxation. The act of 1884 amended only §§ 607, 608, of the code of 1880, as to privilege taxes. It left intact §§ 597-606, imposing *ad valorem* taxes. All of these acts are general revenue laws. As such, the subject of taxation passed out of the domain of special charters.

The act of 1884 was amended by the acts of 1886, pp. 12, 23, and whereby the privilege tax chapter of the code of 1880 was amended so as to require that "hereafter said railroad companies shall pay privilege taxes, respectively, 25 per cent. greater per mile than as fixed in said act" of 1884. This is clearly a repeal of the restoration, if any, of the exemption by the act of 1884. This act of 1886 escaped the attention of both court and counsel in Lambert's case.

The privilege tax sections of the code of 1880 were again amended by the act of 1890, p. 12, and whereby secs. 1 and 2 of said act of 1884 were re-enacted as amended, but the *ad valorem* clauses of the code of 1880 remained intact. Lambert's case held that this act of 1890 continued the "exemption of railroads entitled to it" (p. 787), but it did not hold that it had been repealed by the act of 1886 and re-enacted The proviso is that no railroad shall be subjected to taxation while exempt by its charter. This, under well-established rules, would not create an exemption. This act is a general revenue law.

When the constitution of 1890 was ordained, the Natchez road was not entitled to any exemption from taxation. Lambert's case declared that sec. 181 of the constitution of 1890 has no effect as to the exemption claimed. It left the matter as if the constitution had not been adopted. It let it alone, to rest upon legislation, unaffected by the fundamental law (p. 790).

The code of 1892 contains a revision of all the privilege and *ad valorem* tax laws, and, by § 3379, a privilege tax of a very small amount as compared with the previous tax in lieu of *ad valorem* taxes, is imposed on all railroads. All of the limiting provisions of the acts of 1884 and 1890 are omitted, and privilege taxes, as such, are imposed. This is a plain repeal of the previous legislation permitting privilege taxes to be paid in lieu of *ad valorem* taxes. This repeal left the policy of *ad valorem* taxation in full force. This policy is executed in the code of 1892. Section 3744 declares what property shall be exempt from taxation, and railroads are not mentioned; and this under the spirit of sec. 90 (*h*) const., 1890. Then, by § 3875, *ad valorem* taxes are imposed. To ascertain the taxable value of railroad property, § 3875 requires a return of all of the property of railroads, within and without this state, with its value, so that the value may be ascertained. The property without the state adds value, relatively,

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to the property within the state. Dealing with all of the property, wheresoever situated, that section requires that "all of its property, real or personal, taxable and nontaxable," etc., shall be included. By "taxable and nontaxable" property, exemption from taxation was not created or recognized. "Nontaxable" property is not exempt property. Exemption from taxation implies that the property is taxable, but is relieved from payment. Nontaxable property is that upon which no taxes can be imposed. United States bonds are nontaxable property; farm products, if raised in this state, are exempt property. That this language did not mean exempt property is evidenced by the concluding clause: "If any of said property is claimed to be exempt from taxation, it shall be separately stated, and the law cited under which the claim is made." All property within and without the state must be returned. "If any of said property," within or without the state, is claimed to be exempt, it shall be separately stated, and the law cited, etc. This last clause did not create or recognize any exemption. The assessors were to "assess all railroads . . . and express company property liable to taxation in the state, affixing its true value" (§ 3877), and if there was a "claim" of exemption, it was to be made to the railroad commission, so that it might be adjudged by its order in making the assessment. There is a broad distinction between a provision for propounding a "claim" to an exemption and a legislative declaration of the existence of the exemption. This provision could not impair § 3744: "The following property, and no other, shall be exempt from taxation."

The policy of the constitution of 1890 was to compel corporations for pecuniary gain to bear their equal proportion of taxation. This policy is executed in the code of 1892, wherein, in revision, every provision that squinted at exemption from taxation was omitted and abrogated.

Section 606, code of 1880, was not affected by the privilege tax clauses of the code of 1880, acts of 1884, 1886, and 1890,

and, hence, *ad valorem* municipal taxes have remained intact.

Therefore there was no exemption of any railroad property from taxation under the code of 1892, and especially not that of the Natchez, Jackson & Columbus R. R. Co.

Mayes & Harris, for appellee and cross appellant.

The consolidation effected between the Yazoo & Mississippi Valley Railroad Company and the Louisville, New Orleans & Texas Railway Company on the 24th day of October, 1892, was not a waiver of the privilege conferred by sec. 5 of the act of March 3, 1882, incorporating sec. 21 of the charter of the Mobile & Northwestern Railroad Company. On the contrary, notwithstanding such consolidation, the privilege remained to the company, whether we consider the common law applicable to consolidation, or whether we consider the effect of the constitution of 1890.

We submit, however, that this question is not open in this case. It is conclusively settled by *Railroad Company* v. *Lambert*, 70 Miss., 779, and is *res adjudicata* in favor of the company.

In that case the state was represented by its authorized agent to collect taxes by suit, the sheriff of Adams county, just as herein it is represented by the state revenue agent, and the difference in agent is immaterial, the principle being the same; and in that case the Yazoo & Mississippi Valley Railroad Company, the appellant here primarily liable, was also a party to the record. The pleadings in that case, on their face, set forth the identical consolidation which is relied on by the state revenue agent here. The state was represented in the supreme court by the attorney-general; and the record, especially the attorney-general's brief on file therein, shows that two principal propositions were relied on, the second of which was that, so far as the taxes of 1892 (which constituted part of the demand in controversy therein) were concerned, the privilege claimed by the company was waived by the consoli-

dation of October, 1892, and the constitution of 1890 was expressly invoked.

The court held that the consolidation was not a waiver; and in so holding it did not merely settle the question involved, so as to constitute *stare decisis*, but also, as to this litigation, the effect of the consolidation of 1892 becomes *res adjudicata*. It is *res adjudicata* because the state was a party to the cause, and the railroad company was also a party to the same, and the same question was involved and was actually decided, although the controversy was over a different year's taxes, and taxes on a different property. The fact that two suits are for different taxes does not prevent the operation of the doctrine of *res adjudicata*. The principle is that where the second action is on a different claim or demand, and is between the same parties, the former judgment is, it is true, conclusive only as to those matters in issue, or points controverted, upon the determination of which the finding or verdict was actually based; but it is conclusive as to them. 1 Greenleaf' Evidence, secs. 523, 534, 535, note 9; 21 Am. & Eng. Enc. L., 200*b*; *Lorejoy* v. *Murphy*, 70 U. S., 1, 19; *Robins* v. *Chicago*, 71 U. S., 657, 673; *Butterfield* v. *Smith*, 101 U. S., 570; *Brooklyn, etc.*, v. *Bank*, 102 U. S., 14, 22; *Hale* v. *Finch*, 104 U. S., 261, 265; *Plumb* v. *Crane*, 123 U. S., 560; *Keokuk* v. *Missouri*, 152 U. S., 301; *Nesbit* v. *Riverside Dist.*, 144 U. S., 610; *Wilmington, etc., R. R.* v. *Alsbrook*, 146 U. S., 279.

Coming now to the merits of the question, we maintain that the consolidation of 1892 was not a waiver of the privilege of sec. 21, so corporated into the act of March 3, 1882; and, first, that it was not such a waiver, whether the effect of that consolidation is considered and decided under and by the general principles of the law of consolidations as declared by the courts; and, secondly, that it was not such a waiver, even under the altered condition of the law as established by the adoption of our new constitution of 1890.

1. It was not a waiver when considered under the general

principles of the law without reference to the constitution of 1890. Under such general law, a privilege like this passed to the consolidated company whether the statutes authorizing the consolidation do or do not so provide, and it so passed whether the consolidation does or does not create a new company in the legal sense. We state the law as it is, not as we need it to be; for the law is wider than our necessity. Our statutes do provide, in effect, that the privilege shall pass by the consolidation; and our consolidation did not create a new company in the legal sense, but the existence of the Y. & M. V. continued unbroken; the consolidation made operated only as a merger of the L., N. O. & T. into the Y. & M. V. *Philadelphia, etc., R. R.* v. *Maryland,* 10 How., 276; *Tomlinson* v. *Branch,* 15 Wall., 460; *Charleston* v. *Branch, Id.,* 677; *Delaware Railroad Tax cases,* 18 Wall., 206; *Central Railroad* v. *Georgia,* 92 U. S., 665; *Southwestern Railroad* v. *Georgia, Id.,* 676; *Chesapeake, etc.,* v. *Virginia,* 94 U. S., 718; *Greene County* v. *Conness,* 109 U. S., 104; *Tennessee* v. *Whitworth,* 117 U. S., 139; *Wilmington, etc., R. R.* v. *Alsbrook,* 146 U. S., 279. See also analogous questions, *Scotland* v. *Thomas,* 94 U. S., 682; *Schuyler Co.* v. *Thomas,* 98 U. S., 169; *Wilson* v. *Salamanca,* 99 U. S., 499; *Empire* v. *Darlington,* 101 U. S., 87; *Menasha* v. *Hazard,* 102 U. S., 81; *New Buffalo* v. *Cambria Iron Co.,* 105 U. S., 73; *Citizens' Street Railway* v. *Memphis,* 53 Fed. Rep., 715; *People* v. *L. & N. R. R. Co.,* 120 Ill., 48, 61; *O. & M. Ry. Co.* v. *People,* 123 Ill., 467, 483; *State* v. *Keokuk, etc., Ry. Co.,* 99 Mo., 31, 36.

2. The consolidation of 1892 was not a waiver of the company's privilege, even when considered in relation to the new constitution of 1890. That consolidation did not form a new company. It operated only as a merger of the L., N. O. & T. into the Y. & M. V., and the existence of the latter dates back to its original charter, in 1882, with its autonomy unbroken.

The continuity and unity of the Y. & M. V. is not broken because of the fact that it has absorbed the L., N. O. & T.,

nor by the further fact that, in absorbing it, new rights were acquired, new property obtained, and a further issuance of stock possibly entailed. That consolidation was made under sec. 16 of the original charter of the Memphis & Vicksburg Company and under sec. 25 of the original charter of the Baton Rouge Company (both of which had been incorporated into the charter of the L., N. O. & T. by sec. 1 of the act of March 3, 1882), and also under sec. 5 of the charter of the Y. & M. V. Company. These charters authorized a consolidation to be made upon such terms as the consolidating companies should agree on, and the articles of consolidation expressly stipulated that the consolidation, when made, should not disturb the corporate existence of the Y. & M. V. Company, or form any new and distinct corporation. *Railroad Company* v. *Howard*, 13 How., 332, 333; *Pullman Car Co.* v. *Missouri Pacific Co.*, 115 U. S., 587, 594; *Central Railroad* v. *Georgia*, 92 U. S., 665; *Southwestern Railroad* v. *Georgia, Id.*, 676; *Greene County* v. *Conness*, 109 U. S., 104; *Citizens' Street Railway* v. *Memphis*, 53 Fed. Rep., 715; *Meyer* v. *Johnston*, 53 Ala., 237, 313.

The cases which hold that the consolidations under consideration therein created new companies are distinguishable from the one at bar. In them, new companies were created because of the absence of enabling terms in their charters, and because when the consolidation was effected there was a rule of local state law, affirmatively expressed in the statutes, that such consolidation must, and did, form a new company independent of and against the expressed will and written contract of the contracting parties. See *Shields* v. *Ohio*, 95 U. S., 319; *Railroad Company* v. *Maine*, 96 U. S., 499; *Railroad Company* v. *Georgia*, 98 U. S., 359; *Railway Company* v. *Berry*, 113 U. S., 465; *Wabash* v. *Railway Company*, 114 U. S., 587, 595; *Pullman Car Co.* v. *Pacific Co.*, 115 U. S., 587, 594; *Wilmington R. R. Co.* v. *Alsbrook*, 146 U. S., 279; *Keokuk* v. *Missouri*, 152 U. S., 301; *Railway Company* v. *People*, 123 Ill., 467,

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483; *Insurance Company* v. *Railway Company*, 149 Mass., 214, 220; *Day* v. *Railroad Company*, 151 Mass., 30[illegible], 307; *Railroad Company* v. *Jones*, 29 Ind., 465; *Paine* v. *Railroad Company*, 31 Ind., 349; *Railroad Company* v. *Powell's admr.*, 40 Ind., 89; *Railroad Company* v. *Hendricks*, 41 Ind., 60; *Railroad Company* v. *Boney*, 117 Ind., 501; *Berry* v. *Railroad Company*, 52 Kas., 774; *Langhorne* v. *Railroad Company*, 91 Va., 369; *Cumberland Railroad* v. *Railroad Companies*, 177 Pa., 519.

Furthermore, the bare fact that by a consolidation a new company is formed does not cause a lapse or forfeiture or waiver of any privilege, even of exemption from taxation, previously enjoyed by one of the consolidating companies. On this point the counsel for appellant, in their argument, beg a great part of the question. In order that such a lapse or waiver shall occur, there is needed a double event: First, the creation of a new company by the consolidation; and, secondly, the creation of that new company at such time and under such conditions that for it to acquire the controverted privilege at the time of the consolidation would be to violate some expressed will of the state, expressed either by statute or by constitution. The lapse or waiver does not occur if either no new company was created or there is no such expressed will to be violated. This is clearly shown in *Tennessee* v. *Whitworth*, 117 U. S., 138, and is expressly admitted even in *Keokuk, etc., Railroad Co.* v. *Missouri*, 152 U. S., 301.

There is no such prohibition expressed in the constitution of 1890. That constitution was a movement to establish, and re-establish and maintain, legislative power. The question of exemption from taxation was not at that time a question of legislative power, because the constitution of 1869 had already secured that point. The harm against which sec. 180 of the constitution was directed was this: To subject charters theretofore granted, but not accepted because not organized under, to the new rules of the constitution, they being as yet mere

offers of franchises by the state, and not closed contracts. The provision had no relation to a mere consolidation of two old companies long since organized and in active business under their charters. *People* v. *Stanford*, 77 Cal., 371; *Santa Ana Co.* v. *San Buenaventura*, 56 Fed. Rep., 339, 351.

Furthermore, suppose, on the other hand, that sec. 180 did include such a transaction as this consolidation, and suppose that by the consolidation a new corporation was formed, still the privilege was not lost by operation of the constitution. Sec. 180, by its own terms, clearly fixes the consequence when any corporation shall be organized under its dominance. That consequence was that such corporation should "be subject to the provisions of this article;" that is to say, it would become subject to the new rule of legislative power to amend, repeal, or alter, laid down in sec. 178, and to the ninety-nine-year rule as to duration. So, also, of sec. 178, etc. But just so clearly as those new rules are laid down in art. 7, quite as clearly does the same article in sec. 181 declare that "exemptions from taxation, to which corporations are legally entitled at the adoption of this constitution, shall remain in full force and effect for the time of such exemption as expressed in their respective charters, or by general law, unless sooner repealed by the legislature."

Here, then, in the very article to which they "become subject," is a specific and clear direction that the privilege should remain until repealed by the legislature. It is manifest that the convention did not intend to embrace, as a condition to the exercise of any powers contained in charters already granted and organized under and put into operation, the requirement that the companies should come under any new and different law as made by the constitution itself. *County of Scotland* v. *Thomas*, 94 U. S., 682, 688; *Supervisors* v. *Galbraith*, 99 U. S., 214, 220; *Pretty* v. *Solly*, 26 Beav., 606; Endlich on Interpretation of Statutes, sec. 216.

This view is strongly reinforced, indeed made conclusive,

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by sec. 279 of the constitution. That section declares that all rights, etc., rights of individuals and bodies corporate, and of the state and charters of incorporation, shall continue, etc.

Nor does this position at all conflict with the case of *Louisville R. R. Co.* v. *Kentucky*, 161 U. S., for here it is only a question as to what is the true intent of the constitution itself, while there it was a question of power in the constitution to control the effect of a consolidation.

The brief of Messrs. Mayes & Harris on the appeal of the revenue agent, and on the cross appeal of the company, was very voluminous, being 367 printed pages; but the residue of it was devoted to a consideration of points of error (of which seventy-one were assigned) not passed upon by the court in its decision.

Argued orally by *R. C. Beckett, Frank A. Critz, J. A. P. Campbell,* and *Marcellus Green,* for the appellant and cross appellee, and by *Edward Mayes,* for the appellee and cross appellant.

WHITFIELD, J., delivered the opinion of the court.

The question which lies at the foundation of this case is this: Conceding for argument's sake that the L., N. O. & T. R. R. Co. had an exemption from taxation, did the consolidation of that railroad with the Yazoo & Mississippi Valley Railroad Company on October 24, 1892, create a new corporation, as of that date, and thus result in the cutting off of said exemption by sec. 180 of the constitution of 1890? If this question be answered in the affirmative, then, obviously, the contention of the state must prevail throughout, without regard to any other questions in the case. The power to consolidate must be granted by the state, and permission to consolidate, so granted, is not a contract, but a mere license. 6 Am. & Eng. Enc. L. (2d ed.), p. 802; *Pearsall* v. *G. N. Ry. Co.*, 161 U. S., 667; *Louisville, etc., Railroad Co.* v. *Kentucky*, 161 U. S., 695; *Keokuk, etc., Railroad Co.* v. *Missouri*, 152 U. S., 312.

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These railroad companies were perfectly free to consolidate or not. The L., N. O. & T. R. R. Co., if it had a legal exemption, could have retained it by simply retaining the precise corporate existence it then had. Sec. 181 of const. of 1890. Consolidation was voluntary on their part, and effected subject to the law and constitution then in force. What the effect of consolidation is depends upon the will and purpose, not of the corporation, but of the state speaking through the legislature.

Great stress has been laid upon the provisions of sec. 5, acts of 1882, p. 843, to the effect that the Y. & M. V. R. R. Co. might consolidate with other railroad companies "upon such terms as they may agree upon." But this simply meant "such terms as they, the companies, might agree upon," consistent with the law as announced in their charters, and otherwise. The charter of the Memphis & Vicksburg Railroad Company, one of the constituents of the L., N. O. & T. R. R. Co., expressly stipulates any consolidation shall be "on such terms as may be consistent with the powers conferred on said company." Substantially identical language with the language of sec. 5, supra, occurred in the charters under consideration in *Keokuk, etc., Railroad Co.* v. *Missouri*, 152 U. S., at p. 309, top of the page, and *Railroad Co.* v. *Georgia*, 98 U. S., at p. 361, and in many other cases. These words, "upon such terms as they may agree upon," are not new. They perhaps appear substantially in all grants of power to consolidate railroad or other corporations—as, for example, in the *Atlanta, etc., Railroad Co.* v. *State*, 63 Ga., at p. 486. They have no magic in them. They are plain, everyday phrases, and relate alone to the mere administrative details attending the consolidation of corporations, which must, of course, be left to the officers of such corporations, and with which the legislature cannot be burdened; and they convey no substantive powers or rights. These must be found, if anywhere, expressly set forth by the legislature in the charters in the first instance,

and not delegated to the corporations, to be worked out under the gloss of these mere administrative phrases. Whether, therefore, the union of these two corporations resulted in consolidation and the creation of a new corporation, or in mere merger of the L., N. O. & T. R. R. Co. with the Y. & M. V. R. R. Co. is to be found, not in this phrase so much relied on, but in the clear purpose of the legislature. The articles of consolidation are to be carefully looked to, of course, but they must conform in what they do, if valid, to the purpose of the legislature as to what the effect of the consolidation shall be. *Keokuk, etc., Railroad Co.* v. *Missouri*, 152 U. S., 305; *Central Railroad Co.* v. *Louisiana*, 92 U. S., 660.

Let us inquire, then, what the effect of this consolidation was; and, first, What railroads entered into this consolidation? The L., N. O. & T. R. R. Co. and the Y. & M. V. R. R. Co. What was the L., N. O. & T. R. R. Co.? It is described in the "Articles of Consolidation" as "The Louisville, New Orleans & Texas Railway Company, a corporation of the states of Tennessee, Mississippi, and Louisiana of the first part;" and it is further expressly declared in said articles that the consolidation is effected "under and by virtue of the charters of the respective states of Tennessee, Mississippi, and Louisiana, in such case made and provided," etc. The two ends of this railroad are in Louisiana and Tennessee. Now, what are the laws touching consolidation in these states, "in such case made and provided?" Of course we deal here exclusively with the Mississippi corporation under our laws; but the laws of Louisiana and Tennessee are expressly referred to as having been held in mind in effecting this consolidation, and they will materially aid us in solving this question. The road, with all its property, was a unit in the three states. If the effect of the consolidation in Tennessee and Louisiana was known necessarily to be the creation of a new corporation, it hardly comports with reason to suppose that any different consolidation would have been sought at the hands of the Mississippi legis-

ture or granted by it, if sought; and so we shall find it to be. The act No. 157 of 1874 of Louisiana, set forth in 40 La. Ann., p. 385, a general law, expressly provides that "any two business [companies] may consolidate said corporations and form one consolidated company, holding, etc., all property, etc., belonging to each, and under such corporate name as they may agree upon; and a certificate of the fact of such consolidation, with the name of the consolidated company, shall be filed and recorded in the office of the secretary of state." This is like the Ohio and Missouri statutes, referred to in *Keokuk, etc., Railroad Co.* v. *Missouri,* 152 U. S., 308-310, and they were all held to provide for a consolidation resulting in a new corporation. *Board* v. *Gaslight Company,* 40 La. Ann., 384. The provisions of the Tennessee code (Mill. & V.), 1884, §§ 1263-1270, are stronger and more explicit still in necessitating the creation of a new corporation, § 1270 expressly declaring that no exemption from taxation of any constituent company should pass to the consolidated company. The Tennessee and Louisiana ends of the L., N. O. & T. R. R. are integral parts now of the present Y. & M. V. R. R. As to these ends, under Louisiana and Tennessee law, the present Y. & M. V. R. R. is undoubtedly a new corporation. How, then, can this corporation—the present Y. & M. V., an entire corporation—be one new corporation, with stock of but one corporation, the new one, in Louisiana and Tennessee; and, in Mississippi, not one new corporation, and having double stock of both constituent roads? As counsel very pertinently asks: "Which is Tennessee stock, which is Louisiana stock, and which is Mississippi stock?"

What, now, are the provisions of Mississippi law as to this consolidation? The L., N. O. & T. had itself no power to consolidate, and it is conceded that this consolidation of the L., N. O. & T. with the Y. & M. V. did not take place under sec. 1 of the act of 1882—the charter of the L., N. O. & T.—but that the power of consolidation authorized by that section

was exhausted in the consolidation of the Baton Rouge Railroad with the M. & V. R. R., forming the L., N. O. & T. R. R. The provisions of law we look to, then, as authorizing the consolidation under consideration are sec. 16 of the acts of 1870, p. 326, the charter of the Memphis & Vicksburg Railroad Company; sec. 25 of the acts of 1882, p. 932, the charter of the N. O., B. R., V. & M. R. R. Co., the Baton Rouge charter; and sec 5 of the acts of 1882, pp. 842, 843, the Yazoo & Mississippi Valley Railroad charter. The language of said section 16 is as follows: "That said company shall have the right and power to consolidate the stock, property, and franchises of the road with any other road or roads, in or out of this state, at any time that the president and directors of the road may deem proper, and upon such terms as may be consistent with the powers conferred upon said company." We understand the well-settled rule of law, as declared by the supreme court of the United States to be that a consolidation of stock results uniformly and necessarily in the creation of a new corporation. *Clearwater* v. *Meredith*, 1 Wall., 25; *Savannah, etc., Railroad Co.* v. *Georgia*, 98 U. S., 361, 363, 364; *Keokuk, etc., Railroad Co.* v. *Missouri*, 152 U. S., 308; *St. Louis, etc., Railway Co.* v. *Berry*, 113 U. S., 466-473; Green's Brice's Ultra Vires, note at p. 538.

In 98 U. S., supra, at pp. 363, 364, the court says "that generally, the effect of consolidation, as distinguished from a union by merger of one company into another, is to work a dissolution of the companies consolidating, and to create a new corporation out of the elements of the former, is asserted in many cases, and it seems to be a necessary result. In *McMahan* v. *Morrison*, 16 Ind., 172, the effect of a consolidation was said to be a dissolution of the corporations previously existing, and at the same instant the creation of a new corporation, with property, liabilities, and stockholders derived from those passing out of existence. So in *Lauman* v. *Lebanon, etc., Railroad Co.*, 30 Pa. St., 42, the court said: 'Consoli-

dation is a surrender of the old charter by the companies, the acceptance thereof by the legislature, and the formation of a new company out of such portions of the old as enter into the new.' This court, in *Clearwater* v. *Meredith,* 1 Wall., 40, expressed its approval of what was said in the former of these cases. It is true these expressions have not all the weight of authority, for they were not necessary to the decisions made, but they are worthy of consideration, and they are in accordance with what seems to be sound reason." Justice Strong, who delivered this opinion, also delivered the opinion in 92 U. S., where, at p. 671, he referred, in the spirit of criticism, to these cases. It is, therefore, noteworthy that three years later, after fuller consideration, he says, speaking for a unanimous court: "They are in accordance with sound reason." The authority in 98 U. S., 361, was to "consolidate their stocks upon such terms as might be agreed upon by the directors and ratified by a majority of the stockholders," and it was unanimously held that it was not merger, as in 92 U. S., 665, nor alliance or confederation, but consolidation, resulting in the formation of a new company. Said the court, at p. 364: "When, as in this case, the stock of two companies is consolidated, the stockholders become partners, or quasi partners, in a new concern. Each set of stockholders is shorn of the power which, as a separate body, it had before. Its action is controlled by a power outside of itself. To illustrate: The stockholders of the Savannah & Albany Railroad Company could not, after consolidation, have exercised any of the powers or franchises they had prior to their consolidation with the stockholders of the Atlantic & Gulf Railroad Company. They could not have built their road or controlled its management. They could not, therefore, have performed the duties which, by their original charter, were imposed upon them; those duties could only have been performed by another organization, composed partly of themselves and partly of others. Their powers, their franchises, and their privileges were therefore gone, no longer

capable of exercise or enjoyment. Gone where? Into the new organization, the consolidated company, which exists alone by virtue of the legislative grant and which has all its powers, facilities, and privileges by virtue of the consolidation act. What, then, was left of the old companies? Apparently nothing. They must have passed out of existence, and the new company must have succeeded to their rights and their duties; but the new company comes into existence under a fresh grant. Not only its being, but its powers, franchises, and immunities, are grants of the legislature which gave it its existence." Since, then, a consolidation of the stock of two corporations means the creation of a new corporation, it necessarily follows that the power to consolidate given by this sec. 16, supra, did not authorize a merger or any consolidation except such as resulted in the formation of a new company. The next source of power to consolidate is sec. 25, acts of 1882, p. 932, supra. That provides "that the company shall have power and authority to . . . consolidate the company with any other company, under the name [not under the name and charter, as in 92 U. S., 667] of one or both; but when such . . . consolidation is effected. the said company shall be entitled to all the benefits, rights, franchises, lands, and property of every description belonging to said road or roads so consolidated." The language here sharply distinguishes between the old companies and the new, in a way that makes it perfectly clear the legislature meant the consolidation to result in the creation of a new corporation. Said company, that is the new consolidated company, may be under the name of one, but not the charter of one; on the contrary, it, said company, shall be entitled to all the benefits, etc., belonging to said roads—all of them so consolidated. Manifestly the legislative purpose here was the consolidation of two or more companies into one new company. No power can be found here for merger. The next source of power to consolidate is sec. 5 of the acts of 1882, p. 843, which provides: "Said company may con-

solidate with any other railroad company in or out of the State of Mississippi, upon such terms as the consolidated company may agree upon; and upon any such consolidation the consolidated company shall have and enjoy all the property, rights, privileges, powers, liberties, and immunities and franchises herein granted; but such consolidation shall not have the effect of exempting from taxation the railroad or property owned by such other consolidated company prior to its consolidation with the company hereby chartered, nor of exempting from taxation any property which the consolidated company may, after such consolidation, acquire under the provisions of the charter of such other consolidating company." Clearly here, also, it is consolidation and not merger which is provided for, and such consolidation as should result in a new company, a "consolidated company which should" enjoy all the property, etc., of its previously existing constituent companies. It will not fail to be noted that in none of these acts is the word "merger" ever used. Always and everywhere it is "consolidation" alone that is authorized. If merger merely was intended, what was easier than to have used the words appropriate to manifest that intention? Why this careful and exclusive use of the word "consolidation?" And not of this word only, but of other terms indicating a clear intention to create a new consolidated company? We conclude, therefore, on a review of the statutes authorizing the consolidation under review that, so far as the purpose of the legislature was concerned, it was its clear purpose that consolidation, and not merger, should occur, and such consolidation as should result in the creation of a new corporation.

Counsel for the railroad company relies on three authorities especially to show that what the legislature here intended was merger: *Tomlinson* v. *Branch*, 15 Wall., 460; *Central Railroad Co.* v. *Georgia*, 92 U. S., 666; and *Meyer* v. *Johnson*, 53 Ala., 313. But in *Tomlinson* v. *Branch*, Mr. Justice Bradley properly characterized what was done as

"amalgamation," which is merger, and not consolidation (15 Wall., 463), and the act of the legislature expressly provided for merger. It provided (p. 463) that "the said South Carolina Canal & Railroad Company shall be merged in the said South Carolina Railroad Company," and provided expressly that the South Carolina Railroad Company should retain its autonomy and previous existence. There was no room for construction in this case, and it was conceded on all hands that what occurred was merger. So in *Central Railroad Co.* v. *Georgia,* it was expressly provided (92 U. S., 671) that the union should take place under "the name and charter of the Central Railroad & Banking Company." Merger was clearly provided for (pp 671-3); and in *Meyer* v. *Johnson,* 53 Ala., the court lay stress upon the word "unite" (p. 318)—"were united with those of the Alabama Company and vested in it, so as to enable it [called in the contract the consolidated company, because their franchises were consolidated with it]," etc.—a case, again, of merger. The authorities are wholly inapplicable to a case like this, where the statutes all sedulously avoid the word "merger," exclusively use the word "consolidate," and accompany that word, definite enough in itself, with other provisions, which leave no doubt that consolidation, resulting in the creation of a new corporation, was intended. Turning now from the legislative purpose, let us see what was actually done in pursuance of this power to consolidate.

1. The stock of the two companies was consolidated. Learned counsel for the railroad insists that the testimony of Welling shows that the stock was never exchanged. He is mistaken in this. Welling does so state, but on cross-examination expressly declares on this very point, "I do not know as to that question, I do not recall the fact just what was done;" and he is a witness for the railroads. This falls far short of showing that the stock was not exchanged; the other testimony shows it was.

2. The deed of consolidation, on its face, provides for and

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creates a new organization and new officers. See articles 4, 5, 6, 7, and 8.

3. The fifth article of consolidation conveys all the "rights . . . . property, etc., of every kind belonging to either of the parties . . . to the consolidated company, without any further act, deed, or conveyance," distinguishing clearly between the two previous companies—"either of the parties"—and the new company, the grantee, the "consolidated company."

4. The articles of incorporation themselves on their face declare that doubt exists as to the effect of what has been done, and conclude most significantly: "But whatever may be the legal consequence of the consolidation herein provided for, this agreement is to stand and be effective." This is pregnant with meaning. The railroad companies knew that the only power the legislature had given was to so consolidate as to create a new corporation, and that under sec. 180 of the constitution of 1890 the exemption, if any existed, would be cut off. They knew the only word used was "consolidate" in all the legislative acts, and that merger and consolidation are very distinct and different things; and yet, not conforming to the power, but seeking to carry the exemption in spite of it, they used the words "unite, merge, and consolidate," and say that "such consolidation shall be effected by uniting or merging the stock, property, and franchises of the L., N. O. & T. R. R. Co. with and into the stock, property, and franchise of the said Yazoo & Mississippi Valley Railroad Co. without disturbing the corporate existence of the last named company, or the formation of any new, distinct corporation, unless such result shall be necessary to give legal effect to this agreement; but whatever may be the legal consequence of the consolidation herein provided for, this agreement is to stand and be effective." Doubtless they desired to merge; but the legislature had only authorized consolidation, and such consolidation as necessarily resulted in the creation of a new corporation, and they could only lawfully do what the legislature in fact

authorized, not what they might wish to do; and the words "consolidate upon such terms as they might agree upon" mean that the thing done must be consolidation, but the mere administrative details of uniting the two into one new corporation were left to the companies. Names count for nothing; it is substance courts look to. Consolidation resulting in the creation of a new corporation is what the legislature authorized, is what the articles of consolidation actually effected, and it is utterly beyond the power of the railroad companies to change the essential nature of what was done by calling it "merger."

We have not adverted to all the considerations sustaining this view. The closer the analysis of the articles of consolidation and of the action of the authorities of the two companies, the more indisputably it appears that such consolidation as resulted in the creation of a new corporation was precisely what was effected. The notice for a meeting of the stockholders called for August 1, 1893, is a meeting of the stockholders of the Y. & M. V. R. R. Co. The minutes recite that it was a meeting of the stockholders of the Y. & M. V. R. R. Co., and gives the number of shares and names of the holders; and all this is true also of the meeting of stockholders of October 1, 1893. Again, on August 1, 1893, a resolution was passed "that the stock, property, and franchises of said two corporations had been merged or united in one single corporation under the corporate name of the Y. & M. V. R. R. Co." Another resolution was passed, reciting that the Y. & M. V. R. R. Co. was the "successor" or assignee of the L., N. O. & T. R. R. Co. Of course the mere name—Y. & M. V. R. R. Co.—is utterly immaterial in determining whether it is attached to the same old company, known as the Y. & M. V. R. R. Co., or to the consolidated company, the new company, and this action of the stockholders, as well as the articles of consolidation, pointed clearly to the same result—consolidation, and not merger. The new company was the successor or assignee

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of the two old companies, and the language of Mr. Justice Brown, of the supreme court of the United States, in *Keokuk, etc., Railroad Co.* v. *Missouri*, 152 U. S., 309, fits in here as if uttered for this case: "It is impossible to conceive of a corporation existing without stock or certificates representing the interests of the corporators in the organization. Now, if the act provides [the deed in the case at bar] that these certificates shall be surrendered and certificates in another company issued in their place, what becomes of the prior companies? Who are their stockholders? Who their officers? [The deed in this case appoints an entirely new set of officers. See charter book, pp. 731, 732.] If the stock in the new company is sold, what interest in the prior company passes by the sale? There can be but one answer to these questions. The property and franchises of the prior companies are gone, as much as if they had surrendered their charters. The new company doubtless received by transmission from its constituent companies their property, rights, privileges, and franchises, including any immunity from taxation; but it receives them as an heir receives the estate of his ancestor, or as a grantee receives the estate of a grantor—by inheritance, succession, or purchase. The result is not a mere union or partnership of two companies, nor the merger of franchises of one in another, but the extinguishment of one and the creation of another in its place. It follows from this that when the new corporation came into existence, it came precisely as if it had been organized under a charter granted at the date of the consolidation and subject to the constitutional provisions then existing." To the same effect, also, is *St. Louis, etc., Railway Co.* v. *Berry*, 113 U. S., 469-475.

Art. 2 of the articles of consolidation is as follows: "The corporate name of the said consolidated company shall be the Yazoo & Mississippi Valley Company." Articles 4 to 8, inclusive, are as follows:

"Art. 4. Every holder of the stock of either of the said companies now outstanding shall be entitled to cast one vote

for each share of stock held by him in the stockholders' meetings of the consolidated company, which vote may be cast either in person or by proxy, and shall have all the rights of a stockholder of the consolidated company as fully as if new shares of the consolidated company had been issued and exchanged therefor; and in case the consolidated company shall determine to issue new shares, such shares shall be exchangeable at par for the now outstanding shares of each of the constituent companies; and the remainder of the capital stock of the consolidated company shall be issued from time to time, and upon such terms and conditions as may be prescribed by the board of directors of said company.

"Art. 5. All and singular the rights, powers, privileges, immunities, and franchises, and all the railroads, real and personal estate, easements, fixtures, equipments, choses in action, and property and assets of every kind, nature, or description belonging to either of the parties hereto, shall be vested in and become the property of the said consolidated company, without any further act, deed, conveyance, or assurance being required in the premises.

"Art. 6. The affairs of the consolidated company shall be managed by a board of directors, which shall consist of such a number of members, not less than five, as the company may determine from time to time, each of whom shall be a stockholder, and one of them a resident of the State of Mississippi, one of Tennessee, and one of Louisiana. The members shall be divided into three equal classes, as nearly as practicable. Successors, for the term of three years, shall be chosen for those belonging to the first class at the first annual meeting of the stockholders held after this consolidation shall have been effected; for those who belong to the second class, at the next annual meeting, and for those belonging to the third class, at the next succeeding annual meeting of the stockholders. Each director successively chosen shall continue in office until his successor is elected. Vacancies in the board, caused otherwise

than by expiration of term for which the retiring director was chosen, may be filled by a vote of a majority of the directors remaining, such appointee to continue in office until the next regular election of directors by the stockholders. The first board of directors shall be composed of the following members, divided into three classes, as follows: First class, Stuyvesant Fish, Adolph Schreiber, W. C. Craig, Chas. A. Peabody, Jr.; second class, John W. Auchinloss, Walther Luttgen, Edward H. Harriman, J. T. Harahan; third class, S. V. R. Cruger, R. P. Neely, R. C. Shepherd, John C. Welling.

"Art. 7. The board of directors of said consolidated company shall choose one of their number president, whose term of office shall be one year, or until his successor shall be chosen or qualified. They may also appoint such other officers and agents as they may deem necessary from time to time, and prescribe their duties and compensation; and may provide, by the by-laws to be adopted, such rules and regulations relating to the affairs and business of said company as may be necessary or proper. The said board shall also have power to appoint an executive committee, of whom the president shall be one *ex officio*, who shall possess and exercise all the powers and duties of the board of directors when the board is not in session. Until otherwise ordered, the corporate seal of the said consolidated company shall be that of the Yazoo & Mississippi Valley Railroad Company.

"Art. 8. The said consolidated company shall be, and the same is hereby, authorized and empowered in such a manner and upon such conditions as are permitted by law, to issue its bonds and secure the same, as well as all bonds heretofore issued by either of the constituent companies, or that have been heretofore or may be hereafter issued by any other railroad company, by mortgage or deed of trust, upon all or any of its railroads, rights, franchises, and property, real and personal, wherever the same may be situated, and whether the same may be owned by said company at the time this consolidation is

effected or may be hereafter acquired; and may also exercise any and every other corporate right or power now vested in or which might have been heretofore lawfully exercised by either of said constituent companies."

It will be seen that said art. 5 itself conveys all the property, rights, and franchises, etc., belonging to either constituent to the consolidated company, without any further act, "deed, conveyance, or assurance being required in the premises," and in this regard is substantially identical with the provisions in *St. Louis, etc., Railway Co.* v. *Berry*, 113 U. S., 475, and *Keokuk, etc., Railroad Co.* v. *Missouri*, 152 U. S., 308, both of which cases hold that a new corporation was created. It will be noticed also that art. 6 creates a new organization, and actually names a new set of directors for the consolidated company, who are, under art. 7, to elect officers for the consolidated company. It will be noticed that art. 8 authorizes the new consolidated company to "issue its bonds and secure the same, as well as all bonds heretofore issued by either of the constituent companies," and further provides "that the consolidated company shall exercise any and every other corporate right or power now vested in, or which might have been heretofore lawfully exercised by, either of said constituent companies," clearly drawing the distinction between the two previous constituent companies and the new consolidated company; and it will further be specially noticed, and to this we direct the closest attention, that art. 4 provides "that every holder of the stock of either of the said companies now outstanding shall be entitled to cast one vote for each share of stock held by him, in stockholders' meetings of the consolidated company, and shall have all the rights of a stockholder of the consolidated company as fully as if new shares of the consolidated company had been issued and exchanged therefor." Now, it is clearly admitted by both sides that the L., N. O. & T. Railroad Company was dissolved and became extinct. The L., N. O. & T. Railroad Company had 50,000 shares of stock;

the Y. & M. V. had 6,000 shares of stock, and if anything is certain, it is undoubted that it is a metaphysical and legal impossibility that a corporation with 6,000 shares of stock could absorb one with 50,000 shares, and allow one vote to each share. It is well said by counsel for the revenue agent: "The voting power of the latter is more than eight times that of the former, and it could absorb the former and seven more like it, and no legislative declaration or judicial dictum could alter this fact, for it is founded in the nature of things. The deed of consolidation provides for the contingency, and says whatever the effect, that consolidation shall stand and be effective. What is then effected? If the L., N. O. & T. Railroad Company is extinguished and the voting power of each share of stock is equal, and extends equally over all the property, rights, operations, and franchises of the consolidated company, you may put in what name, or call it what you may, but the actual result is a complete and perfect consolidation with the combined voting power of both. One cannot absorb $8\frac{1}{3}$, but one and $8\frac{1}{3}$ can make $9\frac{1}{3}$, a new number."

We have thus far been discussing two things: the purpose of the legislature in authorizing the consolidation, and what was actually done in pursuance of that authority, and it is perfectly clear that what the legislature authorized, and what was actually created in fact in pursuance of that authorization, was consolidation of such character as resulted in the creation of a new company under the name of the Y. & M. V. Railroad Company; that the Y. & M. V. Railroad Company with which we now deal is not the old Y. & M. V. Railroad Company—one of the constituent members—but is the new Y. & M. V. Railroad Company, a new consolidated company, taking its grant of corporate rights from date of said consolidation, October 24, 1892, some two years after the constitution of 1890 went into effect. This leaves for solution on this branch of the case a single inquiry, Did sec. 180 of the constitution of 1890 cut off the exemption claimed by the L., N. O. & T.

Railroad Company, conceding now for the purpose of argument that it ever had any such exemption? That section is in the words following:

"Section 180. All existing charters or grants of corporate franchise under which organizations have not, in good faith, taken place at the adoption of this constitution, shall be subject to the provisions of this article, and all such charters under which organization shall not take place in good faith, and business be commenced within one year from the adoption of this constitution, shall thereafter have no validity, and every charter or grant of corporate franchise hereafter made shall have no validity unless an organization shall take place thereunder, and business be commenced within two years from the date of such charter or grant."

It is too clear for argument that the "power to consolidate is the grant of a corporate franchise." 2 Morawetz Priv. Cor., sec. 954, p. 903; *Ashley* v. *Ryan*, 153 U. S., 436–463. It is not a right but a mere license, as heretofore shown. It takes effect not as of the date of the charter, but as of the date of the deed of consolidation. *Keokuk, etc., Railroad Co.* v. *Missouri*, 152 U. S., 308. A corporation can have no status or existence until organized. 1 Morawetz Priv. Corp., 288. Unless, therefore, the present Y. & M. V. R. R. Co. had been organized at the date of the adoption of the constitution, it is settled that it could not possibly have been legally entitled to an exemption at that time. *Planters' Ins. Co., etc.*, v. *Tennessee*, 161 U. S., 193. A corporate franchise is the right to exist as a corporation. It is the franchise invested in the individual stockholders before a corporation is authorized, authorizing them to form such corporation by organization. This is the precise corporate franchise meant by sec. 180 of the constitution. There is an exact analogy between this corporate franchise authorizing individuals to organize themselves into a corporation, and the franchise authorizing constituent corporations and artificial persons to organize them-

selves into a consolidated company, and in the one case as in the other, the result of the organization must be a new company. There are various other franchises which may belong to corporations, such as the right to be and operate a railroad after the corporation is organized, receive tolls, etc., but this belongs to the corporation as an artificial person. It is clear, therefore, that the corporate franchise referred to in sec. 180 is the right to exist as a corporation. It is thoroughly settled by the United States supreme court that the effect of sec. 180 of the constitution of 1890 was to cut off any exemption claimed, if it ever existed. *St. Louis, etc., Railway Co.* v. *Berry*, 113 U. S., 475; *Keokuk, etc., Railroad Co.* v. *Missouri*, 152 U. S., 308.

Learned counsel for the railroad companies insist that under sec. 181 of the constitution, and sec. 279, in the schedule of the constitution, this exemption was continued. These sections are in these words:

"Sec. 181. The property of all private corporations for pecuniary gain shall be taxed in the same way, and to the same extent as the property of individuals, but the legislature may provide for the taxation of banks and banking capital by taxing the shares according to the value thereof (augmented by the accumulations, surplus, and unpaid dividends), exclusive of real estate, which shall be taxed as other real estate. Exemptions from taxation to which corporations are legally entitled at the adoption of this constitution, shall remain in full force and effect for the time of such exemptions, as expressed in their respective charters, or by general laws, unless sooner repealed by the legislature."

Section 279 is as follows:

"Sec. 279. All writs, actions, causes of actions, proceedings, prosecutions, and rights of individuals and bodies corporate, and of the state, and charters of incorporation shall continue, and all indictments which shall have been found, or which shall hereafter be found, and all prosecutions begun, or that may be begun, for any crime or offense committed before

the adoption of this constitution, may be proceeded with and upon as if no change had taken place."

This is a wholly mistaken view of these provisions of the constitution: Sec. 181 preserves only such exemptions as corporations fully organized prior to the constitution were legally entitled to at the adoption of the constitution. Its meaning plainly was that if corporations organized and existing at the date of the adoption of the constitution should retain the precise corporate existence they then had, such exemptions as they legally had should continue whilst their corporate organizations remained as they were. It has nothing to do with the preservation of exemption to any corporation existing at the date of the adoption of the constitution which ceased to retain its said precise corporate existence, and became consolidated with another corporation, thereby ceasing to exist. Sec. 279 meant the same thing, to wit: that charters of incorporation belonging to corporations at the date of the adoption of the constitution were not, in any way, to be infringed by the constitution so long as such corporations retained their precise previous corporate organization. This, and this only, is the whole scope of the two sections. Their plain meaning is in harmony with the whole spirit of the chapter on corporations in the constitution, and cannot be frittered or pared away by ingenuity or refinement.

It was well said by Mr. Justice Brown, in *Keokuk, etc., Railroad Co.* v. *Missouri,* 152 U. S., 312: "But the decisive answer to this objection is that the legislature had no power, in 1869, to extend to a new corporation created by the consolidation an exemption contained in an act passed in 1857, before the constitution was adopted, and, hence, under the terms of this act, we cannot hold that immunity from taxation passed as a franchise or privilege to the consolidated corporation. The construction claimed by the defendant would be directly in the teeth of the constitutional provision that no property shall be exempted from taxation. While, as heretofore observed, an exemption

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from taxation contained in a charter previously granted could not be taken away by this constitutional provision without the impairment of the obligation of a contract, it doubtless applies to all corporations thereafter formed either by original charter or by the consolidation of prior corporations under the act of 1869."

It is further clear that if the different charters relied upon had expressly provided by the use of the word "immunity," or by direct declaration to that effect, that the alleged exemption of the L., N. O. & T. should pass into the consolidated company, sec. 180 of the constitution of 1890 still cut off the exemption, since the constitution is the paramount law of the land, the consolidation have taken place some two years after its adoption. It is so expressly held in the *Louisville, etc., Railroad Co.* v. *Kentucky*, 161 U. S., 695, and *Pearsall* v. *G. N. Railroad Co.*, 161 U. S., 667. And, in this view, it, of course, becomes immaterial whether the position of learned counsel for the railroad, that the exemption passes by general law into the consolidated company without express declaration, is correct or incorrect, though we understand the supreme court of the United States to have distinctly held that the sovereign right of taxation does not so pass unless there be either express declaration to that effect, or the use in statutes authorizing the consolidation of the word "immunity." And that court has distinctly held as "the later and best considered view, sustained by the weight of authority," that the use of the word franchise, or privilege, or any other word than the word immunity, is not sufficient to embrace an exemption from taxation. *Phoenix Ins. Co.* v. *Tennessee*, 161 U. S., 176; *Keokuk, etc., Railroad Co.* v. *Missouri*, 152 U. S., 304; *Covington Turnpike, etc., Co.* v. *Sanford*, 164 U. S., 586; *Norfolk, etc., Railroad Co.* v. *Pendleton*, 156 U. S., 172; *Pickard* v. *Tennessee, etc., Railroad Co.*, 130 U. S., 640; *Railroad Co.* v. *Palmes*, 109 U. S., 244; *Home Ins. Co.* v. *Tennessee*, 161 U S., 198.

On this very point Mr. Justice Peckham, in *Phoenix Ins. Co.* v. *Tennessee*, 161 U. S., p. 178, says: "The inference

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is sought to be drawn in favor of exemption if the legislature did not affirmatively grant the right to tax. We cannot assent to any such view, and we could come to no such conclusion from an examination of the general statutes cited by counsel. It is a complete overturning of the universal rule in regard to taxation. The power and the right to tax are always presumed, and the exemption is to be clearly granted. Mere silence is the same as a denial of exemption." Nothing certainly can be clearer than this. Indeed, the opinion of Mr. Justice Peckham in this case is so clear and forcible that we quote from it to adopt the following passages on this particular proposition:

"In *Wilson* v. *Gaines,* 9 Bax., 546, it was held by the supreme court of Tennessee that as the state, in its constitution (art. 11, sec. 7, const. 1834) used in the same connection all the words 'rights,' 'privileges,' 'immunities,' and 'exemptions,' each of these words was to be given, in interpretation, a meaning so limited as not to include anything expressed by the others, and that when any one of them is found in a statute, the legislature must be conclusively presumed to have used it in its restricted sense. This decision of the Tennessee court tends very strongly to the idea that the words 'immunity' or 'exemption' would have been required to secure the exemption to a company in a case like this. It is true that this view was not assented to by this court as being the correct one, in *Tennessee* v. *Whitworth,* 117 U. S., 139, 146, and it is simply cited for the purpose of showing what the Tennessee court did decide in regard to the meaning of its own constitution in reference to this subject.

"That the legislature was, about the time, freely incorporating various companies and granting them exemption from taxation with considerable liberality, is not a sufficient reason to induce this court to depart from the universal and well-established rule making a claim for exemption a matter to be proved beyond all doubt. The circumstance which we regard as very significant, and which has already been alluded to, consists in

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the omission of the word 'immunities' in the grant to plaintiff in error. That omission we attach great weight to, and the least that can be said of it is that it involves the question in doubt.

"It cannot be denied that the decisions of this court are somewhat involved in relation to this question of exemption. It is difficult in some cases to distinguish the language used in each so far that the different results arrived at by the court can be seen to be founded upon a real difference in the real meaning of such language. The question has sometimes arisen upon the consolidation of different companies, and sometimes upon a sale under a mortgage foreclosure. Among the former is the case of *Keokuk, etc., Railroad Co.* v. *Missouri*, 152 U. S., 301, where, under the laws of Missouri (sec. 4 of the act of March 2, 1869) there was a provision that the consolidated company should be 'subject to all the liabilities and bound by all the obligations of the companies within this state,' and 'be entitled to the same franchises and privileges under the laws of this state as if the consolidation had not taken place.' The question was said to admit of doubt whether, under the name 'franchises and privileges,' an immunity from taxation passed to the new company. Various cases are cited in the opinion, which was delivered by Mr. Justice Brown, showing the grounds taken by this court in such cases. In *Chesapeake, etc., Railway Co.* v. *Miller*, 14 U. S., 176 (a foreclosure case), it decided that an immunity from taxation enjoyed by one railroad company did not pass to the purchaser under the foreclosure of a mortgage, although the act provided that the purchaser should forthwith become a corporation, 'and should succeed to all such franchises, rights, and privileges as would have been had by the original company but for such sale and conveyance.' The case followed that of *Morgan* v. *Louisiana*, 93 U. S., 217 (also a foreclosure case), where it was held that the words 'franchises, rights, and privileges,' did not, necessarily, include a grant of exemption or immunity from taxation. See

also, to same effect, *Memphis, etc., Railroad Co.* v. *Railroad Commissioners*, 112 U. S., 609. The case of *Pickard* v. *Tennessee, etc., Railroad Co.*, 130 U. S., 637, 642, may also be referred to, upon the point that exemption, although it might be granted, must be considered as a personal privilege not extending beyond the immediate grantee unless otherwise so declared in express terms, and it was therein declared that such immunity would not pass merely by a conveyance of the property and franchises of a railroad company, although such company might itself hold property exempt from taxation. In that case Mr. Justice Field, speaking for the court, said: 'It is true there are some cases where the term "privileges" has been held to include immunity from taxation, but that has generally been where other provisions of the act have given such meaning to it. The later, and we think the better, opinion, is that unless other provisions remove all doubt of the intention of the legislature to include an immunity in the term franchise, it will not be so construed. It can have its full force by confining it to other grants to the corporation.' This language is referred to by Mr. Chief Justice Fuller, in the case of *Wilmington, etc., Railroad Co.* v. *Alsbrook*, 146 U. S., 279, where, at page 297, he says: 'We do not deny that an exemption from taxation may be construed as included in the word "privileges," if there are other provisions removing all doubt of the intention of the legislature in that respect,' citing the Pickard case.

"Looking at the other side, we find the case of *Humphrey* v. *Pegues*, 16 Wall., 244, where there was a grant to a railroad company of 'all the rights, powers, and privileges' granted by the charter of another company, which exempted the property of such other companuy from taxation, and it was held that the property of the first company was thereby also exempted. Mr. Justice Hunt, in delivering the opinion of the court, said that: 'A more important or more comprehensive privilege than a perpetual immunity from taxation can scarcely be imagined. It contains the essential idea of a peculiar ben-

efit or advantage, or special exemption from a burden falling upon others.' Again, in *Tennessee* v. *Whitworth*, 117 U. S., 139, it was held that a right to have shares in its capital stock exempt from taxation within the state was conferred upon a railroad corporation by a state statute granting to it 'all the rights, powers, and privileges,' or granting it 'all the powers and privileges' conferred upon another corporation named, if the latter corporation possessed by law such right of exemption. The question in that case arose as to the meaning of certain statutes passed by the legislature of Tennessee, resulting in the consolidation of certain railroads therein mentioned. In the course of his opinion, Mr. Chief Justice Waite cites the case of the *Philadelphia, etc., Railroad Co.* v. *Maryland*, 10 How., 376, 393, where Mr. Chief Justice Taney, speaking of a statute which authorized the union company to have 'the property, rights, and privileges which that law, or other laws, conferred on them' (the separate companies, or either of them), said that such language extended to the union company the exemption from taxation contained in the charter of one of the united companies. Mr. Chief Justice Waite, continuing in his opinion, said: 'As has already been seen, the word "privilege," in its ordinary meaning, when used in this connection, includes an exemption from taxation.' The decision of this last case should be confined to the peculiar language used in the various statutes therein cited, wherein, aside from the word 'privilege,' it may be argued that, considering all the language used in those statutes, the intention of the legislature to exempt the company named from taxation may fairly well be made out.

"The later cases of *Pickard* v. *Tennessee, etc., Railroad Co.*, 130 U. S., 637, and *Wilmington, etc., Railroad Co.* v. *Alsbrook*, 146 U. S., supra, show that there must be other language than the mere word 'privilege,' or other provisions in the statute removing all doubt as to the intention of the legislature, before the exemption will be admitted. The case of *Mobile, etc., Rail-*

road Co. v. *Tennessee*, 152 U. S., 486, adds nothing to the discussion on either side. The particular point was not in that case, but it seems to be cited by counsel for plaintiffs in error for the purpose of showing what was the general condition of the state at the time of the adoption of the constitution in 1834, and what was the policy of the state in regard to internal improvements, which the constitution declared ought to be encouraged. The incorporation of an insurance company would hardly come within the most liberal meaning of the term 'internal improvements.' If this were an original question, we should have no hestitation in holding that the plaintiff in error did not acquire the exemption from taxation claimed by it, and we think at the present time the weight of authority, as well as the better opinion, is in favor of the same conclusion which we should otherwise reach."

It is impossible for us to add to the elegance, clearness, or force of this reasoning. It will be noted, too, that the court says that the case of *Tennessee* v. *Whitworth*, 117 U. S., 139, "must be confined to the language used in the various statutes therein cited, wherein, aside from the word privilege, it might be argued that, considering all the language used in those statutes, the intention of the legislature to exempt the company named from taxation may fairly well be made out." *Tennessee* v. *Whitworth* seems fairly to be shaken as authority by the later decisions of the supreme court of the United States, and whether it is sound or unsound cuts no figure in this case, since, in that case, no new constitution intervened. The material fact, that in this case a new constitution does intervene, constitutes the decisive difference between this case and *Tennessee* v. *Whitworth*, and makes this case fall within the principle of *Keokuk* v. *Missouri*, and *St. Louis* v. *Berry*, supra. See, also, *Morgan* v. *Louisiana*, 93 U. S., 223; *Mobile, etc., Railroad Co.* v. *Miller*, 114 U. S., 186. We therefore reach the conclusion that the consolidation of the L., N. O. & T. with the Y. & M. V. Railway Co. resulted in the creation of a new

corporation, the present Y. & M. V. R. R. Co., and that consolidation having been effected October 24, 1892, some two years after the constitution of 1890 went into effect, sec. 180 of that constitution effecually cut off the exemption claimed. We entertain no doubt whatever of the entire correctness of this view, but if the doubt existed, the same result must follow in accordance with the well-settled principle that all doubt must be resolved in favor of the taxing power. This principle has never been more emphatically declared than in *Yazoo & Mississippi Valley Railroad Co.* v. *Thomas*, 132 U. S., 174, in the following clear-cut language: "Exemptions from taxation are regarded as in derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact and express requirement of the language used, construed *strictissimi juris.*" It necessarily follows from these views that on this ground alone, standing by itself, apart from all other considerations in this case, we must, and do hold the railroad company not entitled to the exemption claimed except in the particular hereinafter to be mentioned, and this independent ground of decision disposes of the case regardless of all other grounds. It will be observed that we have, in reaching this conclusion, treated consolidation not as in itself meaning necessarily that a new corporation must be created, but have allowed it the latitude of definition sometimes given it, very loosely and improperly, as we think, according to which consolidation may mean merger, the absorption of one corporation by another. Taking the word even in that sense, as we have done thus far throughout this discussion, we have, nevertheless, found that the purpose of the legislature was such consolidation as meant not merger but the creation of a new corporation, and that the articles of consolidation, together with the action of the stockholders and directors of the two companies, show that what was actually effected was the creation of a new corporation. It is not necessary, therefore, to say that the term consolidation, *ex vi termini*, imports a creation of a new

corporation, though, in our judgment, such is its true meaning, as shown by the best considered cases. The loose phrase—"consolidation by merger"—is too vague and confusing to signify anything clearly; one might as well say merger by consolidation, and that equivalency of phrase would give us the equation consolidation=merger, which manifestly is nonsense. The term consolidation, where such phrase as consolidation by merger occurs, has, it seems to us, been carelessly confounded with the term amalgamation, as used in England. Amalgamation, in the English sense, probably means about what merger does with us, but it is not consolidation in any proper sense of the term; it is in the interest of clearness of definition that consolidation should be limited to signify such union of two or more corporations as necessarily results in the creation of a third new corporation, and as we understand the decisions, this is what is known as the American doctrine, and the better view. Thus, in Green's Brice's Ultra Vires, p. 538, Mr. Green says, summing up in a most learned note: "The term 'amalgamation' is seldom applied to corporations in this country. That which takes its place as much as any is 'consolidation.' But, though it is difficult accurately to define amalgamation, as commonly used in English law, it certainly has a wider meaning than consolidation has with us. Consolidation would, *e. g.*, be inapplicable to a union of two or more companies, in such way that one of the original corporations only was continued in existence, while the other were merged or absorbed in it. The absorption of one corporation by another would, according to some of the decisions, be an amalgamation in England, but it would not be a consolidation here. In *McMahan* v. *Morrison*, 16 Ind., 172, a case frequently cited with approval in the later decisions, it was said that the effect of the consolidation 'was a dissolution of the three corporations named, and, at the same instant, the creation of a new corporation, with property, liabilities, and stockholders derived from those then passing out of existence.' Similarly, in *Lauman* v. *Lebanon*,

etc., Railroad Co., 30 Pa. St., 42, consolidation is said to amount to 'a surrender of the old charters by the companies, the acceptance thereof by the legislature, and the formation of a new corporation out of such portions of the old as enter into the new.' Where, by the terms of the statute and deed, the first corporation was extinguished, the second only continued in existence, this was held not to be 'an amalgamation or consolidation of the two corporations into one.' *Powell* v. *Northern Missouri Railroad Co.*, 42 Mo., 63. In the American view, therefore, it would seem that the dissolution of all the old corporations and the creation of one new one are essential to consolidation."

Mr. Chief Justice Fuller, in *Railroad Company* v. *Alsbrook*, 146 U. S., 279, clearly has this view of consolidation. He says: "And, although the transaction is called by the legislature in the act of 1875, a consolidation, it amounted rather to a merger or an amalgamation, and need not be held to have resulted in a new corporation," clearly distinguishing between consolidation on the one hand and merger or amalgamation on the other hand as two things in their essential nature wholly different from each other, as undoubtedly they are. So the supreme court of Arkansas distinctly hold in *St. Louis* v. *Berry*, 41 Ark., at p. 518, afterwards affirmed by the United States supreme court, saying: "And in the absence of a contrary intention clearly expressed in the law authorizing it, the legal effect of a consolidation is to extinguish the constituent companies and to create a new corporation, with property, liabilities, and stockholders derived from those then passing out of existence," citing *McMahan* v. *Morrison*, 16 Ind., 172; *Lauman* v. *Lebanon R. R. Co.*, 30 Pa. St., 42; *Clearwater* v. *Meridith*, 1 Wall., 25; *Shields* v. *State*, 26 *Id.*, 86; same case on error, 95 U. S., 319; *Central R. R. Co.* v. *Georgia*, 92 *Id.*, 665; *Railroad Co.* v. *Maine*, 96 *Id.*, 499; *Railroad Co.* v. *Georgia*, 98 *Id.*, 359.

Mr. Justice Strong says in *Central Railroad Co.* v. *Georgia*,

98 U. S., 360, that this view of consolidation accords with sound reason, and to the same effect is the *Arkansas Milling Co.* v. *Berry*, 44 Ark., 22; *Atlanta, etc., Railroad Co.* v. *Georgia*, 63 Ga., 486. As before remarked, however, it is not necessary for us to hold that the true definition of the word consolidation is such union of two or more corporations as necessarily results in the creation of a new corporation. We merely remark upon what we think the true definition of the word should be held to be, in the interest of clearness and definiteness in legal phraseology, adding the authorities which restrict its signification, as indicated above.

But it is most earnestly insisted by learned counsel for the railroad company that the case of *Railroad Company* v. *Lambert*, 70 Miss., 781, is *res adjudicata* of this entire controversy. Except in the single particular to be hereinafter mentioned, this position is wholly untenable. The rule laid down by Mr. Justice Field, of the United States supreme court, in *Cromwell* v. *Sac County*, reaffirmed in *Keokuk, etc., Railroad Co.* v. *Missouri*, supra, and in *New Orleans* v. *Citizens' Bank*, 167 U. S., 397, and in *So. Pac. R. R. Co.* v. *U. S.*, 168 U. S., at p. 48, is this: "That where the parties are the same, and the subject-matter and cause of action are the same, the estoppel extends not only to what was decided, but to all that might have been decided in that case; but where the parties are substantially the same, but the cause of action different, it only extends to what was necessarily involved, and was actually decided in the first suit," which is the doctrine laid down in the Duchess of Kingston's case. The parties in the Lambert case were the Natchez, Jackson & Columbus Railroad Company and the sheriff of Adams county, and the subject-matter or cause of action was the tax, state and county, on the part of the Natchez, Jackson & Columbus Railroad within Adams county; the exemption asserted was under the charter of the Natchez, Jackson & Columbus Railroad Company. In this case the parties are the Illinois Central Railroad Company and the Yazoo & Mississippi Valley

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Railroad Company on the one hand, and the state revenue agent on the other, and the subject-matter is state and county taxes of an entirely different railroad, the L., N. O. & T. Railroad, and an exemption is claimed under the charter of the L., N. O. & T. Railroad Company, an entirely different charter. It is perfectly manifest, therefore, that neither the parties nor the subject-matter are the same, except in the particular to be hereafter mentioned. The thing adjudgd in the Lambert case was that state and county taxes were not due on that part of the Natchez, Jackson & Columbus Railroad Company lying within Adams county. It is true the principle of the decision would extend to the exemption of the whole property of the Natchez, Jackson & Columbus R. R. Co., but that was not the thing adjudged, and that feature of the decision is persuasive under the doctrine of *stare decisis,* but not binding as an estoppel under the doctrine of ***res adjudicata.*** It is also true that to claim the benefit of *res adjudicata* as estoppel in the strict and technical sense, it must be pleaded or offered in evidence. It is further to be remarked that it is not the reason which a court gives for its decision which constitutes estoppel, but the thing it adjudges. This is well settled in *Buckner* v. *Calcote,* 28 Miss., 432. The property adjudged by a court to a litigant is his thenceforward under the doctrine of *res adjudicata* as a rule of property as against the parties in that same litigation, but the reasons which the court may give for the decision are thereafter simply persuasive under the doctrine of *stare decisis,* and not in themselves to be invoked as the estoppel. It is a mere confusion of thought to blend these two wholly different principles underlying these legal doctrines, thus practically treating them as the same. Nor are the taxes of any one year the same cause of action as the taxes of any other year in the only proper technical signification to be given to the term *res adjudicata.* It is so held by the United States supreme court in *Keokuk, etc., Railroad Co.* v. *Missouri,* supra,

and in *Phoenix Ins. Co.* v. *Tennessee*, 161 U. S., at p. 186. A decision for the taxes of any one year may be invoked under the doctrine of *stare decisis*, where the taxes of any other year are involved under the same claim. But certainly never, on any clear thinking or correct reasoning, under the doctrine of *res adjudicata*.

On this very subject the supreme court of Iowa said, in the *City of Davenport* v. *C., R. T. & P. R. R. Co.*, 38 Iowa, pp. 639, 640: "Each year's taxes constitute a distinct and separate cause of action, and the determination of the matters involved in the injunction reached no further than the taxes for the years then in question. The cases are unlike those where two causes of action (as, two promissory notes) forming the subject-matter of successive actions between the same parties, both growing out of the same transaction, in which a defense set up in the first suit and held good will conclude the parties in the second. But the taxes of separate years do not, in any just sense, grow out of the same transaction. They are like distinct claims on two different promissory notes, made from two distinct and separate though similar transactions between the same parties. A judgment on one of such notes, it is quite clear, would not be of any force as an estoppel in an action on the other note between the same parties. In support of these views see the following cases," citing twelve cases.

Mr. Justice White says in *New Orleans* v. *Citizens' Bank*, 167 U. S., p. 371, that this was practically overruled in *Goodenow* v. *Litchfield*, 59 Iowa. But Seevers, chief justice, in that case, says, at p. 236, that the cases are not in conflict. And Rothbroch, judge, in delivering the opinion of the court in the Goodenow case, says, at p. 234: "That (the case in 38 Iowa) was a direct proceeding by the taxing power to collect its revenue, and it may well be questioned whether any decree could operate upon future assessments and levies," the very principle announced in *Keokuk, etc., Railroad Co.* v. *Missouri*, 152 U. S., 301.

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It will, however, be distinctly observed, and we direct emphatic attention to this statement, that whether the decision for taxes of one year is *res adjudicata* as to taxes for another year preferred under the same claims, as held in *New Orleans* v. *Citizens' Bank,* 167 U. S., 397, is wholly immaterial here, since the parties to this litigation are not the same with the parties to the litigation in the Lambert case, except, perhaps, as hereafter indicated. There is, therefore, no *res adjudicata* arising out of the Lambert case, except as will be indicated, and that exception is this: Perhaps the state revenue agent, as to the taxes, state and county, on the property of the Natchez, Jackson & Columbus Railroad Company, in Adams county, for the year 1892, may be regarded properly and substantially as the same party with the sheriff of Adams county; and the Natchez, Jackson & Columbus Railroad Company, as to the same taxes on the same part of its property, may properly be regarded as substantially the same party with the Yazoo & Mississippi Valley Railroad Company, into which the property of the Natchez, Jackson & Columbus Railroad Company has been integrated. Substantially, in this small particular, as to the state and county taxes for the year 1892, on that part of the property of the Natchez, Jackson & Columbus Railroad Company lying in Adams county, the parties may be said to be the same, and the cause of action the same, and we hold, accordingly, that as to that the railroad company is entitled to claim the exemption under the Lambert case as *res adjudicata.* Except as to this alone there is clearly, as we think, no right to invoke the Lambert case as *res adjudicata,* for the reason that the parties are not the same without reference to other considerations, and let it be further specially noted that the Lambert case went off on demurrer, and the evidence in this case was not before the court. It is well said by the supreme court of the United States in *Keokuk, etc., Railroad Co.* v. *Missouri,* 152 U. S., 313, in an opinion of unusual clearness and power, that "it is not to be tolerated that the state should be forever debarred of its taxes by

an erroneous decision" (p. 316). But it is said if the Lambert case is not *res adjudicata* it should control this case, under the doctrine of *stare decisis*. There is one view of the Lambert case which authorizes the appeal to the doctrine of *stare decisis;* it did distinctly decide that what occurred between these companies was merger and not consolidation, and that no new corporation was created thereby, applying the principles of the *Railroad Company* v. *Maine*, 96 U. S., 499, to the facts of this case, which are, in our judgment, wholly different from the facts in the Maine case. It did not decide, of course, holding that the case was one of merger, whether sec. 180 of the constitution of 1890 would have cut off the exemption had there been a consolidation creating a new corporation. Holding that it was a case of merger, the court very naturally held that sec. 181 of the constitution of 1890 had no effect on the exemption claimed in that view. The court most emphatically did not decide that, had there been a consolidation resulting in the creation of a new corporation after the constitution of 1890 went into effect, such new corporation could claim that exemption belonging to one of its constituents prior to that consolidation, as the property of the absorbed company alone, was continued by virtue of sec. 181. There is no process of interpretation by which the decision in the Lambert case can be so distorted as to mean any such thing. The court proceeded throughout upon the proposition that, it being a mere case of merger, the Yazoo & Mississippi Valley Railroad Company absorbing the L., N. O. & T. Railroad, sec. 181 had no effect upon the exemption, and that such exemption passed to the Y. & M. V. Co. so far as the property of the Natchez, Jackson & Columbus Railroad Co. was concerned. If it had been a mere case of merger, as held by the court, we think it clear, as hereinbefore pointed out, that that exemption did not pass, and that the court was in error in so holding, because of the well-settled proposition hereinbefore stated and supported by the authorities, that, under the general law alone, without reference to the constitution, an exemption

will not pass in a case of merger to the absorbing company which attached to the property of the company merged alone, unless the legislation authorizing in such case merger either expressly declared that the exemption shall pass, or used the word "immunity," or an equivalent word. It was correct, in fact, to say that the exemption of the property of the Natchez, Jackson & Columbus Railroad Company passed to the L., N. O. & T. Co. by virtue of the word "immunities," used in the act of 1890, authorizing a sale or consolidation of the Natchez, Jackson & Columbus Railroad Company with the L., N. O. & T. Railroad (Laws of 1890, p. 675), provided, always, that exemption was legal in its origin, the validity of which exemption was not contested but conceded in the Lambert case, but which was clearly invalid, as we shall show later in this opinion. The power of the word "immunities" in said act to pass such exemption to the L., N. O. & T. Railroad under said act of 1890, was exhausted by that consolidation, and had no virtue to carry that exemption into the new company, the present Y. & M. V. Railroad Company, resulting from the consolidation, even had sec. 180 of the constitution of 1890 not been adopted. We have most carefully considered the Lambert case, giving all due weight to the doctrine of *stare decisis,* and as to the two propositions that what occurred here was merger and not consolidation creating a new corporation, and that the exemption consequently of the Natchez, Jackson & Columbus Railroad properly passed to the Y. & M. V. Railroad Company, even in the view of merger under the legislation alone, we hereby expressly overrule the Lambert case. Exemptions, where proper, should be expressly granted, not stealthily referenced in.

2. We turn now to a second ground of decision, wholly independent of, and disconnected from, all that we have said in the first ground, from which we think the same result must follow. The exemption asserted here is that contained in the twenty-first section of the Mobile & Northwestern Railroad Company's charter, which is as follows:

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"Section 21. *Be it further enacted,* That in consideration of the construction of the railroads provided for herein, and of the great benefit which the state will receive in the development of its agricultural resources by means of said railroads, as works of internal improvement, and also of the increased value which will thereby be added to the property of the state, thus enabling the state to greatly increase its revenue without additional and burdensome taxation upon the people, the state hereby agrees with said company (and which agreement is irrepealable), that all taxes to which said company shall be subject for the period of thirty years are hereby appropriated and set apart, and shall be applied, to the payment and debts and liabilities which the said company may have incurred in the construction of said road, or for money borrowed by said company upon lands, or otherwise, to be used in constructing the same, and it shall be the duty of the tax collector in every county, in each and every year, to give to said company a receipt in full for the amount of said taxes upon receiving from said company an affidavit, made by the president or cashier of said company, that the amount of said taxes have actually and in good faith, been paid and applied by said company during the year in payment of the debts incurred, or money borrowed, as aforesaid, and which receipt so given shall be in full of all taxes, county, state, and municipal, to which said company shall be subject; *provided however,* That whenever the profits of said company shall enable it to declare and pay to the stockholders an annual dividend of eight per centum upon its capital stock, over and above the payment of its debts and liabilities, then the appropriation of the taxes aforesaid shall cease, and said taxes shall be paid by said company to the tax collector, to be by him paid over as required by law."

That act was passed in 1870, after the constitution of 1869, sec. 13, art. 12, and sec. 20, art. 12, had been adopted, and it is expressly decided in Lambert's case, 70 Miss., p. 786, 789, that this was "a thin disguise to evade constitutional restraints

apprehended to be contained in said sec. 13, art. 12, of said constitution," and the Lambert case further declares—what is manifest—that the pretended exemption was irrepealable on the face of said section. Unquestionably, said twenty-first section did provide for an irrepealable exemption on its face, and we hold it, therefore, to have been in violation of sec. 13, art. 12, and sec. 20, art. 12, of the constitution of 1869.

The case of *Mississippi Mills* v. *Cook*, 56 Miss., p. 40, expressly held that the legislature had no power to grant an irrepealable exemption, and under that decision the exemption claimed under this section is manifestly unconstitutional. Sec. 13, art. 12, of the constitution of 1869, is in these words: "The property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals." Sec. 20 is in these words: "Taxation shall be equal and uniform throughout the state. All property shall be taxed in proportion to its value, to be ascertained as directed by law." *Mississippi Mills* v. *Cook* decided that the property of private corporations for pecuniary profit was and should remain subject to taxation; it expressly held that, while an exemption might be granted, yet it might, at any time, be repealed by the legislature, and, further, that no exemption could be granted to any private corporation for pecuniary profit by a special act extending a special exemption to that special corporation alone; but that, in order to make any such exemption valid, it must be extended to all corporations for pecuniary profit, of the same class, and in the same situation. And the precise exemption asserted in that case was asserted distinctly under the acts of April, 1872, and 17th of April, 1873, amendatory thereof, set out at pages 42, 43, of 56 Miss. The Mississippi Mills did not claim that it had a valid exemption by virtue of a special act granting such special exemption to the Mississippi Mills alone, but that it had such exemption in common with all other factories similarly situated by virtue of said general law. The exemption set up here under the twenty-first section of the Mobile &

Northwestern charter is wholly different. The claim here is that this particular railroad is entitled to this special exemption, which it is conceded is not now, and never was, extended to all other railroads similarly situated in this state. And, further, this exemption is irrepealable on its face, and the Mississippi Mills case decided no irrepealable exemption was constitutional. It is certainly obvious, from these considerations alone, that the *Mississippi Mills* v. *Cook* is no authority to sustain the exemption set up here. It is further clear that the constitutionality, under the constitution of 1869, of a legislative grant of exemption to private corporations for pecuniary profit, if it embraced all of the same class—the property of individuals being at the same time taxed—was not argued, considered, or decided in *Mississippi Mills* v. *Cook*, but was conceded by the attorney-general and the judges who wrote the majority opinions. One of the vices of the decision in *Mississippi Mills* v. *Cook* is that it did not hold that all the property of private corporations for pecuniary profit was required to be taxed by the terms of the constitution, secs. 13 and 20, art. 12, just as, and when, the property of individuals was. Instead of doing this, the court decided that all such property was free from taxation unless the legislature expressly subjected it to taxation, even though the property of private individuals was taxed, inverting the rule of the constitution. It was certainly an idle performance to declare, as the court did declare, that the whole effect of the constitutional provision was to render the property of private corporations for pecuniary profit liable to taxation; that everybody knew, and to so limit the constitutional declaration was to emasculate it. More than thirty-five years had intervened between the previous constitution of the state and the constitution of 1869. When that previous constitution was adopted—in 1832—the state was young, and had had little experience with the grasping demands of corporations for grants of exclusive privileges, but the experience of more than thirty-five years had taught it wisdom in this regard, wisdom

learned long prior by older commonwealths like California and Iowa, from the constitution of which latter state the provisions of the constitution of 1869, in question, were doubtless borrowed, and so sec. 13 of art. 12 was put in the organic law of the land, beyond the reach of legislative control, for the express purpose of formulating a fundamentally great line of public policy prohibiting any difference in the exercise of the taxing power between the property of individuals and the property of private corporations for pecuniary profit. The court in *Mississippi Mills* v. *Cook*, at pp. 51, 52, looked too narrowly at the mere word, "subject." It should have taken broadly the whole section into view, and deduced from all its terms the meaning of the provision. Judge Campbell, in *Beck* v. *Allen*, 58 Miss., 177, most wisely said: "Subtlety and refinement and astuteness are not admissible to explain away the expression of the sovereign will. The framers of the constitution, and the people who adopted it, must be understood to have intended the words employed in that sense most likely to arise from them on first reading them." This is the doctrine announced by Cooley and Story, and our construction of the meaning of sec. 13, to wit: that it required the property of private corporations for pecuniary profit to be taxed just as—"the same as"—the property of individuals, so that one would not be exempt and the other taxed, is the identical construction placed upon the same words by the supreme court of the United States, and the supreme courts of Alabama, Arkansas, California, Florida, and Iowa. We prefer now to distinctly align ourselves with the supreme court of the United States on this important question, and overrule *Mississippi Mills* v. *Cook* in so far as it held that the property of private corporations for pecuniary profit was not, by the constitution of 1869, secs. 13 and 20, of art. 12, expressly directed to be taxed just as the property of individuals. The decisions of the United States supreme court, to which we refer, are as follows: *Louisville* v. *Palmes*, 109 U. S., 248; *St. Louis, etc., Railroad Co.* v. *Berry*, 113 U. S., 475;

Schurz v. *Cook*, 148 U. S., 408; *Keokuk, etc., Railroad Co.* v. *Missouri*, 152 U. S., 303, and 310–312.

The decisions of the state supreme courts to which we have referred are as follows: 38 Iowa, 635; 34 Cal., 432; 25 Ark., 289; 19 Fla., 231, which collates the constitutions of Wisconsin, Missouri, Illinois, Kansas, Mississippi, Alabama, Arkansas, and Louisiana. In *Mobile* v. *Stonewall*, 53 Ala., 570, Judge Brickell, in a most masterly opinion, says: "The constitutional provision supposed to have been offended by the enactments under which the appellee claims immunity from the taxation the appellant seeks to recover, has a history which must be consulted in determining its just interpretation. Its purpose was not an adaptation only of the organic law to the changed political condition of the people, and to conform it to the new relations springing from the amendments of the federal constitution and the conditions imposed by congressional enactment. It was intended also to cure defects time had developed in former constitutions, to narrow and restrain legislative power in the instances experience had shown it most liable to abuse. Under former constitutions the taxing power was not defined, qualified, or restrained by any other provision than the simple declaration: 'All lands liable to taxation in this state shall be taxed in proportion to their value.' There cannot be a just interpretation—an interpretation which will consummate the intent of the people in the adoption of these and other constitutional provisions—which is not deduced, not only from their language, but from their history, from the causes to which they owe origin, the mischief they were intended to remedy. In respect to the constitution of the United States, it is said 'the safest rule of interpretation is to look to the nature and objects of the particular powers, duties, and rights, with all the lights and aid of contemporary history, and to give to the words of each just such operation and force consistent with their legitimate meaning as may fairly secure and attain the ends proposed.' In the creation of the greater part,

if not all, of the private moneyed or commercial corporations which were created prior to 1861, a commutation of taxation was a prominent feature of the charter. Entire or partial exemption from taxation, temporarily, has been frequently granted corporations formed to pursue branches of industry the encouragement of which it was believed a wise public policy required. All exemptions from taxation necessarily increase the burdens imposed on the property not exempt, and are directly injurious to the taxpayer. The incidental benefits which it is supposed may result to him, in common with the community at large, are speculative, and not often a compensation for the immediate injury sustained. Invidious exemptions or discriminations, by which the property of an individual or of a corporation is relieved from bearing a just proportion of the common burden taxation is intended to discharge, are violative of the equality of right of the citizen, which is a fundamental principle of our institutions. To prevent any exemption or discrimination in favor of corporations, to subject their property to the same rate of taxation to which the property of individuals of the same kind is subject, is the purpose of the constitutional provision, clearly expressed: 'The property of corporations now existing, or hereafter created, shall forever be subject to taxation the same as property of individuals,' etc. The argument of appellee, that it was intended only to reserve to the legislature the power of subjecting corporate property to the taxation imposed on individuals, and to avoid the introduction into charters of irrepealable exemptions, or discriminations, cannot be supported. Reading these constitutional provisions in the light of their history, and with a due regard to the words in which they are expressed, it is impossible for us to doubt that it was not competent for the general assembly, in the imposition of taxes, to distinguish or discriminate in favor of corporate property subject to taxation. If property of a particular kind is subjected to taxation, and owned by a corporation, it must bear the rate of taxation imposed on indi-

viduals. While the constitution inhibits the exemption or discrimination in favor of corporations, it equally inhibits a discrimination against them. Equality in bearing a common burden, which is natural right and equity, is secured alike to the corporation and to the citizen.

"The constitution of Iowa contains a provision identical in meaning, if not in words, with the provision of the constitution of 1868, under consideration. It reads: 'The property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals.' In *The City of Davenport* v. *C. R. J. & P. R. R. Co.*, 38 Iowa, 633, it was the subject of construction, and was declared mandatory, requiring the legislature to provide for taxation of the property of corporations for pecuniary profit the same as that of individuals. A statute releasing railroad companies from certain taxation to which individuals were subject was declared violative of it. The court says: 'What are we to understand to be intended by the language "the same as that of individuals?" We need not determine whether this language requires that corporate property shall be taxed in the same manner as that of natural persons. It seems, however, quite clear that it was intended by this language to require the legislature to impose the burdens of taxation upon the property of corporations for pecuniary profit, the same as, or equally with, that of individuals; that each shall be taxed for the same objects, and in the same degree, so that individuals shall not be required to pay any taxes on their property which have not also been assessed and laid upon the property of corporations of the class named, or in any greater proportion. When the legislature provides for taxing the property of individuals, this clause of the constitution requires it to tax the property of corporations for pecuniary profit to the same extent and for the same purposes. If the property of individuals be taxed for state, county, school, and municipal purposes, the property of this class of corporations must be subjected to the same taxes, and at the same rates. The one cannot be exempt, and the other liable.'"

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It will thus be seen that on the particular holding of *Mississippi Mills* v. *Cook*, which we now overrule, this court stood absolutely alone: its decision in direct conflict with all the decisions we have just above cited. So much for the mere inaccuracy of that holding.

We turn now to the proposition that the overruling of *Mississippi Mills* v. *Cook*, as to the holding which we have particularized, overturns a rule of property and destroys a vested right on which the railroad company has a right to rely. The alleged vested right is this: That the twenty-first section of the Mobile & Northwestern charter, containing this alleged exemption, has been declared repeatedly in this state by the *Mississippi Mills* v. *Cook*, and other cases down to and including the Lambert case, not to have been violative of the constitution of 1869. This statement is wholly inaccurate, and is the result alone of a careless study of the decisions of this court. There are some primary rules on the subject of *stare decisis* to which we shall first call attention. They are formulated by the supreme court of the United States as follows:

1. The court is not bound by expressions in former decisions on points which were not contested. *Cross* v. *Burke*, 146 U. S., 86.

2. The doctrine of *stare decisis* cannot be invoked in favor of decisions on former statutes which were merely similar to but not identical with the one under review. *Wood* v. *Brady*, 150 U. S., p. 20. This rule was relied upon by the supreme court of the United States in the celebrated income tax case. *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S., 574, the court pointing out that whilst the language of former decisions was sometimes very broad, yet the exact points involved in all former decisions were different.

3 It is expressly held that a decision that a statute constitutes a contract, and that an act repealing it is void, is not an estoppel to a subsequent decision holding that the former statute itself is unconstitutional, and this is the exact case now before us. *Boyd* v. *Alabama*, 94 U. S., 645.

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Keeping these principles steadily in mind, a review of the decisions of this court will show that no charter identical with that of the Natchez, Jackson & Columbus Railroad was ever passed on in this state until January, 1891, a period subsequent to the purchase of that road by the L., N. O. & T. Railroad Company, from which it necessarily follows that that purchase could not have been made on the faith of that decision rendered in 1891. It will further be seen that the question whether the twenty-first section of the charter of the Mobile & Northwestern Railroad Company violated the constitution of 1869, as we hold it did, has never been passed on in this state up to this time. The cases in this state relied on to show the opposite of these facts are as follows: *Mississippi Mills* v. *Cook*, 56 Miss., p. 40, decided at the April term, 1878, where the sole question was, according to the opinion, whether exemption under general law, was repealable or irrepealable; the constitutionality of the exemption was not argued or decided. But much more than this is to be said about *Mississippi Mills* v. *Cook*. An examination of the original record in *Mississippi Mills* v. *Cook* shows that it was a bill for injunction by the Mississippi Mills against Cook, tax collector, averring the establishment of its factory after and on the faith of the acts of 1872–3, granting an exemption in consideration of the construction of factories, etc., and that Cook was willing to accept the affidavit for the taxes of the mill proper, but refused to accept the affidavit for taxes on outlying land, and the bill prayed an injunction against Cook, prohibiting the sale of its property for these taxes assessed on outlying lands on the ground that they were essentially part of the mill property for wood, etc. The bill averred that under the act of 1877, Cook himself insisted on collecting these taxes on these lands. There was a general demurrer to the bill sustained by the court below, and the bill was dismissed, and an appeal taken to the supreme court. The sole question involved, therefore, as thus clearly shown by the record itself, arose under the general exemption

law applicable to all the factories of the class described, and not to a special grant of a special exemption to a particular corporation. All, therefore, that appears in the opinion beyond what would relate to the right to collect these taxes on outlying land is mere dictum, for in determining what has been adjudged courts look to the decree and the record, and are not controlled by the mere opinion. Herman on Res Adjudicata, p. 470. Another striking difference between the exemption claimed in that case and in this, is that the act of 1872, under which that exemption was asserted, did not attempt to preserve exemptions granted to corporations or individuals establishing factories under its provision from legislative repeal; whereas, in the act of 1870, this twenty-first section is declared in the Lambert case a miserable attempt to evade the constitution of 1869, and secure an irrepealable grant of exemption, and that, too, to a particular corporation. The next case is *McCulloch* v. *Stone*, 64 Miss., 378, decided in 1886, in which the only question involved was whether outlying lands of a railroad company were embraced in an exemption contained in that charter, the court holding that they were not. The next case is the *Yazoo & Mississippi Valley Railroad Company* v. *Thomas*, 65 Miss., 553, decided in 1887, in which the only question involved was whether the property was exempt before completion of the railroad to the Mississippi river. The charter provided for a twenty years' exemption after such completion, the court holding that it was not exempt. The next case is the *Vicksburg Bank* v. *Worrell*, 67 Miss., p. 47, decided at October term, 1889, where the legislature had provided for what the court calls a privilege tax on all banks in the state, and the question was whether this violated art. 12, sec. 20, of the constitution of 1869, providing that taxation shall be equal and uniform and in proportion to value, and the court held that it did not. The next case is *Attala County* v. *Kelly*, 68 Miss., 44, decided at October term, 1890, a case in which the bank had paid in advance a commutation tax of $1,000, called by the court a

privilege tax, and the legislature in the same year repealed that law and provided for an *ad valorem* tax. The court held it was liable to the *ad valorem* tax, notwithstanding it had paid the commutation tax, and that was the only point involved. The next case is the *Louisville, New Orleans & Texas Railroad Co.* v. *Taylor*, 68 Miss., 361, decided at October term, 1890; not actually decided, however, till January 26, 1891, as the records of this court show. No question was raised in that case by counsel or the court as to the constitutionality of the exemption contained in such sec. 21 of the Mobile & Northwestern charter. The sole question involved was the right to exemption of a gravel pit claimed by the L., N. O. & T. Railroad Company under the charter of the Vicksburg, Pensacola & Ship Island Railroad Company (afterwards the Mississippi & Ship Island Railroad Company) which never was a part of the L., N. O. & T. Railroad Company, and the court decided that the exemption should be allowed under that charter! This was a most extraordinary mistake, for it is now conceded by counsel for the railroad and everybody else that the charter of the Vicksburg, Pensacola & Ship Island Railroad Company (afterwards the Mississippi & Ship Island Railroad Company) had nothing on earth to do with the charters of the L., N. O. & T. Railroad Company. Nor was that railroad any constituent of the L., N. O. & T. Railroad Company. It appears that the court was led into this mistake by an assumption of counsel to that effect in the case. Certain it is that it was a tremendous mistake of fact, and one against the sovereign right of taxation. It is perfectly obvious that this case is wholly fictitious, and is of no authority for any purpose. It is further to be observed, however, that inasmuch as the L., N. O. & T. Railroad Company purchased the Natchez, Jackson & Columbus Railroad Company in March, 1890, and the decision in the Taylor case was not rendered until January, 26, 1891, the L., N. O. & T. Railroad Company could not possibly have made said purchase on the faith of the Taylor case, nor on the faith of sec. 181 of the con-

stitution of 1890, because that was not adopted until November 1, 1890, and then continued only legal exemptions to corporations retaining the precise identity they had before the constitution was adopted. The next case is *State* v. *Simmons*, 68 Miss., 361, decided at October term, 1890, which involved the mere question as to whether the capital stock was exempt under the charter, and the court held that it was not. The next case, and the last, is the *Natchez, Jackson & Columbus Railroad Company* v. *Lambert*, 70 Miss., 779, decided at the March term, 1893, and the question contested in that case was whether the exemption of the *Natchez, Jackson & Columbus Railroad Company* v. *Lambert*, which had been purchased by the L., N. O. & T. Railroad Company, passed to the Y. & M. V. Railroad Company, the court deciding that it did. The question whether that exemption violated the constitution of 1869 was not argued by counsel or considered or decided by the court. These are the cases on which so much reliance has been placed to show a vested right, a rule of property, and it is perfectly manifest that in none of them was it proper to have decided upon the constitutionality of this sec. 21, unless in the Taylor case and the Lambert case, because in none of the other cases was that question involved, and they could all have been decided without reference to that question, and consequently, under the authority of *Pollock* v. *Trust Company*, 157 U. S., and *Boyd* v. *Alabama*, 194 U. S., supra, they are not binding, under the doctrine of *stare decisis* even, on this court in this case; and while the question of the constitutionality of said sec. 21 was involved in the Taylor case and the Lambert case, the constitutionality of the exemption was conceded on all hands, and not contested, and not having been contested, these cases, as held in *Cross* v. *Burk*, 146 U. S., supra, are of no force on us in this case under the doctrine of *stare decisis*. It will thus be clearly seen (1) that the exemption claimed in the *Mississippi Mills* v. *Cook* was one claimed under a general law, applicable to all the factories in the state

of the same class; whereas, the exemption claimed here, to wit, sec. 21 of the charter of the Mobile & Northwestern Railroad Company, is an exemption attempted to be granted to this special corporation, and not to all the other railroads in the state—a special privilege under a special charter to a special corporation; (2) that the Mississippi Mills had established their factory after the passage of the act of 1872-1873, on the faith of those acts as a rule of property; whereas, the L., N. O. & T. Railroad Company never came into existence, as admitted by counsel for the railroad, until the 12th day of August, 1884, by the consolidation of the Baton Rouge Railroad and the Vicksburg & Memphis Railroad, after the construction of the road had been practically finished in July, 1884; (3) that the exemption claimed in *Mississippi Mills* v. *Cook* had no irrepealable feature, whereas the exemption set up under the said sec. 21 is, on its face, irrepealable, and was so judicially declared to be in the Lambert case itself; (4) that the L., N. O. & T. Railroad Company claims under charters granted in 1882 and 1884, asserting as its exemption this sec. 21, the unconstitutionality of which, as violative of sec. 13 of art. 12 of the constitution of 1869, was not only not considered, argued, or decided in *Mississippi Mills* v. *Cook*, but which, by virtue of its irrepealable feature and its special grant of an exclusive privilege to a special corporation, would have been condemned by the reasoning of that very case; (5) and not only is it true that the particular exemption claimed here, under this sec. 21, was not argued or decided in *Mississippi Mills* v. *Cook*, but no other decision was ever rendered in this state in which the constitutionality of this sec. 21 was even involved until *McCulloch* v. *Stone*, decided in 1886, four years after the grant of the charter of the L., N. O. & T. Railroad Company; (6) from which it necessarily follows that that road was not built on the faith of any decision ever rendered in this state up to the time of the grant of its charter, which even involved the constitutionality of said sec. 21, and that the claim

that it was organized or built on the faith of such decision operating as a rule of property is utterly unfounded and absurd; (7) that the Taylor case was neither more nor less than a fictitious case, which misled the court by the misstatement of fact that the Vicksburg, Pensacola & Ship Island Railroad, afterwards Gulf & Ship Island Railroad, was one of the constituent members of the L., N. O. & T. Railroad, and its charter was a constituent charter of that railroad, and that the Taylor case is authority for nothing; (8) that the Lambert case was decided at the March term, 1893, eleven years after, not before, the grant of the charter of the L., N. O. & T. R. R. Co., and it is hence utterly incomprehensible to the legal mind how anybody could invoke that case under the doctrine of *stare decisis* as affording a rule of property to a company constructed under a charter granted before it was rendered. Such claim becomes more incomprehensible still when the further facts are recalled that the consolidation of the L., N. O. & T. and Y. & M. V. into the present Y. & M. V. R. R. Co. took place October 24, 1892, long before the decision in the Lambert case.

Let us get out of the realm of idle and reckless assertion into the realm of fact, and inquire more particularly and accurately exactly what was decided, even in the opinion of the court, which went far beyond the record, in the *Mississippi Mills* v. *Cook*. The vice of that decision is that it looked exclusively to the word "subject" in sec. 13, art. 12, and failed to give force and effect to the words "the same as that of individuals." When we say that the court's construction of the word "subject" attributed to it some supposed magical effect, we are simply reiterating the language of Chalmers, justice. He said (56 Miss., p. 59):

"I find no such magic as my colleague in the words 'shall be subject to taxation the same as that of individuals.' To me they have no meaning other than that which would be conveyed by the equivalent phrases shall be treated or shall be dealt with the same as that of individuals, or shall be

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liable to taxation the same as that of individuals. This, and many similar phrases which might perhaps be suggested convey one and the same idea—namely, that the lawgiver, in the imposition of taxes, shall know no difference between the property of individuals and that of corporations for pecuniary profit."

The opinion of the court declares as its gist that sec. 13 was not mandatory upon the legislature to tax the property of private corporations for pecuniary profit whenever the property of individuals was taxed. It distinctly put the property of such private corporations, as to the power to tax them or exempt them, in a class by themselves distinct from the class of individuals. In other words, it held that although the property of individuals might be taxed, yet the property of such corporations might be at the same time exempted by the legislature from taxation, provided such exemption extended to all corporations of the same class in the state. We think it is perfectly manifest that the language, "the same as the property of individuals," imperatively commanded the legislature, whenever they tax the property of private individuals, to tax also the property of such corporations, and under the same rules of equality and uniformity. It was well said by Justice Campbell that this provision of sec. 13 "sprang from the experience that corporations were in the habit of asking and obtaining legislative exemption from liability to taxation." That experience the state had acquired in the thirty-seven years elapsing between the constitution of 1832 and the constitution of 1869, and that experience was wisely availed of to put an end to the grant of exclusive privileges to such corporations. It marked a new era in the history of corporate taxation in this state; it laid down a fundamental new line of great public policy, one that will be found essential to the preservation of the rights of the people, as is abundantly attested by the experience of older states dealing with such corporations. It is that feature of the decision thus

holding that this sec. 13 merely permitted the taxation of such corporations, but did not require that taxation whenever the property of individuals was taxed, and in just the same manner in all respects as the property of private individuals was taxed, which we now condemn and overrule. In no other respect do we interfere with the decision in that case. That case decided, and properly decided, that under the constitution of 1869 the legislature had the power to select for exemption from taxation certain designated kinds of property, such as the agricultural implements of farmers, the tools of the mechanics, etc. Such exemption of particular kinds of property, for reasons of public policy, the constitution allowed the legislature to grant, and, when granted, it applied to such property, whether owned by individuals or such corporations. And to permit such exemptions was perfectly consistent with holding that said section mandatorily required the legislature to tax the property of such corporations whenever and just as it taxed the property of individuals. The vice of the holding of the court was in disregarding and repudiating the correlation by the constitution of the property of such corporations and the property of private individuals in the same category as to the right to tax and the duty to tax, and in declaring that under that section the legislature might put into operation a scheme of taxation which taxed property of all the private individuals in the state, and at the same time, at the will of the legislature, exempted all property of such corporations from any taxation whatever. The constitution plainly and clearly yoked together indissolubly the property of such corporations and the property of individuals, and subjected both alike to the same taxation, to be imposed under the same rules of equality or uniformity. The legislature might not exempt all the property of private corporations for pecuniary profit and tax all the property of private individuals, but it might exempt certain selected kinds of property, in pursuance of a wise public policy, whether that property belonged to such

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corporations or to private individuals. One other observation: The case before us most emphatically does not present a claim to exemption under a charter identical with the charter in the *Mississippi Mills* v. *Cook,* nor the case of any corporation which has acted on the faith of a decision construing a charter identical with the charter in the case of *Mississippi Mills* v. *Cook,* and which might thus be said to constitute for such corporation, acting on it and investing its capital on it, a rule of property. It will be time enough to decide that precise question when that question shall be presented. Whence did we get sec. 13, art. 12, of the constitution of 1869? It is said in the *Mississippi Mills* v. *Cook* that we get it from the constitution of Iowa. The clauses in the constitution of Iowa and constitution of Mississippi, 1869, are identical on this subject, and the supreme court of Iowa, in *The City of Davenport* v. *Railroad Company,* 36 Iowa, 635, and *The City of Dubuque* v. *Illinois Central Railroad,* 39 Iowa, expressly decided that this identical section prohibited the legislature from exempting the property of corporations from the same taxes imposed on the property of individuals, and that the property of corporations must be taxed whenever that of individuals was taxed. The constitution of Alabama, in *Mobile* v. *Stonewall Insurance Company,* 53 Ala., 70, declared that the provision was in itself self-executing, without the aid, in fact in restraint of, legislative power subjecting corporate property to the taxation imposed on individuals, and expressly declared, further, that if property of a particular kind is subjected to taxation and owned by a corporation, it must bear the rate of taxation imposed on individuals.

The constitution of California contains an identical provision, and in the case of *People* v. *McCrary,* decided at January term, 1868, the supreme court of California announced the same construction held in Iowa and Alabama, expressly overruling early decisions to the contrary, just as we do here. The constitutions of Arkansas and Florida contain similar

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provisions, and the supreme courts of those states announced the same construction which we here announce. When, therefore, sec. 13 of the constitution of 1869 was adopted in this state, it was written in the organic law of our land, bringing with it the same meaning precisely, under well-settled rules of construction, which it had in the state from which it came here; and the same construction was unanimously approved by the supreme court of the United States in four concurring decisions, rendered in November, 1883; March, 1885; April, 1893, and March, 1894, to wit: *Louisville, etc.*, v. *Palmes*, 109 U. S., 248-254; *St. Louis, etc.*, v. *Berry*, 113 U. S., 475; *Schurz* v. *Cook*, 148 U. S., 408; *Keokuk* v. *Missouri*, 152 U. S., 303, 304, 310-312.

In overruling this feature of the decision in *Mississippi Mills* v. *Cook*, therefore, we were announcing a rule of construction supported by four decisions of the United States supreme court and by the decisions of five state supreme courts, as against a rule of construction announced in no case in this union except *Mississippi Mills* v. *Cook*.

We have all proper respect for the doctrine of *stare decisis*, but it is a doctrine not inflexible and departed from over and over by the wisest courts in proper cases; and if the doctrine of *stare decisis* can be disregarded in proper cases, where the question is one merely of property rights between individuals, how much stronger is the reason for disregarding it when so to do results, as here, in merely restoring to a sovereign state the right to tax corporations and make them bear their just share of the burdens of that government whose protection they so constantly and persistently invoke. This distinction is not one of our invention. It is well settled in the law and it was voiced in words which we quote to approve by Chief Justice George, in *Lombard* v. *Lombard*, 57 Miss., 177, who said: "Speaking for myself alone, I would say that on constitutional questions, where the former decision refused a right reserved to individuals as against the power of the government,

or where it impaired the powers of the people or their representatives to prevent maladministration by their officers and agents, or sanctioned an alienation by the legislature of powers conferred for the public good, I should feel little hesitation in departing from it, when satisfied of its incorrectness."

And in *Beck* v. *Allen*, 58 Miss., 173, Judge George, delivering the opinion of the court, overruled two previous decisions on the same point, justifying departure from the rule of *stare decisis* by the very distinction here referred to, the case being one involving the taxing power. In concluding this ground of decision we repeat that it is wholly independent of the first ground of decision hereinbefore elaborated, and whether we are right or wrong in the view announced in this second ground, the exemption must be denied, looking to the first alone.

In our summary of the holdings in this case we said there were other views leading to the same conclusion which we might embrace in the opinion. We proceed to notice these. We come, now, to a third ground of decision, and that is this: that the exemption claimed here under said sec. 21 of the Mobile & Northwestern charter, whether applied to the property of the Natchez, Jackson & Columbus Railroad alone, or to the other property of the L., N. O. & T. R. R. Co., has been repealed by legislation, certainly since the code of 1892 went into effect. It was declared in the Lambert case (70 Miss., 787), through Judge Campbell, the author of the code of 1880, that, by the code of 1880, each railroad in this state was subjected to taxation. That code, therefore, repealed all railroad exemptions then existing. The Lambert case further held that by the act of 1884, p. 29, the exemption of the Natchez, Jackson & Columbus Railroad was restored, and that by the act of 1890, p. 12, if it then existed, it was continued. An examination of all the statutes on the subject (which are as follows: Code of 1880, §§ 596-606, inclusive, and §§ 607, 608; acts of 1886, sec. 6, p. 23; acts of 1888, p. 49;

acts of 1890, p. 12; code of 1892, §§ 3379, 3875, 3744), will show that the scheme propounded by the legislature was, up to the code of 1892, this: That railroad companies should pay *ad valorem* taxes, unless they should accept the conditional exemption provided in the privilege tax law in lieu of the *ad valorem* tax and manifest their acceptance of the law providing this conditional exemption from *ad valorem* taxation by putting such acceptance in writing and annually paying the privilege tax specified. The provisions of law respecting such conditional exemption from *ad valorem* taxation, by accepting the privilege tax imposed in lieu thereof and paying it, run side by side through all the legislation from the code of 1880 to the code of 1892. The scheme was that *ad valorem* taxes should be paid by all railroads in the state, but that any railroad should be exempt from such *ad valorem* taxes which would pay the privilege tax provided in the various acts, provided it manifested its acceptance of such exemption in writing and paid such privilege tax. As to the Natchez, Jackson & Columbus Railroad Company, the code of 1880, as shown, repealed its special exemption in its special charter by § 597 through § 606, and placed its conditional exemption from *ad valorem* taxation upon acceptance manifested in writing, and upon payment of the privilege tax thenceforward, under the general law of the state, thus withdrawing any right that railroad company had to claim a special exemption under this special charter; and whether it had an exemption from *ad valorem* taxes thenceforward was to be determined, not by reference to a special charter, but by reference to the general law on the subject of privilege taxes enacted from time to time. The act of 1884, in fixing the privilege taxes, did, however, restore, by recognition, to the Natchez, Jackson & Columbus Railroad Company the exemption of its charter, according to the opinion in the Lambert case. As the act of 1884 did not pretend to affect § 597 through § 606, of the code of 1880, in imposing *ad valorem* taxes, but only §§ 606-608, relating to

the privilege taxes, it is to our mind quite doubtful whether the act of 1884 did have the effect to restore the charter exemption; but conceding that it did, it is strange that the court, in the Lambert case, overlooked the act of 1886, sec. 6, p. 23, amending the privilege tax chapter, code of 1880, fixing the privilege taxes to be paid by each railroad in the state, and expressly declaring, "that hereafter said railroad companies shall pay privilege taxes, respectively, 25 per centum greater per mile than is fixed in said acts," without once alluding to any exemption of the Natchez, Jackson & Columbus Railroad, or any other railroad. Clearly, if the exemption of the Natchez, Jackson & Columbus Railroad Company was restored by the act of 1884, it was repealed by said act of 1886, and was not in existence from that time until the act of 1890 was passed. The act of 1890, p. 12, amended the act of 1884 and then re-enacted it as amended. This seems to have been an ingenious effort on the part of some one who knew that the act of 1886 had repealed the exemption of the Natchez, Jackson & Columbus Railroad Company, recognized in the act of 1884, to again restore it by an effort to repeal the act of 1886, without disclosing the fact or referring to the act of 1886. But the holding in the Lambert case is that the act of 1890 continued the exemption, if it existed; and since it is clearly shown that no exemption existed when the act of 1890 was passed, there was no exemption to be continued, and the act of 1890, under the rules of construction with reference to taxation most certainly cannot be held to have created then anew such exemption. It follows from this that when the constitution of 1890 was adopted the Natchez, Jackson & Columbus Railroad had no exemption, and consequently sec. 181 of the constitution had no effect to continue the exemption, which was not then in existence. When the code of 1892 was adopted, the legislature, carrying out the mandate of the constitution of 1890, paragraph 90 (*h*), expressly provided in § 3379 that the privilege tax should be imposed on all railroads, without a suggestion

of any exemption to any, and this code was a revision of all general laws on the subject and wholly omitted all the provisions of the acts of 1884 and 1890 in respect to exemptions. The scheme of the taxation up to the code of 1892 was that railroad companies might escape *ad valorem* taxation by accepting the provisions of the law as to privilege taxes, in writing, and paying the same. The scheme of taxation under the code of 1892 changed all this and repealed all former exemptions of all railroads from taxation by said § 3379 and said § 3875. A consideration showing that this was the purpose of the legislature is the smallness of the privilege tax under § 3379, no longer in lieu of *ad valorem* taxes as compared with its amount under former laws. The code of 1892 provides for the exemption of all property, which is to be exempted, in § 3744, and railroads are not mentioned in that section. The provision of that section is as follows: "The following property, and no other, shall be exempt from taxation," which declaration is as positive and emphatic an exclusion of all railroad exemptions as language can furnish. But not only did § 3379 of said code impose privilege taxes, but § 3875 imposed *ad valorem* taxes. By that section every railroad company in the state, without exception, was required to return all its property, within and without this state, with its value, so that the assessors might know what value should be the basis of state, county, and municipal taxation, and the section further declares as to railroads, that all of its property, real and personal, taxable and nontaxable, shall be included. The word "nontaxable" in this connection does not mean exempt property, but property like government bonds, that are not taxable at all, and this is made plain by the provision at the close of the section "that if the said property is claimed to be exempt from taxation, it shall be separately stated and the law cited under which the claim is made." In other words, they were to return three classes of property: taxable property, nontaxable property—that is, property that

could not be taxed in its nature—and exempt property, if any, citing the law for the exemption. The word "nontaxable." therefore, creates no exemption and does not describe exempt property, which is otherwise provided for, but means merely, as stated, property like government bonds, that cannot be taxed at all. So that we hold that certainly since the code of 1892 went into effect, and, as we think, since the act of 1886, the exemptions set up by the railroad company in this case were repealed by the legislature, and on this ground, independently of any other ground heretofore set out, the exemptions must be denied.

4. Counsel for the state revenue agent presents another very ingenious view, to this effect: that sec. 21 of the Mobile & Northwestern charter was plainly prospective and intended to carry the benefit of the exemption therein provided only to a company which should build a railroad after the grant to it of the exemption. We think it is entirely clear that said provision was prospective, and that the consideration to the state for the grant of the exemption was that recited in the act, to wit: "The construction of the railroads provided for therein, and the great benefit which the state would receive in the development of its agricultural resources by means of said railroads as works of internal improvement, and also the increased value which would thereby be added to the property of the state, thus enabling the state to greatly increase its revenue without burdensome taxation upon the people." That was the consideration to the state; that clearly was the reason and object of the statute. So far we agree with counsel. Counsel's argument then proceeds to claim that the act of March 3, 1882, authorized the Memphis & Vicksburg Railroad Company and Mississippi Valley & Ship Island Railroad Company to consolidate, and that the object was to construct a railroad from Memphis, through Vicksburg, to Ship Island, a scheme well known to be dearly cherished by the people of Mississippi for years back. Coun-

sel then proceeds to claim that sec. 1 of the act of March 3, 1882, in providing that the consolidated company should have all the rights, property, immunities, etc., now possessed by the companies which may enter into such consolidation, merely meant such rights, etc., as belonged to the companies existent at the date of the passage of the act; that as the Baton Rouge Railroad Company was not chartered until March 9, 1882, it was not contemplated that that company should be a constituent member of the consolidation, and that sec. 5 of the acts of 1882, p. 1015, was meant by the legislature to extend the exemption of said sec. 21 to such road only as the consolidated company—the L., N. O. & T. R. R. Co.—might build after it came into existence; and that as said company did not come into existence until after the road from Memphis to New Orleans was completed, it is a perversion of the spirit and purpose of the legislature to allow the L., N. O. & T. R. R. Co. to blanket this exemption over a road which was never built by it, and in the construction of which it incurred no indebtedness. This is certainly very persuasive, but we do not now decide whether it is a correct contention or not. Another contention of counsel for the revenue agent worthy of serious consideration is this: that, taking the charter of the Baton Rouge Company and the Memphis & Vicksburg Company as written into the charter of the L., N. O. & T. Co., as part thereof, the legislation of the state shows that it was the purpose of the legislature to extend this exemption of sec. 21 to the company created by the first consolidation, the L., N. O. & T. R. R. Co., but to exclude it from the present Y. & M. V. R. R. Co., the result of the second consolidation. Counsel's argument on this point is about as follows: That conceding that the first section of the act of March 3, 1882—the L., N. O. & T. charter—contained the word "immunity," and that by virtue thereof the exemption of the said sec. 21 passed to the L., N. O. & T. R. R. Co., the only authority for any future consolidation of the said L., N. O. & T. R. R.

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Co. with the Y. & M. V. R. R. Co. is to be found in sec. 16 of the Baton Rouge charter and sec. 25 of the Memphis & Vicksburg charter, and that in both these sections the legislature intentionally omitted the word "immunity," and any other words equivalent thereto, and that this omission conclusively shows that it was the purpose of the legislature to limit the existence of the exemption provided by said sec. 21 to the L., N. O. & T. R. R. Co., the result of the consolidation of the Memphis & Vicksburg Railroad Company and the Baton Rouge Railroad Company, only so long as it retained its existence as the said L., N. O. & T. R. R. Co., and not indefinitely to pass this exemption along to all future consolidations. Counsel has so succinctly stated the facts on this subject that we cannot do better than to quote that part of his brief, which is as follows:

"All of these sections, thus put in the same charter, demonstrate that it was the purpose of the legislature to pass the exemption into the L., N. O. & T. under the wird 'immunities,' but to withhold it from any future consolidation by omitting the word 'immunities' in said secs. 16 and 25, and by using therein no words to indicate the intention of passing the exemption to any future consolidation. But, in this connection, the court will bear in mind that the act of 1890, as to the sale of the N., J. & C. R. R., on which the Lambert case is based, used the word 'immunities,' as elsewhere shown. When the legislature passed the act of March 3, 1882, the L., N. O. & T. charter, it necessarily had in mind the provisions of the charters of the M. & V. Co. and the Mississippi Valley & Ship Island Company, because both of these companies are mentioned in the very beginning of the act, and it was passed for their express benefit; and the legislature made these charters necessary parts of the act, because, by its terms, it could not be made effectual without the charters of said consolidated company be taken and held to be parts of this act. . . . Said M. V. & S. I. R. R. Co. was incorporated in 1871

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(Acts of 1871, p. 237), as the Vicksburg, Pensacola & Ship Island Railroad Company. In 1873 its name was changed to M. V. & S. I. R. R. Co. Acts of 1873, p. 562. The fifteenth section of the original charter of this company gave the power of consolidation (Acts of 1871, p. 247), but omits the word 'immunities,' and gives no power to vest in the consolidated company the exemption from taxation contained in sec. 21 of the charter. Besides the amendatory act of 1873, which vested this exemption from taxation in the charter as amended, uses the word 'immunities' in sec. 1, p. 562, acts of 1873. The charter of the Y. & M. V. Co. uses the word 'immunities' to embrace exemption from taxation. Acts of 1881, p. 843, sec. 5. The amendment of the Y. & M. V. Co. charter (Acts of 1884, sec. 3, p. 985) uses the word 'immunities' for the same purpose. The amendment of the L., N. O. & T. charter (Acts of 1884, p. 936) uses the word 'immunities' for the same purpose. All these things were in the mind of the legislature as parts of said act of March 3, 1882, and show they used the word 'immunities' advisedly, and did not intend that any exemption should pass into any future consolidation, after the formation of the L., N. O. & T., and this sec. 15 of the M. & V. & S. I. R. R. Co. expressly provided that any consolidation should form one company and have a joint common stock."

Certainly the significance counsel seeks to have attached to the omission of the word "immunity," in the act referred to, seems fully borne out by the opinion of Mr. Justice Peckham in *Phoenix Ins. Co.* v. *Tennessee*, 161 U. S., 177; but we decline now to pass definitely upon this contention. There is also much force in another view presented by counsel for the revenue agent to the effect that since 1888 the proof in the record shows that the railroad company had been able to declare and pay the annual dividend of eight per centum upon even its fictitious capital stock over and above its fixed charges on the proper construction debt. But to go into this would protract this

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opinion beyond anything necessary for present decision. There is a rather curious proposition of counsel for the railroad companies in his brief at page 118 et seq. The argument is that what was provided by the twenty-first section of the Northwestern charter was not an ordinary exemption at all, although counsel admits that the Lambert case expressly so decided, but that it was a contract of appropriation irrepealable in its nature, and not an exemption at all. If counsel's contention as to this is sound, then it is perfectly plain that the claim of rule of property and vested right under former decisions of this court falls at once to the ground; for no one will contend that this court has ever treated the said twenty-first section as an appropriation by contract irrepealable in its nature. Counsel's construction is therefore utterly inconsistent with the reiterated claim that the view we take is trenching upon any rule of property laid down in any previous decision rendered by this court. This is the first time that such a construction was ever presented to this court or asserted in any form.

Finally, all the judges concur that because of the inconsistent compromise verdict, the judgment must be reversed both on appeal and the cross appeal.

The judgment is reversed, both on appeal and the cross appeal, and verdict set aside, and the cause remanded for a new trial.

WOODS, C. J., dissented as to so much of the decision as overruled *Mississippi Mills* v. *Cook*, 56 Miss., 40, and *Railroad Co.* v. *Lambert*, 70 *Ib.*, 779.

Upon the filing of the opinion outlined by the summary, on the 22d day of November, the defendants moved to strike the opinion from the files on the ground that it was filed too late; that it was not such an opinion as the statute contemplated to be filed, the cause having been remanded and having been reheard in the court below, under the "summary of hold-

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ings," and a second appeal taken before the filing thereof; and, on the further ground that said opinion presented new grounds of decision, which were not implicated by the said "summary of holdings," on which the second judgment of the court had been based.

The motion was overruled, the court delivering the opinion which follows the briefs of counsel.

The brief of *Messrs. Mayes & Harris,* in support of the motion cannot be found by the reporter after diligent search.

Critz & Beckett, contra.

We do not think this motion is germane to this case, or that this court has any jurisdiction to entertain such a motion. This case, No. 8629, as a case, was decided on June 20, 1898. It was then reversed and remanded, and this court adjourned for the term on July 1, 1898, and thenceforward lost all jurisdiction of this case.

It was the judgment of this court reversing and remanding the cause which reinvested the lower court with jurisdiction to proceed, and the mandate was at most simply an official notification. *Foster* v. *Jordan,* 54 Miss., 510.

We think the court or the judges have a right to correct their opinions at any time. It is a mere matter of taste and accuracy; and even if new grounds are added, they cannot prejudice either party in that case, for the simple reason that the judgment remains the same, and that is all that the litigants are concerned with or have a right to demand or require. If any objection can be made, it is not in that case, but in some other case in which the new decision or finding is attempted to be used, when it might be claimed that it could not be used as *res adjudicata,* because the party has not been heard on it, and has not had his day in court.

There is a second appeal pending in this litigation, but not in this case, and when that appeal comes on to be heard, then

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it will be in order to claim that any new ground in the opinion in this case, inserted after the trial in the lower court, shall not be used on that appeal, except as an original proposition, and on its merits, as applicable to the second appeal, and not by virtue of the fact that it appears in the corrected opinion. If it is a new ground, the defendants may have a right to be heard on it, as if it had not been passed on, but we fail to see the propriety of starting up a fresh litigation with the court about the language in which its opinion is expressed, when its decision, one way or the other, could not have the least effect on the case decided.

We think an *amicus curiae*, or any outsider, would have as much legal interest in the result of such a motion, and as much right to make it, as the defendants.

J. A. P. Campbell, contra.

This motion is without precedent or merit, and is a direct attack on the right of the judges and on the power and dignity of the court. No law prescribes when an opinion shall be delivered. The only provision is that, in certain cases, the opinion shall be in writing, stating the reasons upon which the decision is made. All else is left to the court. Another and distinct provision is that a copy of the opinion, in cases remanded, shall be certified to the court below. The sole purpose of this is to inform the lower court of the ground on which its judgment or decree was set aside, and to make the cost of the opinion a part of the taxable costs of the case, but for which information of the reason for reversal would have to be ascertained by other means. These are mere matters of practice, in no way affecting jurisdiction or the validity of proceedings or judgments. Were the supreme court to reverse and remand without giving an opinion in writing, or with a mere statement that the judgment or decree was found to be erroneous, the validity of the reversal and consequent proceedings would be unquestionable. Were the court below to proceed with a

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case remanded, in which the most elaborate opinion was written, without having a copy of the opinion, no objection could be sustained for that. The matter of opinions must, from necessity, be left to the discretion and control of the court as mere matter of practice, the statutes directing certain things, but not making validity to depend on their being done. Usually the opinion precedes and directs the decision, but the validity of the decision does not depend on the opinion. The opinion might be ever so erroneous and indefensible, but that would not affect the validity of the decision. They are quite independent of each other as to this. It is not uncommon to enter the decision, and deliver the opinion afterwards at leisure, and no law prohibits this or is contravened by it. It is within the control of the court, and hitherto unquestioned.

The motion does not accurately state the case. There was an opinion in writing stating the reasons for the decision, before it was made, and this opinion stated "there are other views leading to the same conclusion which we may embrace in the opinion yet to be filed." Thus the law requiring an opinion was complied with, and, with the several reasons given in it, there was notice of more to follow in a more elaborate opinion thereafter given.

The complaint is that the after opinion "announces decisions on points of law alleged to be controlling in this case additional to and different from any decision announced in the abstract (summary) of June 26, 1898, and certified to the court below with the mandate as the opinion of this court." If this be true, it affords no ground for complaint. A comparison of the opinion (summary) which preceded the decision and the more elaborate opinion subsequently delivered, will show that the latter is but an amplification of the views of the judges in sustaining their conclusions formulated in the former, only an extension of the argument, with some additional views reinforcing it. The summary held that "because of the incon-

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sistent compromise verdict, the judgment is reversed and cause remanded on the appeal and cross appeal."

2. Disposed of the claim of *res adjudicata.*

3. Held that there was consolidation by the companies, and a loss of exemption from taxes, by virtue of sec. 180 of the constitution of 1890.

4. That sec. 21 of the Mobile & Northwestern Railroad Company charter, relied on, was in violation of the constitution of 1869, and therefore void.

5. That *Mississippi Mills* v. *Cook* and the Lambert case were unsound and overruled.

There is little else in the latter opinion, which reaffirms the above propositions, and whatever added reasons may be in it are surely covered by the announcement of the "other views" indicated by the summary as probably forthcoming.

Apart from the undoubted right of the court to deliver its views when and in what form it pleases, what harm has been done, and what right has a litigant to complain? What can be gained were the motion sustained? The object in making it is transparent, but it is not perceived how the mover would be advantaged by its being sustained. The summary or first opinion is quite sufficient. It shows sufficient reasons for the decision, and that consolidation caused loss of exemption by sec. 180 of the constitution of 1890. This is strictly a question for this court to decide finally, and with which the supreme court of the United States can have nothing to do. This is a distinct and independent ground of the decision, supporting it and placing it beyond federal interference; and if all else was stricken from the summary, and if the latter opinion was withdrawn, or this motion sustained, the decision would be unassailable. Can it be that the mover hopes to keep the elaborated opinion from being considered by the supreme court of the United States? The effort made by this motion will insure its consideration by that court, if the case shall ever get before it. It is apparent that the object is to inject into the

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case a federal question, as is shown by the second ground of the motion, which is that the fourteenth amendment of the constitution of the United States was violated by what occurred. How, is not discoverable.

Wherein the trial of the remanded cause by the circuit court, and rendition of judgment against the appellants without the benefit of the full opinion recently given, was "without due process of law," is a profound mystery. The summary cut the defense up by the roots, and that there were other reasons for the decision was immaterial. One is enough, and addition made no difference. If there had been no opinion by this court, and the circuit court, groping in the dark, had ruled in accordance with the views of this court, all would have been well, and the judgment would have been unaffected by that.

The law requiring opinions in writing is simply advisory. It is not obligatory. *Houston* v. *Williams,* 13 Cal., 27, announces the true view, and fully vindicates the action of this court in this case. I cannot add anything to its vigorous presentation, and rest the resistance of the motion on it.

A new definition of "due process of law" will have to be framed to warrant the granting of this motion.

WHITFIELD, J., delivered the opinion of the court.

Sec. 4352 and § 4381 of the code of 1892 were fully complied with by the summary of holdings handed down in June last, certified to and used in the circuit court on the trial of the case after it was remanded. Every reason for decision contained in that summary is also set out in the opinion filed recently, insisted on, and enforced. 24 South., 200. The court has receded from no position in that summary announced. It has added one new reason, and one only, for the decision: That the exemption was repealed by legislation, to wit, the act of 1886, and the provisions of the code of 1892. With this single exception, the reasons given for the decision in the summary are identical with the reasons given in the opinion now

on file; and it is too plain for argument that, had the new reason for decision now set out in the opinion been also set out in the summary, the circuit court would merely have had one more reason for sustaining the action it took. The railroad companies were not, and could not possibly have been, prejudiced by the fact that the summary did not contain this additional reason. Nor is it now, nor can it be, prejudiced by the fact that the opinion does not contain this one additional reason for our decision.

Other views of counsel are adverted to in the opinion, but it is distinctly declared that as to them we decide nothing—not adopting them in anywise as reasons for decision. Moreover, we distinctly stated in the summary: "There are other views, leading to the same conclusion, which we may embrace in the opinion yet to be filed. What we have said is a mere summary of the holdings set forth." And at the last term of this court a motion was made to have a fuller opinion handed down then, before the trial in the circuit court, based on § 4352, code 1892, which we overruled on the ground that the summary was a sufficient compliance with that section, and should stand as the opinion of the court for the time being. The argument made then, and repeated now, as to this, was that the law requires the opinion to accompany the mandate, and that the court below could not proceed without both. This point was disposed of adversely to this contention in *Foster* v. *Jordon,* 54 Miss., 510, the court saying: "This is an erroneous conception of the province of the mandate. It is the judgment of this court reversing and remanding a case which gives the lower court authority to enter upon a new trial." And the opinion of this court is not more necessary to the jurisdiction of the circuit court than the mandate. Both are mere matters of practice. Beyond this, the scope of the motion is to assert the proposition that this court has not the power, after the trial of a remanded cause, in any way to revise, add to, or take from the mere reasons for its decision, even though the reason added or taken

away in nowise affected the party losing in the lower court prejudicially. That, precisely and exactly, is the proposition asserted. It is hardly necessary to say that this wholly novel and extraordinary proposition is untenable. This court, of equal and co-ordinate dignity with the legislative and executive departments in matters judicial, "uttering the voice and registering the will of the state," is reduced to no such pitiable plight. The very question here presented has been settled by authority over and over again.

In *Houston* v. *Williams*, 13 Cal., 24, Mr. Justice Field, afterwards on the supreme bench of the United States, says, for a unanimous court, after citing the statute there relied on, which provided that "all decisions given upon an appeal . . . shall be given in writing, with the reasons therefor, and filed with the clerk of the court:" "It will not be impertinent to say a few words as to the control of the court over its opinions and records. There are some misapprehensions on the subject, arising chiefly from a confusion of terms, and from a misconception of the relations of the different departments of government to each other, and the entire independence in its line of duties of the judiciary. The terms 'opinions' and 'decisions' are often confounded, yet there is a wide difference between them, and in ignorance of this, or by overlooking it, what has been a mere revision of an opinion has sometimes been regarded as a mutilation of a record. A decision of a court is its judgment. The opinion is the reason given for that judgment. The former is entered on record immediately upon its rendition, and can only be changed through a regular application to the court upon a petition for rehearing or a modification. The latter is the property of the judges, subject to their revision, correction and modification in any particular deemed advisable, until, with the approbation of the writer, it is transcribed in the records. . . . All these errors, whether in language, form or substance, should be corrected before a publication is permitted as an authoritative exposition of the law, and as such binding upon

the court. In no civilized state, except California, has the existence of this power ever been doubted. Every judge, from the chief justice of the supreme court of the United States down, claims and exercises without question the right of revision, including thereby modification and partial suppression of his opinions. . . . When the opinions have been revised, and finally approved and recorded, then they cease to be the subject of change." There has been no suppression here. The majority of the court have receded from no position announced in the summary, but positively affirm every one of them in the opinion. And that this is so, we here make part of this opinion that summary, in its entirety, so that a comparison of it with the opinion now on file may show the facts as they are. That summary is as follows:

"SUMMARY OF THE COURT'S HOLDINGS.

"WHITFIELD, J. 1. Because of the inconsistent compromise verdict, the judgment is reversed, and cause remanded, on the appeal and the cross appeal.

"2. The Lambert case, 70 Miss., 779, 13 South., 33, is *res adjudicata* as to the taxes for the year 1892 on all the property that originally belonged to the Natchez, Jackson & Columbus Railroad Company, which was in Adams county; and, being *res adjudicata*, it is, as to that, beyond our power to overrule it.

"3. The Lambert case is not *res adjudicata* as to any of the other taxes here involved, on the property that once belonged to the Natchez, Jackson & Columbus Railroad Company, or on any of the other property here involved.

"4. The Lambert case did decide that sec. 180 of the constitution of 1890 did not cut off the exemption from taxation asserted in this case, on the ground that this is a case of mere merger, and not of consolidation; that the resultant corporation was not a new corporation, and applied the principles of *Tennessee* v. *Whitworth*, 117 U. S., 139 (6 Sup. Ct., 649), which is, beyond all controversy, a clear case of simple merger, and

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not of consolidation. Taking 'merger,' proper, to mean the absorption of one corporation by another, the autonomy of the absorbing corporation being preserved, without the formation of a new company, and 'consolidation,' proper, to mean such union of two corporations as results in a third new corporation, under whatever name, we hold that the clear legislative purpose was (using the words in the sense indicated) consolidation, and not merger, yet consolidation in such sense as to result in the formation of a new corporation, and, besides, that what was actually done here was necessarily the creation of a new corporation, and not mere merger; that, hence, the principles of the Whitworth case do not apply, but the principles of *Keokuk, etc., Railroad Co.* v. *Missouri,* 152 U. S., 301 (14 Sup. Ct., 592), do apply; that, consequently, the constitution of 1890, sec. 180, cut off the exemption; that the Lambert case cannot be upheld, and should be, and is hereby, overruled. If it be conceded that the purpose aimed at by the articles of agreement of the railroad company was mere merger, it is not to be permitted that the company could overthrow the purpose of the legislature to authorize consolidation, and not merger, nor to name that 'merger' which the actual things done show was consolidation. Consolidation is a privilege, to be exercised or not, not a contract. Section 181 of the constitution, and sec. 279 of the schedule thereto, merely mean that corporations existing at the adoption of the constitution, having then exemptions or other 'rights,' should have them 'continue' so long as such corporations retained the precise corporate existence they then had. The new corporation here takes its life, as from a new grant of corporate life, from the date of the consolidation.

"But we hold, further, that the twenty-first section of the Mobile & Northwestern Railroad Company's charter was an effort to secure, as is expressly recited in its face, an irrepealable grant of exemption, and violative of the constitution of 1869, art. 12, sec. 13, and art. 12, sec. 20, even as construed in *Mississippi Mills* v. *Cook,* 56 Miss., 40. The exemption

claimed in *Mississippi Mills* v. *Cook* had no irrepealable feature.

"But, again, we hold that such section violated said clauses of said constitution, even had it not been irrepealable. *Mississippi Mills* v. *Cook* turned upon some supposed magical distinction, in the particular connection, between the words 'subject' and 'subjected,' and sacrificed a great constitutional principle to a piece of mere verbal jugglery. Precisely the same clause, using precisely the same word, 'subject,' occurs in the constitution of Florida and Arkansas; and the supreme courts of both states held, in precisely identical contention, that the clause forbade exemption from taxation of 'corporations for pecuniary profit,' and both of these decisions were on this identical proposition affirmed by the United States supreme court. *Railway Co.* v. *Berry*, 41 Ark., 509; *Id.*, 113 U. S., 475 (5 Sup. Ct., 529); *Palmes* v. *Louisville, etc., Railroad Co.*, 19 Fla., 231; *Id.*, 109 U. S., 253, 254 (3 Sup. Ct., 193). And this construction is reaffirmed in *Keokuk, etc., Railroad Co.* v. *Missouri*, 152 U. S., 310, 311 (14 Sup. Ct., 592). The word 'subject' should have been given its plain, popular signification, occurring in the connection it did, in a great popular instrument, the constitution, the very signification attached to it by the supreme court of the United States. We prefer to align ourselves now with that court in this matter, and overrule *Mississippi Mills* v. *Cook* on that point. It passes all understanding how the court could gravely hold, in *Mississippi Mills* v. *Cook*, that a solemn declaration in the constitution of a state, its organic law, formulating fundamentally great lines of public policy, that 'the property of all corporations for pecuniary profit' should be subject to taxation the same as that of individuals, added no new feature, but merely stated what was the law before, and without the declaration, to wit, that the 'property of corporations for pecuniary profit' was liable to taxation. All the world knew that before!

"Judge Campbell, in his dissenting opinion in *Beck* v. *Allen*,

58 Miss., at page 177, most wisely said: 'Subtlety and refinement and astuteness are not admissible to explain away an expression of the sovereign will. The framers of the constitution, and the people who adopted it, must be understood to have intended the words employed in that sense most likely to arise from them on first reading them.' Doubtless the rule of *stare decisis* is a wise rule, and one not lightly to be infringed. But instances justifying its disregard find manifold illustration in the reports. And, surely, stronger reasons for not applying it can never arise than where, as here, to disregard it restores to the sovereign the exercise of one of the highest attributes of sovereignty, the taxing power, and merely requires that corporations for pecuniary profit, constantly demanding and securing the protection of the government, shall also bear their just share of the burdens of taxation. We feel, therefore, confident of the propriety of overruling, as we now expressly do, the Lambert case and the case of *Mississippi Mills* v. *Cook*, supra. There are other views, leading to the same conclusion, which we may embrace in the opinion yet to be filed. What we have said is a mere summary of the holdings set forth.

"Reversed and remanded."

But the California case is not the only authority. In the appendix to 131 U. S., at page 18, it is said: "Judges frequently correct their opinions in the hands of a reporter after a printed copy has been filed with the clerk. . . ." If one curious in such things would know how far back this corrective practice has existed, let him look as far back as the seventh volume of Cranch (1st ed.), where he will find corrections made by Mr. Justice Story in the opinion of the court delivered by him in *Barnitz's Lessee* v. *Casey*, 7 Cranch, at page 456. In later editions the changes are incorporated in the text. We have examined this first edition, and it is there stated on the page following the table of cases cited in that volume, as follows: "Since this volume was printed, Mr. Justice Story has

requested that the following corrections and additions should be made in the opinion delivered by him." So that illustrious judge actually corrected and added to his opinion in 7 Cranch after the official volume of reports had been published. So far as due "process of law is concerned," it is too obvious for discussion that it cannot be involved in mere matters of practice of the courts. We conclude with these words of Judge Field in the case cited: "The power over our opinions and the records of this court we shall exercise at all times, while we have the honor to sit on the bench, against all encroachments from any source, but in a manner, we trust, befitting the highest tribunal in the state." *The motion is denied.*

STATEMENT OF SECOND APPEAL.

The mandate of the supreme court, pursuant to said summary, was promptly issued to the circuit court of Hinds county, which was then in session. Thereupon two other suits for taxes assessed against the same property for the years 1896 and 1897, respectively, which suits had been brought against the same defendants in the meanwhile, were consolidated with the principal case. Defendants then objected to the taking of any steps in the cause at the June term, 1898, first, for the reason that the supreme court had not yet delivered its opinion in the cause, as required by § 4352, code 1892; nor, secondly, had said opinion been certified with the mandate to the court below, as required by § 4381, code 1892, the "summary of holdings" in these respects not being a fulfillment of the law. These objections were overruled. Defendants then applied for a removal of the cause to the United States court, on the ground that the recent holdings of the supreme court overruling the Mississippi Mills case and the Lambert case, had for the first time introduced into the cause federal questions, and, therefore, for the first time the cause has become removable. The application was denied. Defendants then applied for a continuance of the cause for reasons assigned. The continuance was

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refused. Defendants then filed certain pleas to meet the new aspects of the case imported into it, as they claimed, by the recent decision of the supreme court, which pleas were, on motion of the plaintiff, stricken out. Defendants then withdrew the pleas previously filed by them, and refused to plead further, and judgment *nil dicit* was entered for the taxes from 1892 to 1897, inclusive, from which judgment the defendants took an appeal to the supreme court.

The reporter has been unable, after diligent search, to find the briefs of *Messrs. Mayes & Harris,* and *Cooper & Waddell,* for the appellant, and *J. A. P. Campbell,* for the appellee, on second appeal.

Critz & Beckett, for appellee.

Since the defendants withdrew all their pleas on file, and permitted judgment *nil dicit* to go against them, it is evident that the matters involved in this appeal are reduced to mere matters of practice. These questions are four, viz.: (1) The jurisdiction of the circuit court commencing its term on June 20, 1898, to try a case reversed and remanded to it on that day, the mandate being filed on July 4, 1898, and the case being reached and called for trial the same day; (2) the refusal to transfer to the federal court; (3) the refusal to continue; (4) striking out the additional pleas.

1. Some of the states have express statutes making causes triable at the next term after reversal, and some have statutes requiring a new notice of trial to be given, but ours has neither, and in the absence of such, the lower court has authority to proceed immediately. *St. L. & M. S. Ry. Co.* v. *Sweet,* 60 Ark., 550; *In re Courts,* 100 Cal., 402, 403; *Baker* v. *Baker,* 87 Ky., 461; *Atkinson* v. *Dixon,* 96 Mo., 581, 582; *Schuman* v. *Helburg,* 62 Ill. App., 218; *Ogden* v. *Bosse* (Tex. Civ. App.), 23 S. W., 730; 13 Ency. Pldg. and Pr., 855, note 1; 6 Am. & Eng. Enc. L., 835, note 2.

Our statute provides that "an action shall, for all purposes,

be considered to have been commenced and to be pending from the time of filing the declaration," etc. Code of 1892, § 670.

The mandate is the official notification to the lower court of authority to proceed. It was filed before the case was called, but even the mandate is not necessary to confer jurisdiction. It is the judgment of the supreme court reversing the case that confers the jurisdiction on the lower court. *Foster* v. *Jordan*, 54 Miss., 509.

The only argument the defendants could use was that § 635 of the code required the clerk, before each term of the court, to set the trial cases, but this section itself refers to a decision of *Tift* v. *Virden*, 11 Smed. & M., 153, 163, which says it does not apply to exceptional cases, or those triable at the first term, and this case is not only triable at the return term under § 4194, but is entitled to precedence, and hence is not affected by the setting of the docket.

2. The refusal to transfer to the federal court was clearly proper, for two reasons:

First, the plaintiff is not claiming any right under the federal constitution, and it cannot be raised by the defendants in any proceedings for removal. *Tennessee* v. *Union & Planter's Bank*, 152 U. S., 454; *Chappell* v. *Waterworth*, 155 U. S., 102; *Postal Tel. Co.* v. *Alabama*, 155 U. S., 487; *East Lake* v. *Brown*, 155 U. S., 488; *Mex. Nat. R. R. Co.* v. *Davidson*, 157 U. S., 208; *Oregon* v. *Skottowe*, 162 U. S., 490; *Walker* v. *Collins*, 167 U. S., 57; *Galveston* v. *Texas*, 170 U. S., 226.

Second, the application was made too late, because made after the appearance term. U. S. Stat. at Large, 1887–1889, vol. 25, pp. 433–435; *Fox* v. *So. Ry. Co.*, 80 Fed. R., 945; 1 Desty Fed. Pro., sec. 96, and note; *Howard* v. *So. Ry. Co.* (N. C.), 29 S. E., 778, 781; 138 U. S., 303; 142 U. S., 439; 151 U. S., 673.

It is the same old story related by Mr. Justice Brewer: "They have gone through the state trial and appellate courts, and their rights have been finally declared by the supreme court of

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the state, and though as yet no formal decree has been entered in the trial court, it is none the less true that they have experimented with the state courts and been beaten, and now seek a different forum." *Rosenthal* v. *Coates,* 148 U. S., 147, 148.

3. The continuance was properly refused. The principles of the case had been finally settled by the supreme court, and that decision was conclusive both in the lower court and on any subsequent appeal to this court. George's Digest, pp. 387, 388, sec. 183.

The continuance was asked on account of the absence of leading counsel. The record shows that he was not the leading counsel, but that Mr. Mayes, who was present, was, and no one will contend that this case could have been more faithfully attended to by anyone else. But the absence of "favorite counsel" is not ground for continuance. "It must further appear that there were probable merits which sustained prejudice in consequence of the absence of the particular counsel relied on." A case very much like this is *Garnett* v. *Kirkman,* 41 Miss., 97–99. See also *Tierney* v. *Duffy,* 59 Miss., 364; *Means* v. *Bank of Randall,* 146 U. S., 620, 629; *McGuire* v. *Commonwealth,* 3 Wall., 382.

4. There were four substantive grounds of the motion to strike out the additional pleas, viz.: (1) Because improperly filed; (2) the same defenses could be set up under the pleas already on file; (3) they were no defense; (4) they were vague, uncertain, etc.

(1) They were filed without leave of the court. In such a case pleas will be stricken out on motion. *Pool* v. *Hill,* 44 Miss., 306; *Wright* v. *Alexander,* 11 Smed. & M., 411; *O'Conley* v. *Natchez,* 1 Smed. & M., 31; *Peters* v. *Finney,* 12 Smed. & M., 449; *Hartford Ins. Co.* v. *Green,* 52 Miss., 338, 339; *McAdory* v. *Turner,* 56 Miss., 666; *Hunt* v. *Walker,* 40 Miss., 590; *Higdon* v. *Vaughn,* 58 Miss., 577; *Lewis* v. *Black,* 5 C., 425; *Shropshire* v. *Probate Judge,* 4 H., 142.

A refusal to strike out is equivalent to leave to file, but the striking out cannot be assigned for error. The remedy in such case is to ask for leave to file after they are stricken out, which was not done. *Pfeifer* v. *Chamberlain*, 52 Miss., 91.

(2) The same defenses could be set up under the pleas already on file. They had in fact been set up in the former pleas and in the suggestion of errors, and had all been overruled by the supreme court, and this was simply an attempt to plead before the circuit court that the decision of the supreme court, which was made in the same case, and for the direction of the circuit court, was revolutionary, and should not be regarded, and it is eminently proper to strike out such pleas. *Lane* v. *Seitsinger*, 104 Iowa, 485, 486.

(3) Everything attempted to be set up in these pleas had been fully heard and settled by the supreme court on the regular hearing, and in considering the suggestion of errors, and was *res adjudicata*, and not open to further question in this particular case. This is the settled law both in this court and in the supreme court of the United States. *McDonald* v. *Green*, 13 Smed. & M., 138, 445; *Bridgeforth* v. *Gray*, 10 G., 136; *Stewart* v. *Stebbins*, 1 G., 66; *Smith* v. *Elder*, 14 Smed. & M., 100; *Henderson* v. *Winchester*, 2 G., 290; *Chaffin* v. *Taylor*, 116 U. S., 567; *Clark* v. *Keith*, 106 U. S., 464; *The Lady Pike*, 96 U. S., 461; *Supervisors* v. *Kennicut*, 94 U. S., 498; *Norman* v. *Bradley*, 12 Wall., 121; *Roberts* v. *Cooper*, 20 How., 467; *Seizer* v. *Many*, 16 How., 98; *Sibald* v. *United States*, 12 Pet., 448; *Great Western, etc.*, v. *Burnham*, 162 U. S., 343, 344; see also 117 Ind., 27, 28.

It is perfectly apparent that the defendants are no longer willing to abide by what this court may say, but that this is an attempt now to fix up a record for the supreme court of the United States. A federal question cannot be raised in the arguments or briefs of counsel. *Layward* v. *Denny*, 158 U. S., 183, 184; *Zadig* v. *Baldwin*, 166 U. S., 485.

None was attempted to be raised in this case till the sugges-

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tion of errors, and the supreme court of the United States have always held that to be too late. *Pim* v. *St. Louis,* 165 U. S., 273; *Layward* v. *Denny,* 158 U. S., 180; *Bushnell* v. *Crooke,* 148 U. S., 682; *Loeber* v. *Schroeder,* 149 U. S., 580; *Schuyler* v. *Bolling,* 150 U. S., 85; *Powell* v. *Brunswick Co.,* 150 U. S., 433.

Hence, we insist that there is no rule of law, or of the United States, which requires this court at this late day to take cognizance of any federal question attempted thus to be raised out of the regular order of pleading and practice. See also *Mexican, etc., R. R. Co.* v. *Pinckney,* 149 U. S., 194; *Stevens* v. *Nichols,* 157 U. S., 370, 371.

But if it is admissible to consider the pleas on their merits, they present no federal question. The contract clause of the federal constitution only applies to subsequent laws, and has no application to decisions of the state courts construing their antecedent constitutions, or overruling their former decisions. *Central Land Co.* v. *Laidley,* 159 U. S., 109–112; *Hansford* v. *Davis,* 163 U. S., 278, 279; *Winona* v. *Minnesota,* 159 U. S., 528, 529; *Wood* v. *Brady,* 150 U. S., 20–23.

There was another ground of decision, that the exemption, if it ever existed, was lost by the consolidation, and a plea simply setting up that the decision that the exemption was unconstitutional was a violation of the federal constitution, even if good, was no answer to the other ground of decision that it had been lost by the consolidation. Where there are two or more grounds of decisions, they must all violate the federal constitution, or else there is no violation within the meaning of the law. *Seneca Nation* v. *Christy,* 162 U. S., 289, 290; *Pierce* v. *Somerset Ry. Co.,* 171 U. S., 641.

(4) The pleas were vague, indefinite and uncertain, and § 704 of the code of 1892 expressly authorizes such pleas to be stricken out on motion. The pleas are long and voluminous, and no ordinary jury could tell what issue or issues they were called on to decide, whether to overrule the supreme court,

or what had been the policy of this state, or whether former legislatures had refused to repeal exemptions, or when the first railroad was built, or what the court had decided in the Mississippi Mills and other cases, or when the state was first settled, or a great many other things too numerous to mention. The policy of the law in the circuit courts, where jury trials abound, is to reduce each defense to a single issue in plain, ordinary, concise language, which a jury can easily comprehend and decide intelligently.

As to the first and second assignments of error attempting now to raise questions which could have been raised on the first appeal, it is only necessary to refer to *McKinney* v. *State*, 117 Ind., 27, 28.

Argued orally by *Tim E. Cooper* and *Edward Mayes*, for the appellant, and by *J. A. P. Campbell*, *R. C. Beckett*, and *F. A. Critz*, for the appellee.

WHITFIELD, J., delivered the opinion of the court.

The petition for removal of the cause to the federal court was properly denied. The decisions of the United States supreme court, cited in briefs of counsel for appellee, put this at rest. *Kansas City, etc., Railroad Co.* v. *Daughty*, 138 U. S., 303; *Tennessee* v. *Bank*, 152 U. S., 454; *Galveston, etc., Railroad Co.* v. *Texas*, 170 U. S., 226. The application for continuance was properly overruled. The court's action in striking out the special pleas stricken out was correct, for the obvious reason that they presented no defense to the action, in whole or in part. The former opinion of this court in this case settled definitely and conclusively all the issues involved, and the special pleas are, in effect, nothing else than an effort to have the circuit court disregard that opinion. The futility of that sort of pleading needs no comment.

These and all the other matters of practice and procedure assigned for error were correctly settled by the court. The

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former opinion of this court in this cause, and its opinion on the motion to strike that opinion from the files, disposed effectively of such of these matters as are not here specifically adverted to.

So far as concerns the argument that the appellants relied on the case of *Mississippi Mills* v. *Cook,* 56 Miss., and that if the overruling of that case is correct, nevertheless the appellants should be protected from taxation accruing before the overruling of that case, it is enough to say that question is not material here, since all the taxes here sued for accrued after the consolidation of October 24, 1892, and the appellants were expressly held to have lost their exemption, if any they had, by their own voluntary act of consolidation. That was the first and main ground on which our former opinion was distinctly rested. It must be too clear for serious disputation, in this view, that all discussion of the case of *Mississippi Mills* v. *Cook* is wholly unavailing as to these taxes. Moreover, the twenty-first section of the Mobile & Northwestern charter was not passed on in *Mississippi Mills* v. *Cook,* and we held in our former opinion that its constitutionality was never squarely presented, as the point for decision, until the former judgment in this case. Whatever merit there may be in this line of argument in a proper case, it is clear that here it has, by reason of the fact of the consolidation when and as it occurred, no room for play.

The last proposition which we notice is the one that the Lambert case in 70 Miss. was erroneous, and ought not to be followed in its announcement that the code of 1880 repealed the exemption here claimed. It was said, *inter alia,* that the Mobile & Ohio R. R. Co. had an identical exemption with the twenty-first section of the Mobile & Northwestern charter, and that § 598 of the code of 1880, by providing for "a sworn statement of the capital expended in the construction of its road," recognized the exemption as meant by this § 598 to furnish the state with the means of knowing when the M. & O. R. R. Co.

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should become liable to taxation; and that since it recognized the M. & O. R. R. Co.'s exemption, of course it must also have recognized the alleged identical exemption of appellants. Such was the argument gravely pressed upon the court. It is singular that learned counsel overlooked the easy and overwhelming answer springing from the fact that the twenty-first section of the Mobile & Northwestern charter was granted by an act of the legislature passed in 1870, after the constitution of 1869 was adopted, while the charter of the Mobile & Ohio R. R. Co. was granted in 1848, twenty-one years before that constitution was adopted, at a time when the legislature had full power to grant, so far as any constitutional restriction was concerned, an irrepealable exemption.

But it is said that § 8 of the code of 1880 provides that "no private act not revived and brought into this code shall be affected by its provisions;" and that general laws as to taxation ought not to be held to repeal private grants of exemption, unless expressly so stated. The principle is correct enough. But we think the alleged exemption of the Natchez, Jackson & Columbus R. R. Co. expressly repealed. There were two bills of injunction in the Lambert case—rather, there were two cases. The court distinctly held that this exemption from taxation was an exemption both from *ad valorem* taxes and privilege taxes. Now, the scheme of railroad taxation propounded by the code of 1880 was primarily to subject "each railroad owning and operating a railroad in this state" to *ad valorem* taxes. That scheme is set forth in §§ 597–606 of code of 1880, inclusive. But secondarily, and as a substitute, each railroad was permitted, by §§ 607 and 608 of that code, to escape *ad valorem* state and county taxes by paying the privilege tax named in § 608. Now, the Natchez, Jackson & Columbus Railroad Co. is expressly named in § 608, and required to pay a privilege tax of thirty dollars per mile, if it would escape *ad valorem* state and county taxes. Manifestly no one can be found who would dispute the proposition that the exemption from privilege taxes

of that railroad was expressly repealed by § 608. But since this privilege tax was provided only secondarily, and as a means of escaping the *ad valorem* state and county taxes due by each railroad in the state, primarily imposed by § 597 *et seq.*, it is plain that all the sections taken together expressly provide that the Natchez, Jackson & Columbus Railroad Company was to pay *ad valorem* taxes, state and county, unless it embraced the conditional exemption therefrom by paying the privilege tax assessed by § 608 *eo nomine* against it. There is no escape from this reasoning. If it be asked why, if the Natchez, Jackson & Columbus Railroad Company was expressly named in § 608, it was not so named in § 597 *et seq.*, the obvious reason is that it was necessary to expressly name it in imposing privilege taxes, since each railroad paid a different privilege tax, but it was unnecessary to name it in imposing *ad valorem* taxes, since the rate there was the same for all. And this leaves out of view whatever of force there may be in the suggestion that the phrases "each railroad," "every railroad," etc., might be effective to include this railroad, with all others, as fully as if named in § 597. But as to this we say nothing.

Finally, it is said that this twenty-first section was given the L., N. O. & T. R. R. Co. by independent grant in 1882, by its proper charter, after the code of 1880 had been adopted. But if the code of 1880 had the effect, as held in the Lambert case, to repeal by its provisions this section as applied to the Natchez, Jackson & Columbus Railroad Company, then *a fortiori* did the more emphatic provisions of the code of 1892 have the effect to repeal the same section as applied to the L., N. O. & T. R. R. Co. This last company could not be named in the code of 1880, since it did not come into existence until 1882.

It will be remembered that this third ground of our former opinion, that this alleged exemption was repealed by legislation, if it ever had a valid existence, was wholly uninfluential with the circuit judge on this second trial below, since it was for the first time made part of the opinion when the opinion

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in full was written and filed, which was several months after the trial in the circuit court.

It is perfectly obvious, therefore, that the mere adding a new reason for the decision, which reason did not influence the second trial of the case, in no respect prejudiced the appellants in that trial. We discover no error, and the judgment is

Affirmed.

WOODS, C. J., while recognizing the authority of the former decision to the effect that the consolidation cut off the exemption, and not, therefore, dissenting, adhered to the view formerly entertained by him.

CASES ARGUED AND DECIDED

—IN THE—

SUPREME COURT OF MISSISSIPPI,

—AT THE—

DECEMBER SPECIAL TERM, 1899.

COATS & SONS *v.* BACON & CO.

1. CONTRACT. *Writing. Parol evidence to vary.*

In the absence of fraud parol evidence is inadmissible to vary the terms of a written contract.

2. SAME. *Inattention in signing.*

Inattention to the contents of a written contract when signing it, affords, in the absence of fraud, no defense to a suit upon the contract as written.

FROM the circuit court, second district, of Carroll county.

HON. W. F. STEVENS, Judge.

Coats & Sons, appellants, were the plaintiffs in the court below; Bacon & Co., appellees, were defendants there. The suit was based upon an open account for $180 worth of needles. Bacon & Co. were merchants at Vaiden, in this state, and Coats & Sons were manufacturers of needles at Reddich, England. The manufacturers, from their New York office, addressed a communication to Bacon & Co. extolling the quality of their products, advising that they had changed their mode

No. 35.

OCT 25 1900
JAMES H. McKENNEY,
Clerk

Sup. Ct. of Criz v. Becket for D.

Supreme Court of the United States.

OCTOBER TERM, 1900.

Filed Oct. 25, 1900.

No. 35.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY ET AL., PLAINTIFFS IN ERROR,

vs.

WIRT ADAMS, STATE REVENUE AGENT.

LIST OF AUTHORITIES CITED BY DEFENDANT IN ERROR IN ARGUMENT, AND FILED BY PERMISSION OF THE COURT.

F. A. CRITZ,
R. C. BECKETT,
Attorneys for Defendant in Error.

(17,341.)

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 10-25-1900

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 35.

YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY ET AL., PLAINTIFFS IN ERROR,

vs.

WIRT ADAMS, STATE REVENUE AGENT, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

LIST OF AUTHORITIES CITED BY DEFENDANT IN ERROR IN ARGUMENT, AND FILED BY PERMISSION OF THE COURT.

As to effect of withdrawal and striking out pleas.

Perkins *vs.* Guy, 55 Miss., 180.

Johnson *vs.* Drew, 171 U. S., 98.

That Federal question must be raised in pleadings, evidence, instructions, or exceptions to rulings of the court.

Railroad Co. *vs.* Brock, 4 Wall., 180.

As to origin and effect of certificate of chief justice of State court.

Armstrong *vs.* Treasurer, 16 Pet., 285.
Lawler *vs.* Walker, 14 How., 152.
Mills *vs.* Brown, 16 Pet., 526, 527.
Railroad Co. *vs.* Brock, 4 Wall., 180.

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R. C. BECKETT,
Attorneys for Defendant in Error.

Supreme Court of the United States.

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No. 35.

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vs.

WIRT ADAMS, STATE REVENUE AGENT, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

Brief for Defendant in Error in Answer to Application of the Yazoo and Mississippi Valley Railroad Company for a Modification of the Judgment of Affirmance, Rendered on January 7, 1901.

This application seems to be made on the theory that the opinion and judgment of this court were rendered through mistake and unadvisedly as to the taxes of 1892, and on the claim that the consolidation of October 24, 1892, could not

affect the taxes of 1892; but such is not the case. In our original brief, filed on we called particular attention to this matter. Our contention is that the effect of the consolidation of October 24, 1892, was exactly the same as if a valid law had been passed on that date repealing the exemption. This brief is numbered as No. — of the October term.

In their amended brief on the merits, filed on April —, 1900, and entitled as of the October term, 1899, on page 6 the plaintiffs in error speak of the taxes of the *preceding* year being applied to the construction debts. In order that this court might not be misled by this inaccuracy, we, in our "Brief of F. A. Critz and R. C. Beckett, in reply to brief of opposite counsel on the merits," entitled No. 244, October term, 1899, under subdivision "3rd," on page 2, call the attention of this court particularly to the fact that in section 5 (2) of their charter, under which the exemption is claimed, the appropriation was not to be made in the preceding year, but "during the year" in which the exemption was claimed, and that the taxes under the Mississippi law in force at the time were not delinquent till December 15, 1892, and referred to sections 3379 and 3801 of the Code of 1892.

It is scarcely necessary to add anything to what has already been said, and we call the attention of this court to it in order to show that while opposite counsel only referred to it incidentally, yet they did not overlook it, and that, anticipating some question of this kind in the minds of the court, we met it openly and squarely, and that it was not a matter in which the court was misled or which they overlooked. Under section 3379 of the Code of 1892, which has reference to privilege taxes *eo nomine*, it is provided "the railroad commission

shall annually, on or before the first Monday in August, classify the several railroads according to the gross earnings of each, and the privilege taxes thereon shall be paid on or before the first day of December." Now, if the court will look at our declaration for the taxes of 1892, it will see that out of abundant caution we sued for both the privilege taxes due December 1, 1891, and those due December 1, 1892.

Record, pp. 6–10.

On instructions to the jury on behalf of these plaintiffs in error the court ruled that we were not entitled to recover for taxes due December 1, 1891. In fact, there were no privilege taxes due till December 1, 1892, as they were first levied under the Code of 1892.

Record, p. 12.

We raised no question as to this, and on the second trial, on July 8, 1898, we only took judgment for the privilege taxes due December 1 1892. It must here be borne in mind that privilege taxes are never levied on a business or occupation already ended. That would clearly be depriving a man of his property without due process of law. On the contrary, from the very nature of such taxes, they are prescribed for the privilege of carrying on a certain business or occupation *for the future*. Hence the privilege taxes due on December 1, 1892, were for the privilege of conducting the business of a railroad for the year December 1, 1892, to December 1, 1893, all of which was clearly after the consolidation on October 24, 1892.

Record, pp. 630, 631.

Now, as to the ad valorem taxes. As quoted by opposite counsel in this pending application, the concluding part of

section 3801 of the Code of 1892 is that "and it shall be the duty of every person assessed to pay his taxes to the collector on or before the fifteenth day of December." And section 3802 provides that "all taxes remaining unpaid on the fifteenth day of December shall immediately be collected by the collector by distress and sale of any personal property liable therefor," etc.

From this it is plain that there was no obligation on the part of the plaintiffs in error to pay the taxes *before the 15th day of December*, 1892, and the point we made in the previous briefs, and make now, is that the effect of the consolidation on October 24, 1892, is exactly the same as if a valid law had been passed on that date repealing the exemption and prohibiting the sheriffs and tax collectors from *thereafter* receiving the affidavits in lieu of money for the taxes.

In the pleas first filed there is no allegation whatever that the taxes had been paid on construction debts, and affidavits made and tendered *before October* 24, 1892.

Record, p. 55.

The affidavits and receipts themselves are omitted from the record as immaterial, and if they had in fact been made and tendered before the consolidation, and this was a good defense to the suit, they were very material and should not have been omitted from the record.

This court is not authorized to reverse cases on uncertainties. And when such affidavits and receipts were, as a matter of fact, not tendered or delivered before the consolidation, and for that reason are omitted from the record as immaterial, it is asking most too much of this court to request it to consider these things as done which were not done, and

to presume that those things are material which all parties have agreed are not material.

Record, p. 696.

All the original pleas are withdrawn, and hence could not be looked to, even if they had shown that the affidavits were tendered and receipts given before the consolidation, and the pleas attempted to be filed in July, 1898, could not be looked to because they were stricken out, and this court has decided in its opinion that they were attempted to be filed too late; but, even if they had been filed in time, they do not show that the affidavits were tendered or receipts given *before October* 24, 1892.

Record, pp. 55 and 568, 569.

So far as the assessment for 1892 being made before the consolidation, it must be borne in mind that these suits are all for current taxes on assessments already made under sections 3875 to 3884 of the Code of 1892, and not on assessments for *back taxes* to supply omitted assessments under the delinquent revenue agent law of February 7, 1894 (Laws 1894, pp. 29–31), and the contention of the plaintiffs in error has always been that in such cases an assessment was necessary to fix the liability and amount of taxes which under their charter they were required to pay on construction debts; and also in their plea in No. 355 they expressly state and claim that they have never objected to an assessment on the property for this reason.

See Record in No. 355, pp. 195, 196.

We would also call particular attention to the suggestion of errors in the State supreme court on the first appeal (Record, p. 518), and to the assignment of errors on the second appeal (Record, p. 683), to show that this point was not made, either in the circuit court or State supreme court, and it is too late to make it here now. Indeed, it was not made in the assignment of errors in this court (Record, p. 700), and was only made incidentally, as we have above shown, in a brief of opposite counsel, and under the rules of this court, not having been made and assigned for error, the plaintiffs in error are not in position to make it now.

As also shown above, we did ourselves call the attention of the court to it, and no doubt it was considered by the court.

It is not proper that a point like this should be held back and attempted to be sprung on the court after its decision.

So we think the opinion and judgment of this court rendered on January 7, 1901, was not ill-advised or rendered by oversight or on a mistake of the facts, and that this application should be overruled.

This court has decided that it will not go into or decide constitutional questions unless necessary to dispose of the case.

Baker *vs.* Grice, 169 U. S., 292.
Adams *vs.* Bank, 74 Miss., 316.

If, however, the court thinks it necessary to admit error and go into the constitutional phases of the case, we call attention to the opinion of the supreme court of Mississippi in the record, on pages 651 to 673, and 77 Miss., pages 270 to 293, and the briefs of all the counsel for the defendant in

error in the case, and also especially in cases Nos. 77, 78, and 79, October term, 1900.

In regard to the fiscal year referred to by opposite counsel, that refers to settlements and acts of the State officers in the fiscal affairs of the State and never has had any application to county affairs or to taxes.

Respectfully submitted.

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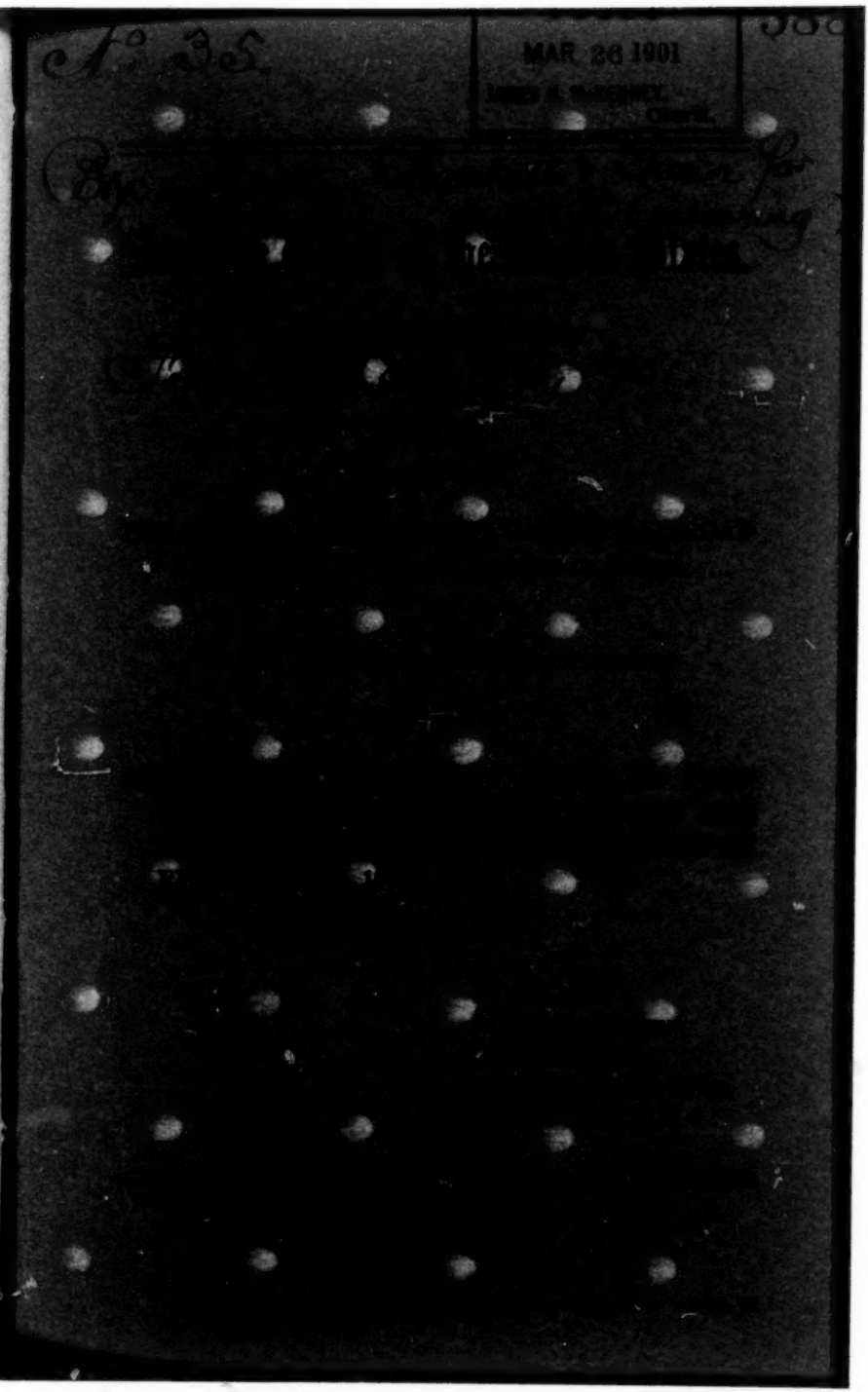
Attorneys for Defendant in Error.


MAR 26 1901

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 35.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY ET AL., PLAINTIFFS IN ERROR,

vs.

WIRT ADAMS, STATE REVENUE AGENT, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

Brief for Defendant in Error on Petition for Rehearing under Order and Leave of the Court Made and Given on February 25, 1901.

Counsel for plaintiffs in error in their brief, on this petition for rehearing, on page 2, think it is of vital importance for this court to decide the other questions involved, as we could or might use the decisions of the supreme court of Mississippi in this case as *res adjudicata* in some other cases to which they refer in a foot-note. That appears to be fair

to them, and in the interest of fairness we now say that we are willing, and agree that the court may decide all four of the points involved in this case, all of which we will argue in this brief. They are:

1. The privilege taxes.

2. The ad valorem taxes.

3. The repeal of the exemption.

4. The unconstitutionality of the exemption.

But in joining in this request to the court we wish it to be distinctly understood that we do not waive or abandon the first and second points, but are willing for the court to also decide the third or fourth points, or both, as it may deem proper. We agree that such a course, under the peculiar circumstances of this case, would not, in our judgment, be improper. This we leave in the discretion of the court.

The matter now under consideration is the suit for the taxes of the year 1892.

It embraces two classes of taxes, the privilege and the ad valorem taxes. As the court will remember, there were several suits for taxes of different years, which were consolidated and tried together by written agreement, the material part of which is as follows:

"This order is made to save the expenses and inconvenience of separate pleadings, and trial in each case, and is not to be construed to the prejudice of either party, and all objections and exceptions are reserved, which could be reserved, if said orders, proceedings and pleadings were separate."

Record, pp. 106, 610.

This is the first suit brought, and we hope the court will excuse us for making some tedious quotations. We wish to get the matter clearly and distinctly before the court. We will now take up the two different kinds of taxes separately, under the first and second points:

FIRST.

The Privilege Taxes.

This suit was brought on December 7, 1893 (Record, p. 1), and was brought under chapter 126 of the Mississippi Annotated Code 1892, for then the amendatory act of February 7, 1894, Laws 1894, p. 29 to 31, had not been passed. The material difference in these statutes in this case is that the act of 1894 authorizes the revenue agent to sue at any time after the taxes became delinquent, while said chapter 126 required him to wait till the fiscal year in which they were due had expired. In regard to said suit for the taxes of 1892, this latter provision was complied with, as, according to the contention of plaintiffs in error and section 115 of the constitution of 1890, the fiscal year began on October 1 and ended on September 30 of each year (Code of 1892, page 60).

We now desire to call the attention of this court to the privilege-tax laws, but let us first say that by a special provision both the privilege-tax laws and the "revenue," or *ad valorem*, tax laws were to take effect on April 2, 1892.

See Annotated Code of 1892, sections 12 and 16, pages 115, 116.

Section 3379 provides that "the railroad commission shall annually, on or before the first Monday in August, classify the several railroads according to the gross earnings of each, and the privilege taxes thereon shall be paid on or before the first day of December."

Section 3401 provides that "any person other than insurance, telegraph, express and sleeping car companies, desiring to enjoy any of the privileges herein enumerated, shall first pay the tax as prescribed."

Section 3405 provides for two series of licenses, one to end with April 30 of each year, and the other for those issued "on or after the first day of May of each year," which latter class, of course, embraced railroad companies required to pay "on or before the first day of December."

Section 3408 provides that each license shall be dated "the first day of the month of its issuance, and it shall be good for one year from that date," and any person failing to pay this privilege tax "may be proceeded against by suit for such tax."

From all which it is plain that the privilege tax due December 1, 1892, was for the privilege of doing the business of a railroad for the period of one year from that date.

The consolidation occurred on October 24, 1892, and the new corporation, the *new* Yazoo and Mississippi Valley Railroad Company, became liable to pay this privilege tax on December 1, 1892, for the privilege of doing business for the year December 1, 1892, to December 1, 1893.

As will be noticed in the declaration, we sued for two privilege taxes. That was on account of the provision in section 3409 of said Annotated Code that "the license herein provided for shall be a personal privilege, enjoyable only

by the person to whom it is issued, and it shall not be transferable" (161 U. S., p. 180).

Under this provision we thought that a privilege tax was due for the year preceding October or December 1, 1892, because we had alleged in the declaration that the railroad was purchased by the Illinois Central Railroad Company on or about July 21, 1892.

Record, p. 5.

On the trial the court instructed the jury, at the request of the defendants, the present plaintiffs in error, as follows:

"5th. The court instructs the jury that they must find for the defendants so far as one-half of the privilege taxes are concerned, which are described in the declaration, as payable for the year 1892."

Record, p. 117.

As there was no express law which authorized a levy of privilege taxes as such previous to December 1, 1892, we assented to this ruling of the court, and in the final judgment of July 8, 1898, we did not ask or take any judgment for privilege taxes for any period antedating December 1, 1892. The declaration does divide the periods as commencing October 1st; but this was a clear mistake, and no objection has ever been made to this formal error anywhere. The substantive thing is that under the declaration for taxes of 1892 we only took judgment FOR ONE PERIOD, and that was for the period commencing December 1, 1892, which was for the period after the consolidation of October 24, 1892.

For illustration, take De Soto county, in the final judgment in the record, on page 630. The judgment for privilege taxes in the five suits is, in the aggregate, $1,543.80.

Now, the privilege tax in the first declaration for the year due December 1, 1892, is $257.40; in the second declaration, embracing two years, it is, for period commencing December 1, 1893, the sum of $257.26, and the same for 1894. In the third and fourth declarations it is the same, and in the fifth it is $257.36. By adding these sums, four times $257.26 and $257.40 and $257.36 together, it will be seen that they make the aggregate of $1,543.80, recovered, and that there was no recovery for any privilege taxes previous to those due December 1, 1892, for the year December 1, 1892, to December 1, 1893, all after the consolidation of October 24, 1892. And so for all the counties.

Record, pp. 6, 77, 103, 614, 626, 630.

So in this connection it is not necessary to make any point of the alleged purchase of the property by the Illinois Central Railroad Company on July 21, 1892.

We will argue that phase of it under the head of *ad valorem* taxes.

In dealing with this case it can be distinguished as original case No. 2788. That was its number. There were other subsequent suits brought, and they were all successively consolidated with this one, and all proceeded under its number, 2788. So it is original No. 2788.

Record, p. 610.

There were no privilege taxes proper until prescribed by section 3379 of the Code of 1892, to take effect as to railroads on December 1, 1892. Previous to that it was called privilege taxes, but were what we and the court below and this court call commutation taxes. In their brief opposite counsel seem to abandon all contention as to the privilege taxes

proper and confine their argument to the ad valorem taxes. But here we wish to call the attention of this court to the fact that in their brief opposite counsel misconstrue the language of this court in its opinion, and treat *commutation taxes* as referring to what they have heretofore called "an appropriation of taxes" as in some manner recognizing that there was a distinction between a pure exemption and the form of exemption embraced in their charter, while we claim and show hereafter that where the word "commutation taxes" is used by this court it refers to the so-called privilege taxes, in lieu of *ad valorem* taxes, and *nothing else.*

SECOND.

The Ad Valorem Taxes.

It is important here for the court to have a clear understanding of the facts. The declaration for the taxes of 1892 is different from all the other declarations, and was prepared specially to meet the objections now interposed. We ask the court to bear this particularly in mind, while we now quote in full the material parts of this first declaration. They are as follows:

"For that whereas heretofore, to wit, during the year 1892 the railroads and property of the Louisville, New Orleans & Texas Railway Company, a corporation authorized under the laws of the State of Mississippi, under an act entitled 'An act to amend an act entitled An act to authorize the Memphis & Vicksburg Railroad Company and the Mississippi Valley & Ship Island Railroad Company to effect a consolidation, approved March 3rd, 1882,' approved March 15th, 1884, and created by a consolidation of the New Orleans, Baton Rouge, Vicksburg & Memphis Railroad

Company, a Mississippi corporation created under an act entitled 'An act to incorporate the New Orleans, Baton Rouge, Vicksburg & Memphis Short Line Railroad Company,' approved March 9th, 1882; the Memphis & Vicksburg Railroad Company, a Mississippi corporation, created under an act entitled 'An act to incorporate the Memphis & Vicksburg Railroad Company,' approved August 8th, 1870; the Tennessee Southern Railroad Company, a Tennessee corporation, and the New Orleans & Mississippi Valley Railroad Company, a Louisiana corporation, under an act or deed of consolidation made and executed on or about August 12th, 1881, was duly assessed for taxation in said State of Mississippi, under its laws, by its Mississippi railroad commission, the said assessment being completed, after objections heard, on September 22nd, 1892, and was also by said commission duly classified for privilege taxation under said laws." * * *

Record, p. 2.

"And whereas on or about July 21st, 1892, all the railroads and property of the said Louisville, New Orleans & Texas Railroad Company was purchased by said Illinois Central Railroad Company;

"And whereas on or about October 25th, 1892, the said Illinois Central Railroad Company turned over, delivered to and merged all said property and railroads of said Louisville, New Orleans & Texas Railway Company with the railroad system and property of said Yazoo & Mississippi Valley Railroad Company, which it then and there also owned and controlled, and the said Louisville, New Orleans & Texas Railway Company then and there surrendered its franchise, and then and there became extinct and ceased to exist as a corporation;

"And whereas the said Yazoo & Mississippi Valley Railroad Company, under the direction and control of the said Illinois Central Railroad Company, then and there in

said October, 1892, began and have since continued operating all said railroads and railroad system of said Louisville, New Orleans & Texas Railway Company in said State, and by virtue and reason thereof have become liable to pay a new privilege tax thereon from said October 1st, 1892;

"And whereas the said Illinois Central Railroad Company and the said Yazoo & Mississippi Valley Railroad Company by taking said property and railroad of said Louisville, New Orleans & Texas Railway Company, became liable for its debts and obligations and liabilities, and did in fact agree to, and did assume and promise to pay all said debts, obligations and liabilities of whatever kind or character;

"Whereby and by force of the which foregoing laws, acts, and agreements, the said Yazoo & Mississippi Valley Railroad Company and the Illinois Central Railroad Company have become and are indebted to the said State of Mississippi and said several counties for privilege and CURRENT State and county taxes." * * *

Record, pp. 5, 6.

Notice the word "*current*" last above, which we have underscored.

And turn to section 3748 of the Mississippi Annotated Code of 1892. It says: "All taxable property brought into the State or acquired or held by any person before the first day of February shall be assessed, and taxes thereon paid for the current year," not the next fiscal year.

Hence, if the Yazoo and Mississippi Valley and Illinois Central Railroad Companies had acquired and held this property *before the first day of February*, 1893, they were liable for the taxes for the fiscal year October 1, 1892, to October 1, 1893. The statute seems to fix a dividing line at February 1. If property is acquired or is exempt after February 1,

then it is free from taxation, for from one to eight months, until after October 1, but if it is acquired or the exemption expires before February 1, being more than eight months, or two-thirds of the year, and sometimes even a whole year, less one day (for it may be acquired or exemption expire on October 2), then the policy of the law seems to be that it shall be assessed and taxes paid on it for the current year; otherwise there might be a total exemption for a whole year, less one day, to which the property is neither entitled in law or equity. The statute might well have provided for a proportional tax for the unexpired part of the year, after October 1, but that would be cumbersome and uncertain, and, instead of that, a date has been fixed as nearly just and equitable as possible.

This is shown by section 3799, which provides:

"In case of the destruction or deterioration in value of any real estate by any casualty, or in any case of any overvaluation known to be such, or in case of clerical error in the assessment-rolls, or in case of a change in the ownership after assessment, or in case of an increase of value by the erection of improvements, the board of supervisors shall have power at any time, on the application of a party interested, or otherwise, to change the assessment so as to reduce it or increase it to the true value of the property, or to cause the taxes to be charged to the purchaser thereof."

By section 3804 it is provided that "the collector shall assess and collect taxes on land liable to taxation left unassessed by the assessor, and on land that has become liable to taxation since the last assessment, and he shall also assess such other persons and personal property as he may find unassessed by the assessor."

Section 3870, in regard to transient merchants, traders, etc., provides if any such apply for a privilege license "after the time for assessing taxes, the collector shall assess the regular ad valorem tax levied on other property in the county, and report the assessment at once to the clerk of the board of supervisors for entry on the assessment-rolls. If the time for collecting taxes has arrived, the collector shall collect the ad valorem tax."

In this case there is no question made of any proportional rate of tax; if such a point had been raised, it would no doubt have been considered by the court, and under certain circumstances might have raised a Federal question.

In another case, involving the same principle, certain parties got to withdrawing their deposits out of the various banks a day or two before the time fixed for the tax to take effect or assessment to be made and placing them back on special deposits in sealed envelopes, in greenbacks, which were not taxable, and after the date had passed would withdraw the special deposit of greenbacks and again make a general deposit. Among others the State of Ohio passed a law making the property assessable at any time and levying a proportional or average tax on all property-owners during the year. This court decided that such conduct on the part of tax-payers was a fraud on the revenue of the State, but also decided that the proportional and average taxes were just and equitable.

It also says:

"It is to be conceded that a State may make the ownership of property subject to taxation relate to any day or days or period of the year it may think proper, and that the selections of a particular day on which returns are to be made

by the tax-payers of the property for the purpose of assessment does not necessarily preclude the making of assessments as of other periods of the year."

Shotwell *vs.* Moore, 129 U. S., 597 to 600.

To the same effect:

C. N. Nelson Lumber Co. *vs.* Town, &c., 22 Fed. R., 54.

But no point of this kind was made in this case. It is not anywhere set up or claimed under their theory that the tax which they say was due on October 1, 1892, is more than their proportional part of the tax for a year, or that the State did not have a right to fix a period antecedent to February 1 as the date of ownership on which taxes could be levied and collected for the current year; and this court has frequently decided that when a case is brought here on a writ of error to a State court on one Federal question it has no jurisdiction to decide and will not decide other Federal questions which were not raised and passed on in the State court.

Dewey *vs.* Des Moines, 173 U. S., 198 to 199.

"In the case at bar, no claim was made in the State court that the assessment was invalid, or in violation of any provision of the Federal Constitution" (*ib.*, p. 199).

"For the same reason, the contention as to whether the bridge was assessed at more than its value, and not at same proportion of its value as other property was, need not be considered."

Keokuk *vs.* Illinois, 175 U. S., 632–634.

To the same effect:

Citizens' Saving Bank *vs.* Owensboro, 173 U. S., 642–644.

Bolin *vs.* Nebraska, 176 U. S., 83, 92.

Cincinnati *vs.* Thiebaud, 177 U. S., 617, 620.

Now, as to railroad property, under section 3881, the railroad commission is required to meet on the first Monday of July of each year to hear and consider objections to assessments, and under section 3882, "so soon as the assessment-rolls have remained subject to objection for one month, and when all objections, if any, are disposed of, the assessment-rolls shall be approved either by order of the railroad commission, or by operation of law, and the same shall be sent to the clerks of the boards of supervisors of the respective counties, who shall file and preserve the same as a record," thus showing, as we contended, that the action of the railroad commission in assessing the property after objections heard was a judicial act and conclusive as to its liability to taxation, unless corrected by certiorari under section 90 of the Code.

See our brief in Railroad Co. *vs.* Adams, 77 Miss., p. 208, and more fully as to back taxes in Railroad *vs.* Adams, 77 Miss., 772 to 774.

The argument as to this in the brief of opposite counsel is not reported, the reporter stating that their brief was embraced in 367 printed pages.

See 77 Miss., 237.

We, however, file herewith a copy of this long brief, and, if this court feels so disposed, it can examine pages 118 to 129

of that brief, referred to by the State court, and see that opposite counsel met our argument that the decision of the railroad commission was a judicial act, and not assailable collaterally, by a long and ingenious counter-argument, *and admission* that under the peculiar terms of their charter an assessment was necessary in order to determine the amount of taxes they would have to apply to construction debts; and they never did claim in this case before the supreme court of Mississippi that the assessment on September 22, 1892, was irregular or improper, but, on the contrary, expressly claimed and insisted that it was both regular and proper, in order to escape from a decision that the decision of the railroad commission was judicial and *res adjudicata*, and it is a principle too well settled to need citation of authorities that a person will not be permitted to blow hot and cold at the same time. He is estopped from assuming inconsistent positions, and they cannot be permitted to come up here now and claim that the assessment was wrong.

See also their plea in Record in No. 355, pp. 195, 196.

In ordinary cases the revenue agent, if no assessment had been made, could have had one made either under section 4192 of the Code or the amendatory revenue agent act of February 7, 1894.

Mississippi Laws of 1894, p. 30, sec. 4.

In this latter case the assessment would have been *res adjudicata*, as held in 77 Miss., 764.

But there never was any dispute on either side that the assessment by the railroad commission on September 22,

1892, was regular and proper. The only dispute was as to the effect of it. We contended that it was judicial and conclusively established the liability of the property to money taxation. They contended that it was necessary, but that it left the question open as to whether they would have to pay in money or could pay by affidavit of appropriation to construction debts under their charter. Now as to the pleadings and record. In their plea to the first declaration, Record, page 55, in paragraph 3, they allege that the charter affidavits were made and receipts obtained *by the said Yazoo and Mississippi Valley* Railroad Company. This was necessarily after the consolidation, for the "said Yazoo and Mississippi Valley Railroad Company" did not exist till after the consolidation of October 24, 1892. There was no denial or complaint made of the assessment of September 22, 1892.

Plaintiffs' eighth replication set up that the decision of the railroad commission was *res adjudicata*. This was demurred to and demurrer sustained.

Record, pp. 59, 84, 87.

Plaintiff asked an instruction to the jury that the decision of the railroad commission was *res adjudicata* in his sixteenth instruction requested.

This was refused.

Record, p. 115.

The plaintiff's bill of exceptions shows the proof of the assessment-rolls by the acting clerk of the railroad commission, W. M. Massie, and their introduction in evidence on the trial (Record, pp. 126 to 130), and the only objection was that they did not reasonably tend to show what the

railroad cost and were not the best evidence on this point. They were not objected to as *an assessment for taxation*, but as evidence of cost of construction.

Record, p. 130.

The same objection was made in the defendant's bill of exceptions.

Record, pp. 492 and 495.

In the agreement as to what the State supreme court record should contain it was agreed to leave out these assessment-rolls and also the affidavits and sheriffs' receipts. (See items 3 and 9.)

Record, p. 503.

And in the agreement as to what the record for this court should embrace it was agreed to omit the assessment-rolls and objections made to the assessment IN *1892*. (See items 1 and 4.)

Record, p. 696.

In the defendant's motion for a new trial the only objection against the admission of the assessment-rolls was that they were not competent evidence of value as to the cost of the road, the construction debts. (See item 1.)

Record, p. 121.

In their suggestion of errors, after the decision of the State supreme court, not one word is raised against the assessment for 1892 nor why it should be differentiated from the other years.

Record, pp. 518–527.

In the second plea, which was not stricken out, but withdrawn, it is distinctly stated that "the said Yazoo and Mississippi Valley Railroad Company" made the appropriation of taxes, delivered the affidavits, and received the receipts of the sheriffs.

Record, p. 553.

The same is true of the third, fourth, and fifth pleas, which were stricken out.

Record, pp. 556, 568, 571 to 572.

And in the sixth plea, which was also stricken out, it is expressly stated this was done "after such consolidation."

Record, p. 576.

If this were not all affirmatively shown, it would be presumed against the pleader, when the pleadings do not show that it was done before the consolidation, and when by express written agreement the assessment-rolls and the affidavits and sheriffs' receipts are left out of this record.

Stephen *vs.* Beall, 22 Wall., 329.

Under the charter the affidavit was required to state "that the amount of the taxes has actually and in good faith been paid and applied during the year" in the payment of the debts, etc.

Record, pp. 40, 41.

Under section 3801 of the Code of 1892 the collector could not even receive the taxes until receipt of the assessment-rolls, and they were not due and delinquent till December 15. Under section 3794 (*a*) the clerk of the board of super-

visors was required to deliver a copy of the assessment-rolls to the tax collector "on or before the first Monday of October," but he was at the same time to send another copy to the auditor of public accounts.

Under section 3795 the auditor was required to examine the assessment-rolls, and, if found incorrect, return them to the board of supervisors for correction, and the assessment was not final until the certificate of the auditor was entered on their minutes, which might take till December 15.

Of course, the board of supervisors had nothing to do with the assessment of railroads, but their clerk was required to perform the same duties as to railroad assessments as he was required to do in reference to county assessments, and so with the tax collectors.

Annotated Code 1892, secs. 3883 and 3884.

We have been thus particular in order to show that the taxes were not really due until December 15, 1892, and there was no obligation or duty to make any appropriation of taxes, or any affidavit, or to obtain any sheriff's receipt until that time. It could not be told until then whether the profits of the year would pay the dividends. Suppose there had been no consolidation, and suppose that on December 15, 1892, *during the year 1892*, there had been a return made or an accounting which had then developed the fact that the profits were sufficient to more than pay the dividend, then certainly the affidavit would not have been receivable under either the terms or language of the charter. This shows conclusively that the assessment, so far as the current taxes are concerned, neither fixes or unfixes the liability to pay, especially when the court refused to treat

the assessment for current taxes as *res adjudicata* on that point. Under the ruling of the court, and also, as above shown, under the contention of these plaintiffs in error, the assessment merely placed the property in a condition to show the amount of taxes due on it, and then the question as to whether the taxes were to be paid in money or by affidavit would depend on whether the profits *during the year* had been actually and in good faith paid on construction debts, and whether there was a sufficient balance left to pay a dividend of 8 per cent. on the stock. The charter and the statute must be made to harmonize. It would be entirely unreasonable to hold that the railroad company could make the appropriation at any time it chose, as virtually contended by opposite counsel on page 4 to 5 of their brief.

Under this theory the railroad company could apply the profits of January or any other short period of one, two, or three months, and not account for the p[illegible] for the balance of the year at all. On the contrary, we think that it is manifest that they could not make the appropriation until they were *forced* by law either to do this or to pay the taxes in money, and that was on December 15.

Even on that construction they would get the benefit of sixteen days to January 1 of the next succeeding year, and hence, under the terms of their charter, as they were required to appropriate the taxes *during the year*, it is very probable that they could not be compelled to make the appropriation or the affidavit until the last day of the year. This is the time allowed by their charter. It is the profits during the year, and it could not in the nature of things be definitely known what the profits for the year were until the end of the year; but if we were to concede that the State, by

authorizing summary proceedings to collect the taxes after December 15, had the power to waive and did waive any calculation of profits for the balance of the year, and if on December 15, 1892, it was found that the profits during the year would enable the company to pay the dividends, then it is clear that the property would be liable for a money tax, and that the necessary exemption affidavit could not be truthfully made. So, if at the time the tax accrued it was impossible for any reason brought on by the voluntary act of the company to make the affidavit, the taxes would have to be paid in money. The affidavit was a *sine qua non* and was required to be made by the president or cashier of the company.

At that time there was no Louisville, New Orleans and Texas Railway Company in existence, and no president or cashier of said company, and hence no one authorized to make any appropriation or any affidavits or obtain any receipts for said company. It falls exactly within the principle laid down in R. R. Co. *vs.* Maine, 96 U. S., 499.

This was a construction by the highest court of the State of its own tax laws, of the time at which the taxes accrued, and that they did not accrue until after the consolidation. The court says (Record, p. 68[illegible] 77 Miss., 316) that the taxes did not accrue until after the consolidation on October 24, 1892. This decision and finding is binding on this court.

Rice *vs.* Jerome, 97 Fed. R., 719.

Haley *vs.* Broad, &c., 94 Fed. R., 299 to 300.

Secor *vs.* Singleton, 9 Fed. R., 809.

Parks *vs.* Watson, 20 Fed. R., 764.

Hodgdon *vs.* Burleigh, 4 Fed. R., 128.

Raymond *vs.* Longworth, 14 How., 76 to 78.

Louisville, &c., *vs.* Mississippi, 133 U. S., 587.
N. Y. Life Insurance Co. *vs.* Cravens, 178 U. S., 395.
Bailey *vs.* Maguire, 22 Wall., 230 to 231.
Union Pac. R. R. Co. *vs.* Cheyenne, 113 U. S., 516.

And such findings of facts are not reviewable by this court.

L. & N. R. R. Co. *vs.* Schmidt, 177 U. S., 237.
Keokuk, &c., *vs.* Illinois, 175 U. S., 631 to 632.

We have not adverted to the fact that the declaration for the taxes of 1892, *supra*, distinctly alleges that this property was purchased by the Illinois Central Railroad Company on or about July 21, 1892, and that at the time of the assessment on September 22, 1892, the pretended exemption had been lost by said purchase. (See authorities collected in Phœnix Ins. Co. *vs.* Tenn., 161 U. S., 180, 181.)

It is true the defendants denied this in their pleas (Record, pp. 54 and 55), but they voluntarily withdrew these pleas, and this court decides that it cannot review the action of the court below in striking out their other pleas.

In the former opinion this court decided the case on the declarations and with all the pleas either withdrawn or stricken out, which, of course, was giving the declarations their full force and effect, and deciding on the facts shown by the declarations themselves. In fact the court, on page 9 of 180 U. S. R., says:

"The original declaration averred the several consolidations by which the defendant companies were formed; the assessment of the same for taxation by the railroad commission; a copy of the assessment by counties; and the refusal

to pay. Annexed thereto as exhibits were copies of the various charters and contracts of consolidation."

The court took the declarations as true. Now, this declaration for the taxes of 1892 is totally and entirely different from the others, in that it alleges that the property was purchased by the Illinois Central Railroad Company on or about July 21, 1892, and this allegation was made with the distinct purpose of meeting and obviating any possible objection to the validity of the taxes for 1892.

As we before said, this court in its former opinion treated the case with all the pleas out, either by the action of the court below or of the parties themselves; but the court is now asked to go a step further, and, notwithstanding there are no pleas in, to consider the declaration as absolutely false. How is this court to do such a thing as that? It could disregard the pleas and decide the case on the face of the declarations, but how is it to decide a case without any pleas *or any declaration either?*

We submit that the only course left is to follow the State supreme court, and hold that the exemption for 1892 was lost by the consolidation in common with the other years, or else, if this case can be differentiated from the others, then to hold that on the face of the declaration for the taxes of 1892 this case, original No. 2788, must be dismissed for want of jurisdiction, the pleas all being out, and hence there being no denial of the fact of the sale on July 21, 1892.

THIRD.

The Repeal.

The State supreme court in the full opinions filed November 22, 1898, treats of this subject of repeal.

Record, p. 671 to 673.

77 Miss., p. 289 to 293.

In the concluding part of its opinion on this point, in Record, p. 673, and 77 Miss., 293, the court holds:

"So that we hold that certainly since the Code 1892 went into effect, and as we think since the act 1886, the exemptions set up by the railroad company in this case, were repealed by the legislature, and on this ground, independently of any other ground heretofore set out, the exemption must be denied."

This is adhered to in the decision in the last and final appeal (Record, p. 687; 77 Miss., 318).

The privilege-tax laws and the revenue laws, under the statute putting the Code of 1892 in force (see Annotated Code of 1892, pages 113 to 116), in section 12, on page 115, were to "take effect and be in force from and after the passage of this act," which, as shown on page 116, was April 2, 1892, all before the date set for any assessments. But the court had as much right to decide that the exemption was repealed by the section 6, page 23, of the Acts of 1886, as it did do, as to hold that it was repealed by the Code of 1892. The one decision might be right and the other a wrong construction, but it would be a simple mistake in judgment, the power and right to decide being the same in both cases.

The decision of the State court as to whether the exemption was repealed or not is a question of local law, and is binding and conclusive on this court if the legislature had the power to repeal. In this case, as above shown, the court did definitely and positively and as an independent ground decide that the exemption had been repealed.

The only question, then, is, did the legislature have the power to repeal it?

The attorneys on the other side have here persistently endeavored to make a distinction between an ordinary exemption from taxation and the peculiar provisions of section 5 (21) of their charter, claiming that theirs was not an exemption, but a donation or appropriation of taxes. We have argued that point in our different briefs in this case and in No. 355, for the taxes on this same property for the year 1898, and in our briefs in Nos. 78 and 79, on appeal from the Federal circuit court in Mississippi, and do not think it necessary or proper to enter into another discussion of it here. We do not think it necessary, for in our last brief on the merits in this case filed in October last, being our "supplemental brief for defendant in error and in reply to supplemental reply brief of plaintiffs in error," on pages 12 to 15 we have copied the exemption or appropriation of taxes provision, and also that in the Mississippi Mills case, and placed them in juxtaposition, in order to show that in so far as the claim that this is an appropriation of taxes, as distinguished from an exemption, there is no substantial or material difference, and argued that phase fully on pages 9–17.

And we think it is not proper to reargue that point, because this court in its opinion in this case, in 180 U. S. R.,

pages 1 to 25, has expressly called and uniformly treated it as an exemption, notwithstanding the contention of opposite counsel. In that opinion, on pages 5, 6, 13, 15, 16, 22, and 23, it is called either exemption or alleged exemption, and we think it would be improper for us to again discuss that point, at least, unless under a *curia vult* from this court.

Hence we will treat it as and call it exemption. Now, in its said opinion, on pages 12 to 13, this court says: "The railroad companies went to a trial of these cases in an obvious reliance upon two previous decisions of the supreme court of Mississippi," and these are there designated as Mississippi Mills *vs.* Cook, 56 Miss., 40, and Railroad Company *vs.* Lambert, 70 Miss., 779.

Although the Lambert case, 70 Miss., 786 to 787, expressly decides that the appropriation form is "*a thin disguise*," and that in truth and in law *it is an exemption from taxation*, and although, on page 787, it says, "It was in the power of the legislature at any time to annul the agreement contained in the twenty-first section aforesaid," we will leave that out of the present argument, because that decision was made in 1893, after the taxes for 1892 in controversy had accrued. We will also leave out of consideration the decision in Attala County *vs.* Kelley, 68 Miss., on page 44, that "the most that can be claimed is that the act allowed an exemption from taxation, and it is well settled that, even when this is done by a charter, it is repealable by a subsequent legislature (Cook *vs.* Mississippi Mills, 56 Miss., 40)," because this decision was made at the October term, 1890, after the charter in this case had been granted, but certainly before the consolidation of October 24, 1892. We will leave all that out as unnecessary for present purposes and see what great case

the plaintiffs in error themselves state that they relied on. The first mention of it occurs in their suggestion of errors to the decision of the State supreme court. In it they say:

"At the April term, 1878, twenty years ago, this court decided the celebrated case of The Mississippi Mills *vs.* Cook, which in its present decision the court now undertakes to overrule. In that case it was determined that section 13 of article 12 above quoted, did not mean that the property of corporations should be taxed, and it did not mean to announce the abstract proposition that such property was taxable, but that it did mean and meant only that such property should always remain subject to the power of the legislature to impose taxes on it, and such power could not be contracted away, but that exemption might be granted, subject always to the power of the legislature to repeal such exemption at any time it saw proper."

Record, p. 519.

Proceeding, on page 525, this suggestion of errors says:

"It is no answer to the foregoing propositions to say that the Mississippi Mills case itself held that the 'exemption' was revocable. That is true, but it is essentially a different thing. The decision was that an exemption could be revoked by the legislature, and the legislature has never revoked it. It was never contemplated that the thing could or would be done by a judicial decision, which the chief justice calls 'legislation,' retroactive over twenty years, and subverting millions upon millions of property rights which had vested under the law as declared."

It is an awfully funny thing that the plaintiffs in error should in this suggestion of errors, on pages 525 and 526, make this charge against the court: "The Lambert case was decided in March term, 1893, and now, after the lapse of

more than five years, this court proposes to overrule that also. Is it not a rule of property?" * * * And: "But now overgoes the Lambert case after five years and a new phase is given to the whole matter," when we commenced this suit on *December 7, 1893*, the earliest period allowed by law, only a few months after the Lambert case, and "the lapse of more than five years" was caused by the persistent and almost unprecedented Fabian tactics of the eminent and learned counsel for the plaintiffs in error.

The same remarkably curious and funny indictment occurs in the stricken-out fourth plea (Record, page 564), wherein it is charged that said Yazoo and Mississippi Valley Railroad Company during said five years made many contracts and incurred numerous obligations, and had on hand ample funds to have paid off all said taxes and had a big surplus left. And therefore they are innocent purchasers!

Oh, ye shades of Great Moses, Wise Solomon, Mighty Nimrod, Patient Job, Wandering Salathiel, Descriptive Shakespeare, Measuring Bertillon!!! That is, as soon as Bertillon has acquired himself a shade.

In their fourth plea (Record, page 558 to 559) they say:

"That at the April term, 1878, the supreme court of said State decided the case reported in the 56 volume of Mississippi Reports, under the style of Mississippi Mills *vs.* Cook, tax collector, in which it was determined that the said provision of the constitution of 1869, set forth above, did not require that the property of corporations for pecuniary profit should be taxed, but only meant that such property should remain subject to taxation at the will of the legislature of the State; that no legislature could, by contract or privilege of exemption thereafter made, place such property beyond the taxing power of any succeeding legislature, or of itself,

but that such contract or privilege could, when thereafter granted by any legislature, be repealed by any legislature.

"That such decision, rendered twenty years ago, has remained unchallenged and unmodified until the 20th day of June, 1898; * * * being the settled and unquestioned law of the State ever since its making."

Again: "On the faith of the decision in the Mississippi Mills case aforesaid," etc., the Yazoo and Mississippi Valley Railroad Company executed certain bonds.

Record, p. 563.

In their sixth plea (Record, page 574) they say:

"At the April term, 1878, of the supreme court of the State of Mississippi, that court decided a certain cause, since widely known amongst the members of the bar of said State as the Mississippi Mills case, in which was litigated and determined the meaning of the foregoing provisions in said constitution of 1869, and by that decision, the said supreme court announced and declared the true meaning of said provision to be, (1) not a mere declaration that corporate property should be liable to be taxed the same as that of individuals, and (2) not a declaration that it should be actually subjected to such taxation, so that the legislature was denied the power to grant exemptions as heretofore, but (3) that the legislature should not thereafter have the power to make grants or exemptions which should be contracts irrepealable by subsequent legislatures, and that the matter of corporate taxation should always be controlled by the legislatures successively.

"This decision, rendered twenty years ago, has remained unchallenged and unmodified until now." * * *

Further on, on page 576, it is said:

"But the said legislatures of said State met each such

effort by a continuous and persistent refusal to repeal the same, and allowed the same to stand unrepealed, and the same does stand unrepealed by the legislature to this day," etc.

This court has decided that the exemption was repealable, and we have taken this great pains to show that the defendants, plaintiffs in error here, have not only not denied, but have themselves strenuously asserted and maintained what is the truth—that the Mississippi Mills case settled the law in the State of Mississippi to be that all exemptions to corporations for pecuniary profits were repealable at the will of the legislature. This is incontrovertible from a perusal of the Mississippi Mills case itself.

In addition to this, it has been admitted in the briefs of opposite counsel all through the litigation that the Mississippi Mills case decided that all exemptions from taxation were repealable at the will of the legislature, and they distinctly admit it in their last brief on this petition made on March 16, 1901, on pages 6, 13, and 22.

On page 19 they again bring in a charge of bad faith and repudiation which we do not think is exactly in good taste, after this court has expressed its opinion on that subject in this case in 180 U. S., p. 24 to 25. But in order to set those high-sounding phrases at rest we will here quote some former expressions of this court on that subject.

Where Congress had a right to repeal exemptions to manufacturing companies, and did repeal the same, about one year after a party had built a very extensive plant on the faith of said exemptions, this court says that while it was a great hardship, yet he was charged with the knowledge at the time he accepted the exemption that it was liable

to be revoked at the will of Congress, and hence the court says: "Nor are we able to see that this action involves any breach of faith towards the owner of this manufacturing property." That exemption was for ten years.

Welch *vs.* Cook, 97 U. S., 541 to 545.

In the case at bar the exemption was for thirty years; but this court has decided that the fact that an exemption is granted for ten or thirty or any specified number of years is not an agreement not to repeal it within the time limited.

Citizens' Saving Bank *vs.* Owensboro, 173 U. S., 650.
Louisville *vs.* Bank of Louisville, 174 U. S., 443 to 444.

In regard to the repeal, it will be seen that the true contention of the plaintiffs in error in the court below is contained in their allegation on page 576 of the record above quoted, "and the same does stand unrepealed by the legislature to this day."

Whether it does stand so unrepealed or not was a question submitted to and determined by the supreme court of Mississippi—a question of the proper construction of its own statutes, which this court ought not to review, and has often decided that it cannot review. This court says:

"Whether or not an act, prescribing such particular mode, has been repealed by a general revenue act not in terms repealing it, is a matter peculiarly within the province of the highest courts of the State to decide—and when such courts have decided the question, their decision is controlling."

Bailey *vs.* Maquiro, 22 Wall., 215 to 216.

In another case this court says:

"The supreme court of Tennessee held in the case before us, that the statute repeals and overrides the ordinance of exemption, and brings the bonds within the scope of general taxation. This is a decision by a State tribunal upon the construction of its own statutes, which we are bound to respect."

Adams *vs.* Nashville, 95 U. S., 19–21.

In order not to worry the court, we will now close this head by quoting from the latest decision of this court on this subject. It is a case where the supreme court of Texas had overruled some of its former opinions. This court says:

"This was a question either of local law or of general law. If of local law, of course the decision of the supreme court of Texas is binding upon us. If of general law, as it involved no Federal element, it is equally binding in this proceeding, since only Federal rights are capable of being raised upon writs of error to State courts. Conceding that if the question had arisen on appeal from a circuit court of the United States, we might have come to a different conclusion, it by no means follows that we can do so upon a writ of error to a State court, whose opinion upon a question of general law is not reviewable here."

Avery *vs.* Popper, 179 U. S., 305 to 315.
Also, Board & Co. *vs.* Louisiana, 179 U. S., 636.
Central Land Co. *vs.* Laidley, 159 U. S., 109 to 112.

FOURTH.

The Exemption Unconstitutional.

Opposing counsel, in our opinion, have not given a fair or just construction of the opinion of the Mississippi supreme court in the case of Wirt Adams, State revenue agent, *vs*, Tombigbee Mills, a copy of which they have filed with their brief on this petition. By a perusal of said opinion it will be seen that the Mississippi supreme court did not decide that exemptions to corporations were valid, even if the law was a general law, and extended to all corporations of the same class. What they did in fact decide was that the legislature might exempt, for the time being, property of a certain kind, whether it belonged to corporations or individuals, but that there could be no distinction between corporations and individuals, and that any law which granted exemptions to corporations by name, or as such, and which did not embrace individuals, was invalid.

In fact the supreme court of Mississippi and this court have always been in exact accord on this subject, and the only trouble is that the corporations have either innocently or deliberately misconstrued the Mississippi Mills case. We would have it distinctly understood that the charter in this case was granted and accepted under the act of March 3, 1882, as amended by the act of March 15, 1884, and that the Louisville, New Orleans and Texas Railway Company was formed under said acts on August 12, 1884.

Record, pp. 12, 43, 44.

At that time there had been no decision under the constitution of 1869 except the Mississippi Mills case. In making

the decision in the Mississippi Mills case at the April term, 1878, the Mississippi supreme court evidently overlooked a decision of this court in the case of Salt Co. *vs.* E. Saginaw, in 13 Wall., p. 373.

On page 376 to 377 Mr. Justice Bradley says:

"Had the plaintiff in error been incorporated by a special charter, and had that charter contained the provision, that all its lands and property used in the manufacture of salt should forever, or during the continuance of its charter, be exempt from taxation, and had that charter been accepted and acted on, it would have constituted a contract."

On page 378 this court makes the following observations:

"This case differs entirely from those laws and charters which have been adjudged to be irrevocable contracts." "Charters granted to private corporations are held to be contracts." "The act under consideration cannot be interpreted on this principle, it applies to individuals as well as to corporations."

And for this reason this court held it to be repealable at the will of the legislature.

In conclusion, on page 379, this court says:

"In short the law does not in our judgment belong to that class of laws, which can be denominated contracts, except so far as they have been actually executed and complied with.

"There is no stipulation expressed or implied, that it shall not be repealed. General encouragements held out to all persons indiscriminately to engage in a particular trade or manufacture, whether in the shape of bounties or drawbacks or any other advantage are always under the legislative control."

This was the exact decision in the Mississippi Mills case, and on the ground that an exemption granted in this class of cases to factories was not forbidden by the constitution of 1869, because the same was repealable at the will of the legislature; but the court went on to say, in said case of Mississippi Mills *vs.* Cook, 56 Miss., 62:

"If the exemption is granted in the form of a contract in the charter, that is prohibited."

In another case, decided by this court at the October term, 1878, shortly after the Mississippi Mills case, the Legislative Assembly of the District of Columbia, on June 26, 1873, under authority of an act of Congress, passed a law as follows:

"All property real or personal which may hereafter be actually employed, within the limits of the District of Columbia, for manufacturing purposes shall be exempt from all general taxes for a period of ten years from the date of this act going into effect; 'provided that the value of the property so employed for manufacturing purposes shall not be less than five thousand dollars.'"

On June 20, 1894, Congress passed another act as follows:

"That for the support of the government of the District of Columbia, and maintaining the credit thereof, for the fiscal year, ending June 30, 1895, there shall be levied on all real estate in said District, except that belonging to the United States, and the District of Columbia, and that used for educational and charitable purposes, the following taxes, namely:"

It will be noticed that this is very similar to section 3744 of Mississippi Code 1892, specifying what property should be exempt from taxation.

In that case this court held that the special act had been repealed by the later general act, and says:

"It has been frequently held that the incorporation of a company by special charter, with the exemption of its lands or other property from taxation, creates, upon the acceptance of the charter, a contract which will insure that exemption during the period specified. But the present case does not come within that rule. It does not create a contract in the sense that it cannot be repealed. This is a bounty law which is good as long as it remains unrepealed; but there is no pledge that it shall not be repealed at any time."

Welch *vs.* Cook, 97 U. S., 541 to 542.

This is in exact accordance with the Mississippi Mills case and also with the opinion in the case of Adams *vs.* Tombigbee Mills, both of which hold that under the constitution of 1869 it was competent for the legislature to grant exemptions or bounties to certain classes, property or certain enterprises, whether they belonged to private corporations or individuals, but that it was not competent under said constitution for the legislature to grant an exemption in a charter to a particular corporation for the simple and unanswerable reason that if good at all it would be a contract and irrevocable, a thing which section 13 of article 12 of said constitution expressly prohibits.

So that on this question the supreme court of Mississippi is not giving any new phase to the question or announcing any new rule, but is simply giving a correct construction of the Mississippi Mills case and a construction exactly in accordance with the rulings of this court. (See opinion in Record, p. 668 to 669.)

This court has, in four concurring opinions, held that,

under provisions the same as or similar to section 13 of article 12 of Mississippi constitution of 1869, the legislature could not grant exemptions from taxation to particular corporations.

Louisville *vs.* Palmes, 109 U. S., 248.
St. Louis, &c., *vs.* Berry, 113 U. S., 475.
Schurz *vs.* Cook, 148 U. S., 408.
Keokuk *vs.* Mo., 152 U. S., 303 and 310 to 312.

In regard to any claim of innocent purchaser or estoppel, we have shown in a previous part of this brief that the plaintiffs in error are in no condition to set up any such claim, because this suit is for current taxes, and they admit that they had the money in hand with which to pay the same. Their only excuse is that notwithstanding the litigation they believed that the court would finally decide in their favor.

But, outside of that, it has been universally held that the claim of the State for its taxes cannot be defeated by any claims of laches, estoppel, or innocent purchaser.

Kansas City, &c., *vs.* Hannibal, 81 Mo., 290 to 291.
Delaware *vs.* Commonwealth, 50 Pa. St., 407 to 408.
2d Thompson Com. Law Corp's, sec. 2825.
Winona *vs.* Minnesota, 159 U. S., 528 to 529.
4 Ed. Blackwell Tax T., p. 184 to 186.
State *vs.* Brewer, 64 Ala., 298 to 299.
Perry *vs.* Selma, 65 Ala., 391.
Vicksburg, &c., *vs.* Denny, 116 U. S., 665.
Yazoo, &c., *vs.* Thomas, 132 U. S., 185.

Read especially above reference in Blackwell.

And in the latest decision on this point this court, in regard to writs of error to a State court, decided as follows:

"Besides, whether a party in a case has been given or refused the benefit of the law of estoppel, involves no Federal question."

Weyerhaueser *vs.* Minn., 176 U. S., 558 to 559.
Central Land Co. *vs.* Laidley, 159 U. S., 109 to 112.

We wish the court to distinctly understand that in the Lambert case the railroad was sold to the Louisville, New Orleans and Texas Railway Company in 1890, but that the railroad company did not at that time sell itself. It continued in existence, and in the Lambert case, in 70 Miss., 779, the bill was filed by the Natchez, Jackson and Columbus Railroad Company in its own proper name to have the taxes due on the property applied to the construction debts or bondholders, so as to get a dividend on its stock.

The case at bar is entirely dissimilar, in that the declaration alleges that on October 24, 1892, "the said Louisville, New Orleans and Texas Railway Co. then and there surrendered its franchise, and then and there became extinct and ceased to exist as a corporation."

Record, p. 5.

This is a suit for the current and not back taxes. The litigation has been going on so long and has been so protracted that we wish to keep this court from being misled, and to bear in mind that it is a suit for current taxes and against the parties who ought to have paid the taxes. All

the above pleadings which we have quoted and referred to show that it is these same plaintiffs in error who have made the appropriations, made the affidavits, and have gotten the sheriffs' receipts, and hence it is impossible that they could have presumed that the taxes had been paid in money. They knew the fact, and that they had attempted to pay with the affidavits and not with money. We hope the court will not be misled on this point.

Some point is made about the supreme court of the State changing its opinion and overruling former decisions, but in regard to that this court says:

"If the highest judicial tribunal of a State adopt new views, and reverse its former decisions, this court will still follow the latest settled adjudication."

Leffingwell *vs.* Warren, 2 Black, 599, 603.
Moores *vs.* Nat. Bk., 104 U. S., 625, 629.
State *vs.* Wisconsin, 94 U. S., 181 to 183.
Hansford *vs.* Davis, 163 U. S., 278 to 279.

As to the appendix attached to the brief of opposite counsel showing various exemptions to corporations, we call attention to the appendix in our last brief on the merits filed in October, 1900, and entitled "supplemental brief for defendant in error and in reply to supplemental brief of plaintiff in error," to show that in a large number of cases there were no exceptions granted and that there was no uniformity or equality in those that were granted.

For a further discussion of the points that the exemption was void *ab initio* under sections 13 and 20 of article 12 of the Mississippi constitution of December 1, 1869, we respect-

fully refer this court to the opinion of the supreme court of Mississippi. It is so exhaustive and conclusive that we feel unable to add anything to its great force and clearness. It is found in Record, p. 659 to 671; 77 Miss., 270 to 289.

Respectfully submitted.

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R. C. BECKETT,
Counsel for Defendant in Error.

Supreme Court of the United States.

No. 35.—October Term, 1900.

The Yazoo and Mississippi Valley Railroad Company, Plaintiffs in Error, vs. Wirt Adams. } In error to the Supreme Court of Mississippi.

[January 7, 1901.]

This case originated in an action at law begun December 7, 1893, in the Circuit Court for the First District of Mississippi, by Wirt Adams, revenue agent, suing for the use of the State and of the counties through which the defendant railways pass, against the Yazoo and Mississippi Valley Railroad Company, incorporated under an act of the legislature of Mississippi of February 17, 1882, and also against the Illinois Central Railroad Company, as successors in interest by consolidation, of a number of other railways, to recover taxes assessed by the railroad commission of that State for the year 1892.

Exhibits annexed to the declaration showed that the Yazoo and Mississippi Valley Railroad Company, as now constituted, was the result of a consolidation made October 24, 1892, between a company of the same name, chartered as above stated, February 17, 1882, and the Louisville, New Orleans and Texas Railway Company, which latter company was itself formed by a consolidation made August 12, 1884, of the Tennessee Southern Railroad Company, the Memphis and Vicksburg Railroad Company, the New Orleans, Baton Rouge, Vicksburg and Memphis Railroad Company, and the New Orleans and Mississippi Valley Railroad Company.

On December 27, 1893, a plea was filed by the Illinois Central Railroad Company, denying certain of the allegations in the declaration; and a separate plea was filed by the Yazoo and Mississippi Valley Railroad Company, claiming in its own favor the benefit of the charter of the Louisville, New Orleans and Texas Railroad Company exempting such company from the assessment of these taxes by reason of the payment of the same in the construction of its road, and also denying material allegations of the declaration. No Federal question appeared in either of these pleas. A demurrer to these pleas having been overruled, replications were filed.

On December 18, 1894, another action was begun against the same defendants for the taxes of 1893 and 1894, and on January 1, 1896, another for the taxes of 1895. An order was made consolidating these actions.

The three cases thus consolidated came on for trial before a jury and resulted in a verdict and judgment, July 25, 1896, in favor of the plaintiff for the taxes of 1895, and in favor of the defendants for the taxes of 1892, 1893 and 1894. Both parties moved for a new trial, which was denied. Both parties appealed to the Supreme Court, but neither assigned a ruling upon a Federal question as error. The Supreme Court reversed the judgment of the court below and remanded the case for a new trial. (77 Miss. 194.) The court, June 20, 1898, filed a summary of its holdings to the effect, first, that the case of the *Railroad Company* v. *Lambert*, (70 Miss. 779,) which apparently had been set up as *res judicata* was an estoppel only as to taxes for the year 1892, on property originally belonging to the Natchez, Jackson and Columbus Railroad Company in Adams County, but not upon other property, or as to the taxes for other years; second, that the Yazoo and Mississippi Valley Railroad Company was a new corporation taking its life from the date of the consolidation, and overruling the Lambert case to the contrary; third, that the twenty-first section of the Mobile and Northwestern Railroad Company's charter was an effort to secure an irrepealable grant of exemption, was in violation of the constitution of 1869, and that it would have been a violation even if it had not been irrepealable, and the case of *Mississippi Mills* v. *Cook*, (56 Miss. 40,) to the contrary was overruled. (77 Miss. 305.) A motion to strike out this "summary of holdings" was denied November 28, 1898. (77 Miss. 302.)

Meantime two new actions had been begun in the Circuit Court for the taxes of 1896 and 1897, which were also consolidated with the others.

On July 4, 1898, the mandate of the Supreme Court reversing the judgment of the court below was filed in the Circuit Court. Meantime, however, and on June 27, 1898, defendants filed a petition and bond for a removal of the cause to the Circuit Court of the United States upon the ground that the case arose under the Constitution and laws of the United States. This petition was also denied July 4, upon the day the mandate was filed.

Thereupon each of the defendants, July 6, 1898, filed special pleas to the declaration, setting forth at great length the exemption claimed under the charters of their constituent companies, and alleging that such exemption constituted a contract which had been impaired by the action of the State. Motion was made by the plaintiff to strike out certain of these pleas viz., the 3d, 4th, 5th, 6th and 7th, as constituting no defense to the action, which was granted by the court, and all of such pleas, except the seventh, which was withdrawn, were stricken from the files. Whereupon the defendants, "to meet the new aspect put upon the case by the decision of the Supreme Court herein rendered on June 20, 1898," withdrew "their joint plea filed by them prior to such decision, and all other pleas filed before that decision," and also withdrew the two pleas filed by them respectively

at this term, (No. 2,) and declined to plead further herein. They did not, however, withdraw the pleas which had been stricken out by the court. A judgment was entered the same day *nil dicit* against the defendants for the amount sued for in said consolidated case, amounting in all to $548,676.99. The case was again appealed to the Supreme Court and a new opinion rendered February 20, 1899, reiterating its former views and affirming the judgment of the court below. (77 Miss. 315.) Whereupon defendants sued out this writ of error.

Mr. Justice BROWN delivered the opinion of the Court.

Motion was made to dismiss this writ of error upon the grounds: First, that the Federal question was not raised until after the decision of the Supreme Court on June 20, 1898. Second, that the action of the defendants in withdrawing their pleas and permitting a judgment *nil dicit* to go against them, because the Circuit Court had struck from the files their additional pleas attempting to set up a Federal question, was an admission that they had no defense upon the facts of the case, and deprived them of any right to insist upon a Federal question. Third, that the petition for removal was not made until after the case had been tried in the State Supreme Court, and reversed and remanded. No claim of error in the action of the State court in this last particular was made in this court. Indeed, the point seems to have been abandoned. Fourth, that the decision of the State Supreme Court on the first appeal, that the alleged exemption, if it existed at all, was lost by the consolidation of October 24, 1892, raised no Federal question. Several other reasons are assigned for the motion, but they are either addressed to the merits of the case, or become immaterial in the view we have taken of those herein specified.

1. Was the Federal question raised too late? The special pleas setting up distinctly the Federal question were filed after the case had been decided by the Supreme Court, its mandate had gone down to the Circuit Court, and the case was ready for a new trial. As already stated, certain of these pleas were stricken out upon motion of the plaintiff as constituting no defense to the action, and all the pleas, except such as had been stricken out by the court, were then withdrawn, and a judgment *nil dicit* entered. On the case being again carried to the Supreme Court, that court held that the action of the court below "in striking out the special pleas was correct, for the obvious reasons that they presented no defense to the action, in whole or in part. The former opinion of the court in this case settled definitely and conclusively all the issues involved, and the special pleas are in effect nothing else than an effort to have the Circuit Court disregard that opinion. The futility of that sort of pleading needs no sort of comment. These matters of practice and procedure, and all the other assignments of error touching matters of practice and procedure,

were correctly settled by the court. The former opinion of the court in this cause, and its opinion on the motion to strike that opinion from the files, disposed effectively of such of these matters as are not here specifically adverted to." (77 Miss. 315.)

It is very evident that the Circuit Court, in striking out these pleas, took the view that the Supreme Court had, upon the first hearing, settled the law to be that no valid contract of exemption existed, and that if such contract existed in favor of the Louisville, New Orleans and Texas Railway Company (hereinafter styled the Louisville Company) it had been lost by the consolidation of October 24, 1892, and that the only effect of the special pleas was to inject a claim under the Federal Constitution as an argument for reversing its ruling. These pleas evidently raised precisely the same questions that had been settled in a slightly different form. The Circuit Court treated this as an attempt to induce it to overrule the action of the Supreme Court, which of course was impossible. The Supreme Court not only held that the Circuit Court was correct in this view, but that the issues having already been settled it would itself treat them as *res judicata*. This accords with what seems to be the uniform practice of the Mississippi courts. Thus, in *Smith* v. *Elder*, (14 S. & M. 100,) it was held that where a demurrer to a plea, which had been sustained in the court below, was overruled by the Supreme Court, all the legal questions raised by the demurrer would be considered as having been settled by the decision overruling it; and that such decision would not only be binding upon the inferior but also upon the appellate court. So also in *Bridgeforth* v. *Gray*, (39 Miss. 136,) it was held that, where the construction of a will had been settled upon demurrer to a bill in chancery, the court would not permit that question to be reopened upon a hearing upon the merits, notwithstanding the Chancery Court of Tennessee in the meantime had placed a different construction upon the will. This is also the rule in this court. (*Supervisors* v. *Kennicutt*, 94 U. S. 498; *The Lady Pike*, 96 U. S. 461; *Thompson* v. *Maxwell Land Grant Co.*, 168 U. S. 451.) See also *Hook* v. *Richeson* (115 Ill. 431;) *Brooklyn* v. *Orthwein* (140 Ill. 620;) *McKinney* v. *State*, (117 Ind. 27.)

In this aspect the case is much like that of *The Mutual Life Insurance Co.* v *Kirchoff*, (169 U. S. 103.) In that case the insurance company had loaned money to Kirchoff and had filed a bill to foreclose the trust deed. Pending this bill an agreement was entered into for the release to Kirchoff of two of the lots embraced in the foreclosure proceedings, but it was agreed that these proceedings should be prosecuted, and as soon as the company obtained a deed from the master, it would convey to Kirchoff. No defense was made to the foreclosure, and the case went to a decree and the property was sold. The case went to the Supreme Court of Illinois, which found the agreement between Mrs. Kirchoff and the insurance com-

pany as claimed by her; determined that she was entitled to the release sought, and remanded the case for the purpose of an accounting. As stated by the Chief Justice: "The record does not disclose that any right or title was specially set up or claimed under any statute of, or authority exercised under, the United States in the courts below, or in the Supreme Court of Illinois prior to the decision of the latter court on the first appeal. . . . The errors there assigned nowhere in terms raised a Federal question. And in affirming the judgment of the appellate court the Supreme Court did not consider or discuss any Federal question as such in its opinion." It appears to have turned upon questions of fact. "It is now contended that it then appeared that defendant claimed to hold an absolute title to the lots in question by virtue of the foreclosure proceedings and the master's deed thereunder, and hence that the title was claimed under an authority exercised under the United States; that a Federal question was thereby raised on the record; and that the decision of the case necessarily involved passing on the claim of title." Upon the second appeal, it was assigned as a Federal question that the Circuit Court erred in entering a decree which would in effect nullify the decree of foreclosure of the Circuit Court of the United States, and in refusing to the defendant leave to file the proposed amendment to its answer. "The appellate court on the second appeal held itself bound by the previous decision, and declined to enter on matters of defense which might have been availed of. The Supreme Court was of the same opinion, for it ruled that where a case which once had been reviewed by the court, and remanded with directions as to the decree to be entered, error could not be assigned on a subsequent appeal for any cause existing at the time of the prior judgment." This court dismissed the writ of error, holding that, as the Supreme Court did not reopen the case as to matters previously adjudicated, and as the Federal question was not set up upon the first appeal, there was no action of that court in relation to it which we were called upon to revise. See also *Northern Pacific R. R.* v. *Ellis*, (144 U. S. 458;) *Great Western Tel. Co.* v. *Burnham*, (162 U. S. 339.)

It is true that in the suit under consideration the case was not formally sent back for an accounting, but it was practically so, since all the questions of law had been settled upon the first appeal beyond the power of the Circuit Court to reopen, and upon the remand that court could do nothing else than enter judgment for the taxes of 1892, 1893 and 1894, as well as for the taxes of 1895. The Supreme Court, in deciding that it would not reopen the question involved upon the first hearing, to let in the Federal defense presented by the new pleas, merely settled a question of practice which we cannot review.

By another process of reasoning we are led to the same conclusion. No leave was applied for or granted to file these additional pleas after the

issues had been made up, as seems to be required by the practice in Mississippi, where it is said that all such pleas must be presented, with the application to file them to the court, that it may judge of the propriety of the proposed action, (*Hunt* v. *Walker*, 40 Miss. 590; *Pool* v. *Hill*, 44 Miss. 306; *Pfeifer* v. *Chamberlain*, 52 Miss. 90;) and even if leave had been asked to file them, it was a matter of discretion with the trial court to permit it, and a matter of State practice which cannot be inquired into here. (*Stevens* v. *Nicholas*, 157 U. S. 370; *Mexican National R. R. Co.* v. *Pinckney*, 149 U. S. 199; *Long Island* v. *Brooklyn*, 166 U. S. 688.) We are therefore of opinion that the Federal question was "specially set up and claimed" too late to be of any avail to the plaintiffs in error.

2. But the very arguments urged upon us by the defendant in error for holding that the Federal question was set up too late, as well as the reasons given for affirming the decree of the court in striking out the additional pleas, furnish a strong argument in favor of the position assumed by the railroad companies, that the Federal question was necessarily involved and must have been passed upon at the first hearing. This argument is in substance that the pleas were properly stricken out, because they presented no defense as the case then stood, by reason of the decision of the Supreme Court on the first appeal. (77 Miss. 194, 237.)

In order to ascertain exactly what was in issue and what was decided by the Supreme Court, it is necessary to set forth the facts at some length. The original declaration averred the several consolidations by which the defendant companies were formed; the assessment of the same for taxation by the railroad commission; a copy of the assessment by counties, and the refusal to pay. Annexed thereto as exhibits were copies of the various charters and contracts of consolidations.

Underlying all the questions in the case are the following provisions of the Constitution of 1869:

"Article 12, section 13. The property of all corporations for pecuniary profits shall be subject to taxation the same as that of individuals."

"Section 20. Taxation shall be equal and uniform throughout the State. All property shall be taxed according to its value, to be ascertained as directed by law."

By the twenty-first section of an act to incorporate the Mobile and Northwestern Railroad Company, approved July 20, 1870, the State "hereby agrees with said company (and which agreement is irrepealable) that all taxes to which said company shall be subject for the period of thirty years, are hereby appropriated and set apart, and shall be applied to the debts and liabilities which the said company may have incurred in the construction of said road, or for money borrowed by said company, upon lands or otherwise, to be used in constructing said road, or paying debts incurred by said company in constructing the same. . . . *Pro-*

vided, however, That whenever the profits of said company shall enable it to declare and pay to the stockholders an annual dividend of eight per cent. upon its capital stock over and above the payment of its debts and liabilities, then the appropriation of the taxes aforesaid shall cease, and said taxes shall be paid by said company to the tax collector, to be by him paid over as required by law."

By an act of August 8, 1870, the provisions of this section were extended to the Memphis and Vicksburg Railroad, the Natchez and Jackson Railroad, and a number of others not necessary here to be mentioned.

The Memphis and Vicksburg Railroad Company was incorporated the same day, August 8, 1870. The sixteenth section of this act enacted "that said company shall have the right and power to consolidate the stock, property and franchises of the road with any other road or roads, in or out of this State, at any time the president and directors of the road may deem proper, and upon such terms as may be consistent with the powers conferred upon said company."

By an act to incorporate the New Orleans, Baton Rouge, Vicksburg and Memphis Short Line Railroad Company, (hereinafter called the Baton Rouge Company,) approved March 9, 1882, it was enacted, sec. 25: "That the company shall have power and authority to purchase and hold any connecting railroad, and to operate the same or to consolidate the company with any other company under the name of one or both; but when such purchase is made, or consolidation is effected, the said company shall be entitled to all the benefits, rights, franchises, lands and property of every description belonging to said road or roads so sold or consolidated."

Both these two last-mentioned companies were consolidated by an agreement made August 12, 1884, into the Louisville, New Orleans and Texas Railway Company.

By an act approved March 3, 1882, and an act amendatory thereto of March 15, 1884, the Memphis and Vicksburg Road was authorized to consolidate with any other company or companies, "whether such company or companies have been incorporated under the laws of this State or of any other State, so that all of the companies so consolidating shall be merged into and become one company; and the company so formed by such consolidation shall be deemed and held to be a corporation created by the laws of this State, and shall have, enjoy and possess all the rights, ways, privileges, franchises, property, grants and immunities, which are now possessed by the companies which may enter into such consolidation, as fully as though the same were conferred specially in this act." Another section (5) applied the twenty-first section of the Mobile and Northwestern charter to the company so consolidated.

By a further act of February 17, 1882, the Yazoo and Mississippi Valley Railway Company (hereinafter called the Yazoo Company) was authorized

"to consolidate with any other railroad company in or out of Mississippi upon such terms as the consolidating companies might agree upon, . . . and upon any such consolidation the said consolidated company shall have and enjoy all the property, rights, privileges, powers, liberties, immunities and franchises herein granted; but such consolidation shall not have the effect of exempting from taxation the railroad or property owned by such other consolidating company prior to its consolidation with the company hereby chartered; nor of exempting from taxation any property which the consolidated company may, after such consolidation, acquire under the provisions of the charter of such other consolidated company." Finally by the act of February 19, 1890, the Louisville, New Orleans and Texas Company, and the Natchez, Jackson and Columbus Company were authorized to consolidate with each other under the name of the Louisville, New Orleans and Texas Company, and upon such terms as might be agreed upon by the companies.

In 1890 the State adopted a new constitution, the following clauses of which only are pertinent:

"SEC. 180. All existing charters or grants of corporate franchises under which organizations have not in good faith taken place at the adoption of this Constitution, shall be subject to the provisions of this article," &c.

"SEC. 181. The property of all private corporations for pecuniary gain shall be taxed in the same way and to the same extent, as property of individuals, &c. Exemptions from taxation, to which corporations are legally entitled at the adoption of this constitution, shall remain in full force and effect for the time of such exemptions as expressed in their respective charters, or by general laws, unless sooner repealed by the legislature."

On October 24, 1892, articles of consolidation were entered into between the Louisville Company and the Yazoo Company, the effect of which will hereafter be considered.

By the Code of Mississippi of 1892, section 3875, a system of taxing the property of railroad companies by the railroad commission was put in force. This article provided for a complete schedule of the property of the company, the total amount of its capital stock, its par value and the value of its franchise; and, by a law subsequently enacted, February 7, 1894, a State revenue agent was provided for, whose duty it was to enforce the payment of taxes by all classes of property owners. It was under the provisions of the laws of 1892 that this action was begun.

The railroad companies went to a trial of these cases in an obvious reliance upon two previous decisions of the Supreme Court of Mississippi. In the first one, (*Mississippi Mills* v. *Cook*, 56 Miss. 40,) that court held the constitutional provision, that "the property of all corporations for pecuniary profits shall be *subject* to taxation," did not require that such corporations must always be *subjected* to taxation, but that their property

could not be placed beyond the reach of the taxing power; and that the legislature might exempt property of a particular class, whether the owners were corporations or natural persons—in other words, that the provision was *mandatory* as to the liability of such property to be taxed, but *permissive* to the legislature to tax it or exempt it, as might seem proper. It further held that the provision of section 20, that "all property shall be taxed in proportion to its value," did not require that *all* property should be taxed, or deny to the legislature the right to exempt any; that the legislature might exempt property of a certain class, or property used for a certain purpose; that it had the power to select such objects of taxation as it might deem appropriate; but when any article of property was selected for taxation, it must be taxed in proportion to its value, and not specifically.

In the second case, (*Railroad Company* v. *Lambert*, 70 Miss. 779,) that court held the exemption in the twenty-first section of the charter of the Mobile and Northwestern Railroad was one which the legislature had power to confer, but not to make irrepealable; that under the acts of August 8, 1870, and March 5, 1878, this immunity from taxation was extended and confirmed to the Natchez, Jackson and Columbus Railroad Company, and by the act of February 19, 1890, authorizing a consolidation with the New Orleans, Louisville and Texas Company, the latter company by its consolidation acquired the immunities of the former company, and was entitled to the same exemption from taxation; also, that after the consolidation of the Louisville Company with the Yazoo Company, the latter succeeded to the same immunity from taxation on that part of its lines which formerly comprised the Natchez, Jackson and Columbus Railroad. In short, these cases cover practically every point involved in the case under consideration, and counsel evidently acted upon the theory that it was unnecessary to specifically set up and claim that there was a contract for exemption which the legislature had subsequently impaired.

But upon the hearing of the case under consideration the court (now differently constituted) overruled both of these cases, and held, first, that the legislature could not grant an exemption to a railway company under the constitution of 1869; second, that it could not grant an irrepealable exemption under that constitution; third, that a new company was formed by the consolidation of October 24, 1892, and no exemption passed into it; fourth, that if the consolidation were a technical merger, still section 180 of the constitution of 1890 prevented any exemption from passing into it; fifth, that any such exemption was repealed by the acts of 1884, 1886 and 1890. Manifestly, that court could not have held the railways liable for the taxes in suit without deciding either that the provision of section 21 did not constitute a legal contract in view of the constitution of 1869, or that no such contract existed in favor of the plaintiffs in error in view of the consolidations, or that the subsequent tax legislation of the State of

1892 and 1894 did not impair the obligation of that contract. All these were Federal questions, the vital one being whether the acts of 1892 and 1894 impaired the obligation of the contract, if any existed.

In short, the case is one of those frequently arising under the second clause of R. S. section 709, in which the validity of a State statute under the Constitution of the United States is necessarily drawn in question, and the decision of the State court being in favor of its validity, this court will take jurisdiction, though the Federal question be not specially set up or claimed. As we have repeatedly had occasion to hold, it is only in cases arising under the third clause of the section where a right, title, privilege or immunity is claimed, that the Federal question must be specially set up. The cases are collected in *Water Power Company* v. *Electric Street Railway Company,* (172 U. S. 475, 488.) Thus, in *Wilson* v. *Blackbird Creek Marsh Co.,* (2 Pet. 245,) the record did not show that the constitutionality of an act of a State legislature was drawn in question; "but," said the Chief Justice, "we think it impossible to doubt that the constitutionality of the act was the question, and the only question, which could have been discussed in the State court." So, in *Satterlee* v. *Matthewson,* (2 Pet. 380,) it was said that if it sufficiently appear from the record itself that the repugnancy of the statute of a State to the Constitution of the United States was drawn in question, this court has jurisdiction, though the record does not in terms declare that this question was raised. See also *Crowell* v. *Randell,* (10 Pet. 368;) *Furman* v. *Nichol,* (8 Wall. 44;) *Chicago Life Insurance Co.* v. *Needles,* (113 U. S. 574;) *Eureka Lake Co.* v. *Yuba County,* (116 U. S. 410;) *Kaukauna Co.* v. *Green Bay Canal,* (142 U. S. 254.) And the fact that the Supreme Court of the State did not expressly refer to the contract clause of the Constitution does not prevent our taking jurisdiction, if the applicability of such clause were necessarily involved in its decision. As was said by Chief Justice Waite in *Chapman* v. *Goodnow,* (123 U. S. 540, 548): "If a Federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of section 709 of the Revised Statutes, as if it had been specifically referred to and the right directly refused."

The decision of the Supreme Court that the exemption in the Mobile and Northwestern Railroad Company's charter of 1870 was void under the constitution of 1869 was practically a decision that the contract of the State was beyond the power of the legislature and void, and hence there was no contract to be impaired. But conceding this contract to have been valid, another distinct question arose, whether that contract enured to the benefit of the plaintiffs in error by the successive consolidations—in other words, whether, as to the plaintiffs in error, there was any contract ever

existing which the taxing legislation of Mississippi could impair. Both these questions were ruled against the railroads; and while the contract clause of the Federal Constitution was not discussed, the case turned upon the existence of such a contract, and no question seems to have been made that, if there had been a contract, it was impaired by the taxing legislation of 1892. As we have often held, that where an impairment of a contract by State legislation is charged, the existence or non-existence of the contract is a Federal question, it is impossible to escape the conclusion that the foundation of the whole case was, whether there was really a contract which had been impaired, and that this was necessary to the determination of the case. As already stated, this was a Federal question, and the fact that the Supreme Court did not in terms discuss the contract clause of the Constitution does not oust our jurisdiction. In view of this record and the opinions of the Supreme Court, the certificate of the Chief Justice, that the validity of the State statutes was actually drawn in question under the contract clause of the Constitution, was but a further assurance of a fact already appearing. The motion to dismiss must therefore be denied.

3. At the foundation of the right to a reversal of this case is the question whether, conceding the validity of the exemption or commutation provision contained in the twenty-first section of the Mobile Company's charter of July 21, 1870, such exemption enured to the plaintiffs in error under their successive consolidations. It will be borne in mind that the existing constitution of Mississippi was adopted November 1, 1890; that the present Yazoo Company was formed October 24, 1892, (nearly two years after the adoption of the constitution,) by the consolidation of the original Yazoo Company with the Louisville Company. By the act of August 8, 1870, the exemption contained in the twenty-first section of the Mobile charter was extended to the Memphis and Vicksburg Railroad, which was chartered the same day. This charter gave it power to consolidate its stock, property and franchises with any other road upon such terms as might be consistent with the powers conferred upon the company. Twelve years thereafter, March 9, 1882, the Baton Rouge Company was incorporated with power to consolidate with any other company, and on March 3, 1882, the Memphis and Vicksburg Company was also authorized to consolidate. The same power had already been extended February 17, 1882, to the Yazoo Company.

It is unnecessary to discuss the terms of the first consolidation of August 12, 1884, between the Tennessee Southern, the Memphis Company, the Baton Rouge Company, and the New Orleans Company, forming the Louisville, New Orleans and Texas Company, since this was made prior to the adoption of the new constitution of 1890. We are specially concerned with the articles of consolidation between the Louisville Company so organized, and the Yazoo Company, which were adopted October 24,

1892, and subsequent to the new constitution. The question in that connection is whether such consolidation created a new corporation, or, in the language of section 180 of the constitution of 1890, whether it was a "grant of corporate franchises," in which case, by the express language of that section, such new corporation became subject to the provision of the new constitution. In their articles of consolidation these companies agreed "to and with each other, to unite, merge and consolidate their several capital stocks, corporate rights, franchises, immunities and privileges, and properties of every kind, real, personal and mixed." The first article provided that "such consolidation shall be effected by uniting or merging the stock, property and franchises of the party of the first part, (the Louisville Company,) with and into the stock, property and franchises of the said the Yazoo and Mississippi Valley Railroad Company, without disturbing the corporate existence of the last-named company, or the formation of any new, distinct corporation, unless such result shall be necessary to give legal effect to this agreement; but whatever may be the legal consequence of the consolidation herein provided for, this agreement is to stand and be effective." This article was evidently drawn in view of the decisions of this court upon the subject of merger and consolidation, and evinces a desire to avoid the legal results following from a consolidation of the two constituent companies into a new corporation, but, at the same time, expresses a doubt whether the agreement would not after all be construed to create a new corporation. These doubts were unquestionably well founded, and if the effect of the agreement be in law the creation of a new corporation, the expression of a wish that it should not be so construed, is of course entitled to no weight. The final clause, that in any event the agreement shall stand and be effective, shows that effect should be given to all its stipulations, whatever be its legal consequences.

Subsequent articles provided that the corporate name should be the Yazoo and Mississippi Valley Railway Company; that the capital stock should be fifteen million dollars; that the stockholders of either of the constituent companies should "have all the rights of a stockholder of the consolidated company, as fully as if new shares of the consolidated company had been issued and exchanged therefor; and in case the consolidated company shall determine to issue new shares, such shares shall be exchangeable at par for the now outstanding shares of each of the constituent companies;" that all the rights, powers, privileges, immunities and franchises of the constituent companies should pass to the consolidated company, which should be managed by a board of directors, whose names, for the purpose of the organization, were given.

Reading this agreement in connection with the charters of the several companies, and especially with that of the Memphis and Vicksburg Railroad Company of March 3, 1882, providing that "all of the companies so consolidating shall be merged into and *become one company*, and the company

so formed by such consolidation shall be deemed and held to be *a corporation* created by the laws of this State," it is impossible to escape the conclusion that a new corporation was created with a capital stock of fifteen million dollars, and that the stockholders of the constituent companies were to become stockholders of the new company, share for share, "as fully as if new shares of the consolidated company had been issued and exchanged therefor." Some question was made in the State courts whether the shares were actually issued in the new company. But the Supreme Court having found that they were, we accept that finding as conclusive. Power was expressly given to issue new shares, and the usual course of business would justify us in inferring that that was the method adopted. A new name was taken, which was none the less a new one by reason of the fact that it was the name of one of the constituent companies.

It cannot be doubted that under this agreement it was contemplated that the constituent companies should go out of existence, and that their officers should resign their trusts in favor of the officers of the new company; that their boards of directors should be supplanted by another board, the names of whose members were contained in the agreement; that the stock of the constituent companies should be surrendered and new stock taken therefor, or, in lieu of that, that the old stock should be recognized as the stock of the new company; that the road should be operated by men holding their commissions from the new company, and that the entire administration of the functions of the constituent companies should be surrendered to the new corporation. In short, nothing was left of the constituent companies but the memory of their existence—the mere shadow of a name. But the new company which took its place suddenly sprang into life with a new corps of officers and a full equipment for the successful operation of the road.

While as stated in *Tomlinson* v. *Branch*, (15 Wall. 460,) the presumption is that when two railroads are consolidated each of the united lines will be respectively held with the privileges and burdens originally attaching thereto, subsequent cases have settled the law that where two companies agree together to consolidate their stock, issue new certificates, take a new name, elect a new board of directors, and the constituent companies are to cease their functions, a new corporation is thereby formed subject to existing laws. But if, as was the case in *Tomlinson* v. *Branch*, one road loses its identity and is merged in another, the latter preserving its identity, and issuing new stock in favor of the stockholders of the former, it is not the creation of a new corporation but an enlargement of the old one. In such case it was held that where the company which had preserved its identity held as to its own property a perpetual exemption from taxation, it would not be extended to the property of the merged company without express words to that effect.

In the earliest of these cases (*Philadelphia &c. R. R.* v. *Maryland*, 10 How. 376) it was held that a Maryland railroad, whose charter contained no exemption from taxation, did not acquire such exemption by consolidation with the Delaware and Maryland Railroad Company, whose charter exempted the road from taxation, except upon that portion of the permanent and fixed works which might be in the State of Maryland.

In *Central Railroad Company* v. *Georgia*, (92 U. S. 665,) an act of the legislature authorized the Central Railroad and the Macon Railroad to unite and consolidate their stock, and all their rights, privileges, immunities and franchises, under the name and charter of the Central Railroad, in such manner that each owner of shares of stock of the Macon Road should be entitled to receive an equal number of shares of the stock of the consolidated companies. "Whether," said Mr. Justice Strong, "such be the effect (consolidation or amalgamation) or not, must depend upon the statute under which the consolidation takes place, and of the intention therein manifested. If, in the statute, there be no words of grant of corporate powers, it is difficult to see how a new corporation is created." It was held that the act did not work a dissolution of the existing corporations and the creation of a new company, since there was no provision for a surrender of the stock of the shareholders of the Central, and none for the issue of other certificates to them. In that case, the road, whose charter contained the exemption from taxation, was preserved intact by the consolidation, and it was held that its exemption continued, while the other road was to go out of existence. As already stated, in the act authorizing the consolidation in this case of the Memphis and Vicksburg Railroad Company, there is an express provision that all the companies so consolidated shall be merged into and become *one company*, and held to be a corporation created by the laws of the State.

Other cases to the same effect, holding that the consolidation did not operate as a dissolution of the constituent companies, are *Chesapeake & Ohio Railroad* v. *Virginia*, (94 U. S. 718;) *Greene County* v. *Conness*, (109 U. S. 104,) and *Tennessee* v. *Whitworth*, (117 U. S. 139.)

It may be observed that all these cases turn upon the question whether the new company inherited by consolidation certain privileges and immunities belonging to the constituent companies, or one of them, and that no question arose as to the applicability of a new constitutional inhibition intervening before the consolidation took place. This question, however, did arise in *Shields* v. *Ohio*, (95 U. S. 319,) where it was held that a consolidation under a statute of Ohio of two or more railroad companies worked their dissolution, and that the powers and franchises of the new company thereby formed were subject to "be altered, revoked or repealed by the General Assembly" under a constitutional provision which took effect prior to the consolidation. The statute in that case expressly provided

that the consolidated company should be a new corporation and subject to the constitutional provision. A like ruling was made under a similar statute of Maine in *Railroad Company* v. *Maine*, (96 U. S. 499.) In *Railroad Company* v. *Georgia*, (98 U. S. 359,) two railroad companies were consolidated by an act of the legislature, which authorized the consolidation of their stocks, conferred upon the consolidated company full corporate powers, and continued to it the franchises, privileges and immunities which the companies had held by their original charters. We held in that case that a new corporation was created, which became subject to the provisions of a statutory code, adopted January 1, 1863, permitting the charters of private corporations to be changed, modified or destroyed at the will of the legislature. The case was distinguished from *Railroad Company* v. *Georgia*, (92 U. S. 665,) as being a consolidation instead of a merger. "Nor was it," said Mr. Justice Strong, "a mere alliance or confederation of the two. If it had been, each would have preserved its separate existence as well as its corporate name; but the act authorized the consolidation of the stocks of the two companies, thus making them one company in place of two. It contemplated, therefore, that the separate capital of each company should go out of existence as the capital of that company." To the same effect is *St. Louis &c. R. R. Co.* v. *Berry*, (113 U. S. 465.)

The latest declaration of this court upon the subject is found in *Keokuk & Western Railroad* v. *Missouri*, (152 U. S. 301.) In that case, a railroad corporation chartered in Missouri in 1857, with a provision that its property should be exempt from taxation for a period of twenty years after its completion, which took place in 1872, was consolidated with an Iowa corporation in 1870, under a general law of Missouri; and in 1886 the consolidated road was sold under a deed of foreclosure to purchasers, who conveyed it to an Iowa corporation. It was held that the act of the legislature of Missouri authorizing the consolidation, making one company of the two, whose stock should be consolidated upon such terms as might be mutually agreed upon, authorizing the adoption of a new corporate name and for the exchange of the stock of the constituent companies for stock in the new company, and providing for the filing with the Secretary of State of a copy of the consolidation agreement, which should be conclusive evidence of the consolidation and of the corporate name of the new company, was in effect the extinguishment of the prior companies and the formation of a new one; and that an intervening constitutional provision, adopted in 1865, prohibiting exemptions from taxation, was thereby let in and to be read as a part of the charter of the new company.

In view of the terms of the consolidating agreement, to which reference has already been made, and of the several acts of the General Assembly of Mississippi authorizing these consolidations, we are of opinion that a new

corporation was contemplated, and that, taken together, these several documents should be read as if they had expressly provided, with legislative sanction, for the formation of a new association. Exemptions from taxation are not favored by law, and will not be sustained unless such clearly appears to have been the intent of the legislature. Public policy in all the States has almost necessarily exempted from the scope of the taxing power large amounts of property used for religious, educational and municipal purposes; but this list ought not to be extended except for very substantial reasons; and while, as we have held in many cases, legislatures may in the interest of the public contract for the exemption of other property, such contract should receive a strict interpretation, and every reasonable doubt resolved in favor of the taxing power. Indeed, it is not too much to say that courts are astute to seize upon evidence tending to show either that such exemptions were not originally intended, or that they have become inoperative by changes in the original constitution of the companies. In cases arising under the Mississippi constitution of 1869, the method adopted in the charter of the Mobile and Northwestern Company of commuting the taxes was originally sustained under the theory that the provision of that constitution declaring "the property of all corporations for pecuniary profits shall be *subject* to taxation, the same as that of individuals," did not mean that it should be necessarily *subjected* to taxation, but that it might be exempted altogether by the legislature. (*Mississippi Mills* v. *Cook*, 56 Miss. 40.) But by the constitution of 1890, "all existing charters or *grants of corporate franchises* under which organizations have not in good faith taken place at the adoption of this constitution, shall be subject to the provisions of the article," one of which was (section 181) that "the property of all private corporations for pecuniary gain shall be taxed in the same way and to the same extent as property of individuals."

It is true that in the act of March 9, 1882, authorizing the Baton Rouge Company to consolidate, in the act of March 3, 1892, authorizing the Memphis and Vicksburg Company to consolidate, and in the act of February 17, 1882, authorizing consolidations by the Yazoo Company, there were provisions that the consolidated companies should be entitled to the rights, privileges, franchises, property grants and immunities belonging to constituent companies, among which, under the name of immunities, might pass an exemption from taxation, as has been sometimes held by this court; and had not the constitutional provision of 1890 taken effect before the final consolidation of 1892, we might have been obliged to hold that the consolidated company was entitled to the commutation of taxes provided for in the twenty-first section of the charter of the Mobile and Northwestern Company. But it is scarcely necessary to say that, if the consolidation of 1892 resulted in a new corporation, it would come into

existence under the constitution of 1890, with the disabilities attaching thereto, among which is the provision that "the property of all private corporations for pecuniary gain shall be taxed in the same way and to the same extent as property of individuals." Even if the legislature, in these several acts of consolidation, had expressly provided that the new corporation thereby formed should be exempted from taxation, the higher law of the constitution would be interpreted as nullifying it to that extent.

A similar remark may be made with regard to the provision that these companies might consolidate upon such terms as they should agree upon. Obviously such terms must be consistent with the law existing at the time of the consolidation. It could never have been the intention of the legislature, and if it were it would be vain, to permit these companies to adopt such terms as they chose, if such terms were inconsistent with existing laws. The language indicated evidently refers to the method adopted for the consolidation, whether it was to be anything more than a simple merger, or whether it was to provide for a surrender of the stock of the constituent companies, the issue of new stock, the adoption of a new name and the choice of a new board of directors. Under no circumstances would they be interpreted as conveying rights to the new corporation which the legislature was incompetent to confer.

Great stress is laid by the railroad companies upon the fact that at the time these companies were incorporated the State was without credit, the treasury without money, the issue of State bonds in aid of public improvements forbidden by the constitution, the levy of general taxes to assist in the building of the roads fruitless, the resources of the State having been exhausted by the civil war, which had left the community so poor that it was with difficulty the inhabitants could raise the taxes necessary for carrying on the government; that millions of acres of land were being abandoned and forfeited to the State for non-payment of taxes and subsequently sold at incredibly low figures; that the paramount necessity was clearly the building of railroads to develop the resources of the State, and yet that the topography of the country was such that both the construction and the maintenance of the roads was difficult and expensive, and railroad enterprises promised very doubtful profits; that the lands along the river bottoms were waste and swamp, uncultivated and unexplored, and subject to annual inundations from the Mississippi; that the levees had been swept away again and again, and Congress asked for aid to rebuild them upon the ground of the impossibility of the State to do the work; that in this condition of affairs the best that could be done was to offer as a remuneration to vote taxes as a consideration for building the road; that these proposals were accepted and carried out in good faith; that the result has been to increase the value of property in portions of the State fully one hundred fold, and to immensely increase the revenues of the State and

counties, and that under these circumstances the present repudiation of these contracts by the State, by pleading a technical incapacity to contract, is a gross breach of public faith, and should be discountenanced by the courts.

Potent as these considerations are, they address themselves to the legislative rather than to the judicial department of the government. The legislature is the proper guardian of the public faith, and in its action with respect to its own obligations, we are bound to assume that it will be guided, not only by its present necessity for revenue, but by consideration of its possible future needs. But whatever policy the State may choose to adopt with respect to encouraging or discouraging the investment of capital from abroad, the duty of the courts is to declare the law as they find it, and avoid the discussion of questions of policy, which are clearly beyond their province. Certainly this court is not the keeper of the State's conscience. We have not thought it proper to inquire what was the answer to these charges. Doubtless they are sufficient, or at least are such as the legislature deemed to be sufficient, or it would not have passed the taxing acts of 1892 and 1894. While we have never hesitated to vindicate the right of individuals or corporations to enforce the performance of lawful contracts as against subsequent legislation designed to impair them, we have always exacted as a condition that the contract was one which the legislature, or opposite party, had power to make under the Constitution, and that the other party was chargeable with knowledge of all its provisions in that connection. To enforce a performance, the plaintiff must also bring himself within the letter and spirit of the contract, and thus provide against any change in public sentiment which may render its performance obnoxious or unpopular.

Being of opinion that the consolidation in question, which took place nearly two years subsequent to the adoption of this constitution, was a new grant of corporate franchises within the meaning of section 180, it follows that it became subject to the provisions of section 191.

The question how far the case of *Railroad Co.* v. *Lambert*, (70 Miss. 779,) is applicable as *res adjudicata* upon the taxes involved in this case, is a local question, upon which we are not called upon to express an opinion. We do not understand it to be pressed as ground for reversal.

The judgment of the Supreme Court is therefore

Affirmed

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 35.—October Term, 1900.

The Yazoo and Mississippi Valley Railroad Company, Plaintiffs in Error, *vs.* Wirt Adams. } In error to the Supreme Court of the State of Mississippi.

[May 20, 1901.]

This was a petition for a rehearing of the case reported in 180 U. S. 1, upon the ground that the taxes for the year 1892 were separable from taxes for the succeeding years, inasmuch as the taxes for that year had been completely levied and assessed on September 22, 1892, and that the claim of the State, if any, had fully accrued at least one month before the articles of consolidation were executed, (October 24, 1892,) and that the judgment therefore gave to the consolidation a retrospective effect.

Mr. Justice Brown delivered the opinion of the Court.

The decision of this case was based upon the theory that all the taxes involved in the case, from 1892 to 1897, accrued subsequent to the consolidation of October 24, 1892, which was held by this court to create a new corporation, subject to existing laws, and particularly to that provision of the constitution of 1890, "that every new grant of corporate franchise shall be subject to the provisions of the constitution." No suggestion was made, in the argument or briefs of the railroad company, of any distinction in respect to the liability of the company between the taxes of the year 1892 and those of subsequent years, and none such was recognized by the court in its opinion; but we are now asked to hold that the taxes for the year 1892 accrued before the consolidation of October 24, and were consequently unaffected by that consolidation, and that with respect to such taxes the right of commutation or exemption, contained in section 21 of the charter of the Mobile and Northwestern Railway Company, attached and operated to exempt the company from the payment of taxes for the year 1892.

We have not found it necessary to decide whether a party, upon a petition for a rehearing in this court, may avail himself of a point not taken in the court of original jurisdiction, or upon either one of two appeals to the Supreme Court, nor in the assignment of errors in this court, nor even called to our attention in the briefs or arguments of counsel, as we are of opinion that upon the merits the petition must be denied.

Whatever force we might be disposed to give to prior adjudications of the Supreme Court of Mississippi upholding these exemptions, there can be no doubt that that court has expressly held that the taxes for the year 1892 did not accrue until after the consolidation of October 24 of that year, and hence that this case does not fall within those adjudications. We quote the following from the opinion of the court of February 20, 1899, upon a second appeal to that court: "So far as concerns the argument that the appellants relied on the case of *Mississippi Mills* v. *Cook*, (56 Miss.,) and that, if the overruling of that case is correct, nevertheless the appellants should be protected from taxation accruing before the overruling of that case, it is enough to say that question is not material here, since all the taxes here sued for accrued after the consolidation of October 24, 1892, and the appellants were expressly held to have lost their exemption, if any they had, by their own voluntary act of consolidation. That was the first and main ground on which our former opinion was distinctly rested. It must be too clear for serious disputation, in this view, that all discussion of the case of *Mississippi Mills* v. *Cook* is wholly unavailing as to these taxes." (77 Miss. 270, 316.)

Whether this opinion be conclusive upon us in view of the argument that a contract has been impaired in violation of the Constitution, we do not feel called upon to decide. The statutes of the State of Mississippi necessary to be considered for the purpose of ascertaining whether the taxes for the year 1892 accrued prior to October 24 of that year, are complex and difficult of interpretation. Assuming that we may exercise an independent judgment respecting their construction, the examination we have given them leaves us in great doubt whether the argument that the taxes had accrued prior to the consolidation is a sound one. The right asserted depends upon a comparison and construction of such statutes; and the settled rule of this court is that, even in a case where we may exercise an independent judgment, any reasonable doubt will be resolved in favor of that construction of the State statute which has been adopted by the court of last resort in that State. (*Burgess* v. *Seligman*, 107 U. S. 20; *Flash* v. *Conn*, 109 U. S. 371, 379; *Clark* v. *Bever*, 139 U. S. 96; *Board of Liquidation* v. *Louisiana*, 179 U. S. 622.)

Had the opinion above cited involved the construction of section 21 of the Mobile and Northwestern charter—that is, the contract for commutation or exemption—it would have directly involved a Federal question; but it did not. It was an opinion as to when, under the general laws of the State of Mississippi, a claim for taxes accrued, and a distinct ruling that such taxes did not accrue until after a certain date. (*Raymond's Lessee* v. *Longworth*, 14 How. 76, 79; *Bailey* v. *Magwire*, 22 Wall. 15.) For the reasons above stated we accept the views of the Supreme Court of Mississippi as to the proper construction of these laws.

The petition for a rehearing must therefore be *Denied.*